



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

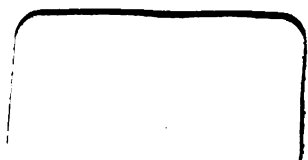
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LII.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY.
LAW PUBLISHERS AND LAW BOOKSELLERS.
1897.

121878

JUL 29 1942

Entered according to Act of Congress in the year 1897,
By **BANCROFT-WHITNEY COMPANY,**
In the Office of the Librarian of Congress, at Washington.

SAN FRANCISCO:
THE FILMED-ROLLING ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.

AMERICAN STATE REPORTS.

VOL. LII.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
CALIFORNIA REPORTS Vols. 110, 111.	70-205
COLORADO REPORTS Vol. 21.	206-265
CONNECTICUT REPORTS Vol. 67.	266-305
ILLINOIS REPORTS Vols. 160, 161.	306-402
INDIANA REPORTS Vol. 143.	403-441
INDIANA APPEALS Vols. 7, 8.	442-495
MASSACHUSETTS REPORTS Vol. 165.	496-537
MINNESOTA REPORTS Vol. 61.	538-621
MISSOURI REPORTS Vol. 131.	622-654
MONTANA REPORTS Vol. 17.	655-699
NEW YORK REPORTS Vol. 149.	700-758
OREGON REPORTS Vol. 28.	759-813
PENNSYLVANIA STATE REPORTS . . Vols. 174, 175.	814-865
WASHINGTON REPORTS Vol. 13.	17-69
WEST VIRGINIA REPORTS Vol. 40.	866-941

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA. — (83) 3; (84) 5; (85) 7; (86) 11; (87) 13; (88) 16; (89) 18; (90) 24; (92) 25; (93) 30; (94) 33; (95) 36; (96, 97) 38; (98) 39; (99) 42; (100, 101) 46; (102) 48; (103) 49.

ARKANSAS. — (48) 3; (49) 4; (50) 7; (51) 14; (52) 20; (53) 23; (54) 26; (55) 29; (56) 35; (57) 38; (58) 41; (59) 43; (60) 46.

CALIFORNIA. — (72) 1; (73) 2; (74) 5; (75) 7; (76) 9; (77) 11; (78, 79) 12; (80) 13; (81) 15; (82) 16; (83) 17; (84) 18; (85) 20; (86) 21; (87, 88) 22; (89) 23; (90, 91) 25; (92, 93) 27; (94) 28; (95) 29; (96) 31; (97) 33; (98) 35; (99) 37; (100) 38; (101) 40; (102) 41; (103) 42; (104) 43; (105) 45; (106) 46; (107) 48; (108) 49; (109) 50; (110, 111) 52.

COLORADO. — (10) 3; (11) 7; (12) 13; (13) 16; (14) 20; (15) 22; (16) 25; (17) 31; (18) 36; (19) 41; (20) 46; (21) 52.

CONNECTICUT. — (54) 1; (55) 3; (56) 7; (57) 14; (58) 18; (59) 21; (60) 25; (61) 29; (62) 36; (63) 38; (64) 42; (65) 48; (66) 50; (67) 52.

DELAWARE. — (5 Houst.) 1; (6 Houst.) 22; (7 Houst.) 40; (9 Houst.) 43.

FLORIDA. — (22) 1; (23) 11; (24) 12; (25, 26) 23; (27) 26; (28) 29; (29) 30; (30) 32; (31) 34; (32) 37; (33) 39; (34) 43; (35) 48; (30) 51.

GEORGIA. — (76) 2; (77) 4; (78) 6; (79) 11; (80, 81) 12; (82) 14; (83, 84) 20; (85) 21; (86) 22; (87) 27; (88) 30; (89) 32; (90) 35; (91, 92, 93) 44; (94) 47; (95, 96) 51.

IDAHO. — (2) 35.

ILLINOIS. — (121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133, 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34; (143, 144, 145) 36; (146, 147) 37; (148) 39; (149, 150) 41; (151) 42; (152) 43; (154) 45; (153, 155) 46; (156) 47; (157) 48; (158) 49; (159) 50; (160, 161) 52.

INDIANA. — (112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 13; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36; (134) 39; (135) 41; (136) 43; (137) 45; (138) 46; (139) 47; (140) 49; (1, 2, 3, Ind. App.; 141) 50; (4, 5, 6, Ind. App.; 142) 51; (7, 8, Ind. App.; 143) 52.

IOWA. — (72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51.

KANSAS.—(37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49.

KENTUCKY.—(83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49.

LOUISIANA.—(39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49.

MAINE.—(79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51.

MARYLAND.—(67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45; (79) 47; (81) 48; (82) 51.

MASSACHUSETTS.—(145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52.

MICHIGAN.—(60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 50.

MINNESOTA.—(36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 45; (57) 47; (58) 49; (59) 50; (60) 51; (61) 52.

MISSISSIPPI.—(65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42; (72) 48.

MISSOURI.—(92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117, 38; (118) 40; (119, 120) 41; (121) 42; (122) 43; (123) 45; (124, 125) 46; (126) 47; (127) 48; (128) 49; (129) 50; (130) 51; (131) 52.

MONTANA.—(9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43; (15) 48; (16) 50; (17) 52.

NEBRASKA.—(22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38; (37) 40; (38) 41; (39, 40) 42; (41) 43; (42, 43) 47; (44) 48; (45, 46) 50.

NEVADA.—(19) 3; (20) 19; (21) 37.

NEW HAMPSHIRE.—(64) 10; (62) 13; (65) 23; (66) 49.

NEW JERSEY.—(43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.) 39; (51 N. J. Eq.) 40; (56 N. J. L.) 44; (52 N. J. Eq.) 46; (57 N. J. L.; 53 N. J. Eq.) 51.

NEW YORK.—(107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38; (142) 40; (143) 42; (144) 43; (145) 45; (146) 48; (147) 49; (148) 51; (149) 52.

NORTH CAROLINA.—(97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32; (112) 34; (113) 37; (114) 41; (115) 44; (116) 47.

- NORTH DAKOTA** — (1) 26; (2) 33; (3) 44; (4) 50.
- OHIO** — (45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29;
(49 Ohio St.) 34; (50 Ohio St.) 40; (51 Ohio St.) 46; (52 Ohio St.) 49.
- OREGON** — (15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22)
29; (23) 37; (24) 41; (25) 42; (26) 46; (27) 50; (28) 52.
- PENNSYLVANIA** — (115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121
Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126
Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17;
(132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21;
(139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27;
(146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.)
33; (149, 152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36;
(157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40;
(161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44;
(166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa.
St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52.
- RHODE ISLAND** — (15) 2; (16) 27; (17) 33; (18) 49.
- SOUTH CAROLINA** — (26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26;
(34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44;
(42) 46; (43) 49; (44) 51.
- SOUTH DAKOTA** — (1) 36; (2) 39; (3) 44; (4) 46; (5) 49.
- TENNESSEE** — (85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30;
(92) 36; (93) 42; (94) 45; (95) 49.
- TEXAS** — (68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10;
(27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 23 Tex.
App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27;
(30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep. 86) 37;
(86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47.
- VERMONT** — (60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44;
(67) 48.
- VIRGINIA** — (82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89)
37; (90) 44; (91) 50.
- WASHINGTON** — (1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8)
40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52.
- WEST VIRGINIA** — (29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29;
(36) 32; (37) 38; (38, 39) 45; (40) 52.
- WISCONSIN** — (69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78)
23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35; (84) 36; (85, 86) 39;
(87) 41; (88) 43; (89) 46; (90) 48; (91) 51.
- WYOMING** — (3) 31.

AMERICAN STATE REPORTS.

VOL. LII.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Aswell v. Scranton.....	<i>Mun. corporations.</i>	175 Pa. St. 172...	841
Banka v. Chicago etc. R. R. Co.....	<i>Res judicata.</i>	61 Minn. 549...	618
Beers v. Boston etc. R. R. Co.....	<i>Carriers</i>	67 Conn. 417...	293
Benedict v. Schmieg.....	<i>Neg. instruments.</i>	13 Wash. 476...	61
Berberet v. Berberet.....	<i>Wills.</i>	131 Mo. 399.....	634
Berry v. Wiedman.....	<i>Husband and wife.</i>	40 W. Va. 36...	866
Branham v. Stallings.....	<i>Lotteries.</i>	21 Col. 211.....	213
Brower Lumber Co. v. Miller.....	<i>Contracts.</i>	23 Or. 565.....	307
Brown v. Franklin etc. Ins. Co.....	<i>Insurance.</i>	165 Mass. 565...	534
Brown v. Wilson.....	<i>Judgments.</i>	21 Col. 309.....	228
Backley v. Gray.....	<i>Contracts.</i>	110 Cal. 339.....	86
Bart v. Real Estate Exchange.....	<i>Corporations</i>	175 Pa. St. 619...	868
Capehart v. Foster.....	<i>Fixtures.</i>	61 Minn. 132...	582
Casper v. Klippen.....	<i>Execution.</i>	61 Minn. 353...	604
Castro v. Gail.....	<i>Limits of actions.</i>	110 Cal. 292.....	84
Cavallaro v. Texas etc. Ry. Co.....	<i>Carriers.</i>	110 Cal. 348.....	94
Charnook v. Higuerra.....	<i>Waters.</i>	111 Cal. 473.....	195
Chicago etc. R. R. Co. v. Field.....	<i>Railroads.</i>	7 Ind. App. 172...	444
Clifton v. Montague.....	<i>Landlord and tenant.</i>	40 W. Va. 207..	872
Clafin v. United States Credit System Co.....	<i>Insurance</i>	165 Mass. 501....	523
Columbian Athletic Club v. State.....			
Commercial Bank v. Sherman.....	<i>Corporations.</i>	23 Or. 573.....	811
Commonwealth v. Murphy.....	<i>Rape.</i>	165 Mass. 68.....	496
Cooper v. Wilder.....	<i>Public lands.</i>	111 Cal. 191.....	163
Croft v. Hanover etc. Ins. Co.....	<i>Insurance.</i>	40 W. Va. 508..	902
Curtiss v. Bachman.....	<i>Injunctions.</i>	110 Cal. 433.....	111
Cushing v. Perot.....	<i>Corporations.</i>	175 Pa. St. 66..	835
Dahlem's Estate.....	<i>Mortgages.</i>	175 Pa. St. 455...	848
Davidson v. Hannon.....	<i>Execution.</i>	67 Conn. 312....	282
De Lany v. Knapp.....	<i>Homesteads.</i>	111 Cal. 165.....	160
Dempsy v. Dobson.....	<i>Master and servant.</i>	174 Pa. St. 122..	816
Denver etc. Ry. Co. v. Denver.....	<i>Mun. corporations.</i>	21 Col. 350.....	239

NAME.	SUBJECT.	REPORT.	PAGE.
Donohoe Kelly Banking Co. v. Pu- get Sound Sav. Bank.....	{ <i>Neg. instruments...</i>	13 Wash. 407....	57
Dorrance v. Raynsford.....		67 Conn. 1.....	266
Driscoll v. Scanlon.....	<i>Master and servant.</i>	165 Mass. 348....	523
Eaton v. Libbey.....	<i>Contracts.....</i>	165 Mass. 218....	511
Eden v. People.....	<i>Sunday.....</i>	161 Ill. 296.....	365
Estate of Dahlem.....	<i>Mortgages.....</i>	175 Pa. St. 455..	848
Estate of Wagoner.....	<i>Gifts.....</i>	174 Pa. St. 528..	828
Fernandes v. Burleson.....	<i>Mechanic's lien.....</i>	110 Cal. 164.....	75
Fidelity etc. Trust Co. v. Fridenberg.....	<i>Estates.....</i>	175 Pa. St. 500..	851
Fire Department v. Gilmour.....	<i>Municipal boards.....</i>	149 N. Y. 453..	748
First Nat. Bank v. Bremer.....	<i>Banks.....</i>	7 Ind. App. 685.	461
First Nat. Bank v. Collins.....	{ <i>Executors and administrators</i> }	17 Mont. 433...	695
First Nat. Bank v. Dovetail etc. Co.....		<i>Corporations.....</i>	143 Ind. 550....
Fisher v. Fielding.....	<i>Judgments.....</i>	67 Conn. 91....	270
Fitzgerald v. Clark.....	<i>Mines.....</i>	17 Mont. 100..	665
Flannegan v. Chesapeake etc. Ry. Co.....	{ <i>Master and servant.</i>	40 W. Va. 436..	896
Fuller v. Shedd.....		<i>Boundaries.....</i>	161 Ill. 462.....
Funk v. St. Paul etc. Ry. Co.....	<i>Railroads.....</i>	61 Minn. 435....	608
German Ins. Co. v. Hayden.....	<i>Insurance.....</i>	21 Col. 127....	206
Giberson v. Patterson Mill Co.....	<i>Agency.....</i>	172 Pa. St. 369..	823
Gould v. Eaton.....	<i>Waters.....</i>	111 Cal. 639....	201
Greenbrier Industrial Exposition v. Squires.....	{ <i>Corporations.....</i>	40 W. Va. 307..	884
Gregory v. Spieker.....		<i>Contracts.....</i>	110 Cal. 150....
Griswold v. Brega.....	<i>Injunctions.....</i>	160 Ill. 490.....	350
Grover v. Smith.....	<i>Partnership.....</i>	165 Mass. 132....	506
Guinsburg v. H. W. Downs Co.....	<i>Pledge.....</i>	165 Mass. 467....	525
Hale v. Life Indemnity etc. Co.....	<i>Insurance.....</i>	61 Minn. 516....	616
Hamilton v. Feary.....	<i>L'ndlord and tenant</i>	8 Ind. App. 615.	485
Hamilton-Brown Shoe Co. v. Saxey.....	<i>Strikes.....</i>	131 Mo. 212....	622
Hammond v. Cailleaud.....	<i>Partition.....</i>	111 Cal. 206....	167
Harding v. People.....	<i>Constitutional law.....</i>	160 Ill. 459.....	344
Harmon v. Old Colony R. R. Co.....	<i>Married women.....</i>	165 Mass. 100....	499
Heffran v. Hutchins.....	<i>Equity.....</i>	160 Ill. 550.....	353
Heidel v. Benedict.....	<i>Attachment.....</i>	61 Minn. 170....	592
Hibernian Ben. Soc. v. Kelly.....	<i>Taxes.....</i>	28 Or. 173.....	769
Hohl v. Chicago etc. Ry. Co.....	<i>Railroads.....</i>	61 Minn. 321....	598
Hunter v. Hunter.....	<i>Mar'ge and divorce.</i>	111 Cal. 261....	180
In re Walker.....	<i>Wills.....</i>	110 Cal. 387....	104
Johnson Co. v. Miller.....	<i>Corporations.....</i>	174 Pa. St. 605..	833
Jones v. Aspen Hardware Co.....	<i>Corporations.....</i>	21 Col. 263.....	220
Jordan v. New York etc. R. R. Co.....	<i>Railroads.....</i>	165 Mass. 346....	522
Justice Min. Co. v. Lee.....	<i>Mines.....</i>	21 Col. 260.....	216
Kaufman v. Shain.....	<i>Records.....</i>	111 Cal. 16.....	139
Knowles v. Pennsylvania R. R. Co.....	<i>Nuisance.....</i>	175 Pa. St. 623..	860

NAME.	SUBJECT.	REPORT.	PAGE.
Lake v. Minnesota etc. Relief Assn.	<i>Insurance</i>	61 Minn. 96....	538
Lake Erie etc. R. R. Co. v. Clark	<i>Railroads</i>	7 Ind. App. 145.	442
Lake Erie etc. R. R. Co. v. Griffin	<i>Railroads</i>	8 Ind. App. 47.	466
Leake v. Hayes.....	<i>Partition</i>	13 Wash. 213...	34
Lewis v. Terry.....	<i>Sales</i>	111 Cal. 39.....	146
Lorence v. Ellensburg.....	<i>Mun. corporations.</i>	13 Wash. 341...	42
Macke v. Byrd.....	<i>Homesteads.</i>	131 Mo. 682.....	649
Mansfield v. Shelton.....	<i>Devise</i>	67 Conn. 390...	285
Marvin v. Foster.....	<i>Mar'ge and divorces.</i>	61 Minn. 154...	586
McGowan v. McDonald.....	<i>Corporations</i>	111 Cal. 57.....	149
McPhail v. People.....	<i>Officers</i>	160 Ill. 77.....	306
Meridian Nat. Bank v. First Nat. Bank.....	<i>Banks</i>	7 Ind. App. 322.	450
Metropolitan Acc. Assn. v. Froiland	<i>Insurance</i>	161 Ill. 30.....	359
Milburn v. Phillips.....	<i>Subrogation.</i>	143 Ind. 93.....	403
Mutual Benefit Co's Petition.....	<i>Evidence</i>	174 Pa. St. 1....	814
National Teleph. Co. v. Du Bois....	<i>Corporations</i>	165 Mass. 117....	503
Nelson v. Davidson.....	<i>Adverse possession.</i>	160 Ill. 254.....	338
Nevitt v. Woodburn.....	<i>Executors and administrators.</i>	160 Ill. 203.....	315
New England Dressed Meat etc. Co. v. Standard Worsted Co...	<i>Statute of frauds.</i>	165 Mass. 323....	516
Nicklin v. Robertson.....	<i>Judgments</i>	28 Or. 278.....	790
Niell v. Order of United Friends. .	<i>Ben. associations.</i> ...	149 N. Y. 430....	738
North Pac. Lumber Co. v. Lang....	<i>Interpleader</i>	28 Or. 246.....	780
Pacific Express Co. v. Shearer.....	<i>Carriers</i>	160 Ill. 215.....	324
Parrett v. Palmer.....	<i>Husband and wife.</i>	8 Ind. App. 356.	479
Pentzel v. Squire.....	<i>Notice</i>	161 Ill. 346.....	373
People v. Adelphi Club.....	<i>Social clubs.</i>	149 N. Y. 5....	700
People v. Bendit.....	<i>Forgery</i>	111 Cal. 274.....	186
People v. Barberi.....	<i>Homicide</i>	149 N. Y. 256...	717
People v. Havnor.....	<i>Sunday</i>	149 N. Y. 195...	707
Picksley v. Starr.....	<i>Gifts</i>	149 N. Y. 432..	740
Plucker v. Teller.....	<i>Pledge</i>	174 Pa. St. 529...	825
Pollock v. Horn.....	<i>Insane persons</i>	13 Wash. 626...	66
Reichenbach v. Sage.....	<i>Building contracts.</i>	13 Wash. 364....	51
Robinson v. Clapp.....	<i>Boundaries</i>	67 Conn. 538....	298
Robinson v. Dickey.....	<i>Partition</i>	143 Ind. 205....	417
Rogers v. Miller.....	<i>Adverse possession.</i>	13 Wash. 82....	20
Safely v. Caldwell.....	<i>Intervention</i>	17 Mont. 184....	693
Schlicker v. Hemenway.....	<i>Executors and administrators</i>	110 Cal. 579.....	116
Schmidt v. Oregon etc. Min. Co....	<i>Appeal</i>	28 Or. 9.....	759
Schuermann v. Dwelling House Ins. Co.....	<i>Insurance</i>	161 Ill. 437.....	377
Schufeldt v. Smith.....	<i>Corporations</i>	131 Mo. 280.....	628
Sherwood v. Powell.....	<i>Libel</i>	61 Minn. 479....	614
Sinsheimer v. Whitely.....	<i>Warehouseman</i>	111 Cal. 378.....	192
Smith v. Downey.....	<i>Corporations</i>	8 Ind. App. 179.	467

NAME	SUBJECT	REPORT	PAGE
Snell v. Harrison.....	<i>Partition</i>	131 Mo. 495.....	642
Spangler v. Green.....	<i>Mechanic's lien</i>	21 Col. 505.....	259
Stallcup v. Tacoma.....	<i>Municipal bonds</i> ..	13 Wash. 141....	25
State v. Buckles.....	<i>Execution</i>	8 Ind. App. 232.	476
State v. Gleim.....	<i>Witnesses</i>	17 Mont. 17....	655
State v. Kelly.....	<i>Jurors</i>	28 Or. 225.....	777
State v. Smith.....	<i>Mun. corporations</i> ..	67 Conn. 541....	301
Stevens v. Reynolda.....	<i>Cotenancy</i>	143 Ind. 467....	422
Taylor v. Buttrick.....	<i>Trust deeds</i>	165 Mass. 547....	530
Thayer v. Lombard.....	<i>Dying declarations</i>	165 Mass. 174....	507
Thompson v. Truesdale.....	<i>Railroads</i>	61 Minn. 129....	579
Townsend v. Tyndale.....	<i>Limits'ns of actions</i>	165 Mass. 293....	513
Travelers' Ins. Co. v. Dunlap.....	<i>Insurance</i>	160 Ill. 642.....	355
Visalia etc. R. R. Co. v. Hyde.....	<i>Corporations</i>	110 Cal. 632.....	136
Wagoner's Estate.....	<i>Gifts</i>	174 Pa. St. 523..	823
Walker, In re.....	<i>Wills</i>	110 Cal. 387.....	104
Walsh v. Packard.....	<i>Covenants</i>	165 Mass. 189....	508
Ward v. Ward.....	<i>Cotenancy</i>	40 W. Va. 611..	911
Wetmore v. Wetmore.....	<i>Alimony</i>	149 N. Y. 520....	752
Wilcox v. John.....	<i>Public lands</i>	21 Col. 367.....	246
Wilhelm v. Wilken.....	<i>Quitclaim deeds</i> ..	149 N. Y. 447....	743
Willamette Real Estate Co. v. { Heudrix.....	<i>Execution</i>	28 Or. 485.....	800
Wilson v. Phoenix etc. Mfg. Co.....	<i>Nuisance</i>	40 W. Va. 413..	890
Wood v. American etc. Ins. Co.....	<i>Insurance</i>	149 N. Y. 382....	733
Woodruff v. Warner.....	<i>Judicial sales</i>	175 Pa. St. 302...	845
Wulff v. Superior Court.....	<i>Certiorari</i>	110 Cal. 215.....	78
Yake v. Pugh.....	<i>Married women</i> ...	13 Wash. 78....	17
Yore v. Booth.....	<i>Insurance</i>	110 Cal. 238.....	81
Young v. Simpson.....	<i>Elections</i>	21 Col. 400.....	254

AMERICAN STATE REPORTS.
VOL. LII.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

YAKE v. PUGH.

[13 WASHINGTON, 73.]

TRIAL—EVIDENCE.—A MOTION TO STRIKE out all testimony relating to a certain subject is properly denied if some of the testimony is clearly competent.

MARRIED WOMEN—SEPARATE PROPERTY.—THE PERSONAL EARNINGS of a wife, acquired from keeping boarders and from work done by her as a dressmaker, under an agreement with her husband that the money so acquired should belong to her alone, are her separate property as against subsequent creditors of the husband.

MARRIED WOMEN—SEPARATE PROPERTY—GIFT FROM HUSBAND.—If articles of personalty are purchased with money earned by a wife under an agreement with her husband, that such money should be her separate property, and such articles are brought into the house and taken possession of by her as her separate property with the consent of her husband, such acts amount to a gift from the husband to the wife, and constitutes such articles her separate property.

Griffitts & Nuzum, for the appellants.

A. M. S. Hilgard, for the respondent.

73 HOYT, C. J. This action was brought to recover **73** possession of certain personal property, and damages for its detention. From defendant's answer it appeared that their claim was founded upon a levy under attachment in a suit against the plaintiff and her husband. The plaintiff's right to possession is founded upon her claim that the property belonged to her; that of the defendants upon the claim that it was community property. And the question presented by these adverse claims is the principal one which we are called upon to decide.

There is a further claim that error was committed by the trial court in refusing to strike the testimony offered by the plaintiff to show that she had been damaged by the detention of the property. This motion was aimed at all of the testimony upon that subject. Some of it was clearly competent. The motion was, therefore, properly denied. There was enough competent testimony upon the question of damages to require its submission to the jury, and, as no exceptions were taken to the manner in which it was submitted, no claim of error can be sustained growing out of the court's action in that regard.

It appeared from the testimony that the property had been acquired by the wife with money which she had received from persons whom she had kept as boarders, and for work done by her as a dressmaker. It also appeared that, before she consented to engage in the business by means of which this money was obtained, her husband told her that, if she did so, whatever money she made should be her separate property. And to further establish the fact that, as between the husband and wife, it was understood to be the business of the wife, and not of the community, it was shown that the husband paid the wife for his board the same as did other boarders. That the earnings of the wife, ^{so} as well as those of the husband, when they were living together, *prima facie* belong to the community has been held to be the law in most, if not all, of the states which have statutes similar to our own. This rule was recognized and applied to the statutes of this state in the case of *Abbott v. Wetherby*, 6 Wash. 507; 36 Am. St. Rep. 176. Under it, if the wife had done what she did, without any agreement between herself and her husband as to who should have the benefit of her services, the money received therefor would have been that of the community. It follows that if the money was hers, it was by reason of the fact that what was said and done by the husband amounted to a gift to her of the money received. It is not claimed that this would not have been sufficient for the purpose, if the property had been in existence, and had been at the time delivered to, and since retained by, the wife. But the contention is, that at the time the arrangement was entered into, that which was attempted to be donated was not in existence and could not be delivered, and that for that reason the attempted gift could have no effect. The general rule is that a gift, to be effective, must be consummated by delivery, but it does not follow that, under the circumstances disclosed by the evidence in this case, the money received by the wife was not legally donated by

the husband. The consent on his part that she should render these services, and receive pay therefor as her own, was a continuing arrangement, and was in force at the time she received the money; hence, when she received each sum, she received it as her own by express direction of her husband, and the effect was the same as though the money had first been in his hands, and had been then delivered to her as a gift. Besides, if the technical legal title to the money may be said not to have passed ⁸¹ to her, yet, under the circumstances, when the several articles were purchased, brought into the house, and taken possession of by her as her separate property, with the consent of the husband, such consent and taking possession amounted to a gift from the husband to the wife.

Property acquired under circumstances very similar to those disclosed by this record have been held by the courts of other states to belong to the wife: See *Johnson v. Burford*, 39 Tex. 242; *Von Glahn v. Brennan*, 81 Cal. 261; and no case holding to the contrary, where the circumstances were at all similar, has been brought to our attention.

The effect of such an arrangement between husband and wife, when attacked by creditors who were such at the time the property was acquired, is not here presented. It is nowhere shown that any of the property was obtained after the debt was incurred, for which the action was brought. Besides, the nature of the property was such that a creditor would not be presumed to have relied upon it as a basis for credit. It was substantially all household furniture or wearing apparel, and exempt from execution or attachment to a householder living in the state.

The motion of the appellants for a peremptory instruction to the jury to find in their favor was rightfully denied, and the proofs were sufficient to support the verdict of the jury to the effect that the goods were the separate property of the wife.

The judgment will be affirmed.

Anders, Scott, Dunbar, and Gordon, JJ., concur.

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE.—
THE EARNINGS of a married woman, made with the consent of her husband, are her separate property: Note to *Abbott v. Wetherby*, 36 Am. St. Rep. 182; *McNaught v. Anderson*, 78 Ga. 499; 6 Am. St. Rep. 278, and note; *Wren v. Wren*, 100 Cal. 276; 38 Am. St. Rep. 287, and note; but see to the contrary *Bailey v. Gardner*, 81 W. Va. 94; 13 Am. St. Rep. 847, and note.

ROGERS v. MILLER.

[13 WASHINGTON, 82.]

ADVERSE POSSESSION—PLEADING.—In an action to quiet title, an allegation of ownership in fee admits proof of any title, including that acquired by adverse possession.

ADVERSE POSSESSION.—Evidence that a person has for twenty-five years listed land for taxation, and paid the taxes thereon, being part of the time in actual possession, continually and uninterruptedly exercising the usual acts of ownership, and refusing to extend like privileges to others, is competent and sufficient to establish adverse possession.

MORTGAGES—DESCRIPTION OF PREMISES.—If a claimant for public land enters and settles thereon prior to its survey, and mortgages all of his "land claim," the mortgage is sufficient to pass the title to such claim as located by subsequent survey, although the description in the mortgage is erroneous, and does not correspond with that of the patent.

JUDGMENTS — PRESUMPTION — COLLATERAL ATTACK. As against collateral attack on the ground that the summons was insufficient to confer jurisdiction, it must be presumed in aid of the judgment reciting that service of the complaint and notice had been duly made according to law, that another and sufficient summons was issued and served, if there was ample time therefor after the completion of the publication of the first summons, and there is no evidence to the contrary.

TRIAL COURT MAY REOPEN A CASE after submission and receive other testimony after due notice to the parties.

I. A. Town and W. W. Likens, for the appellant.

Sharpstein & Blattner, for the respondents.

⁸² GORDON, J. This appeal is from a decree of the superior court of Pierce county, quieting respondents' title to certain real property. It appears from the record that some time in 1850 William B. Wilton settled upon the premises in dispute under the act of ⁸³ Congress of September 27, 1850, known as the donation act. On April 7, 1855, he filed his notification. On May 29, 1869, he submitted his final proof to the register and receiver of the United States land-office at Olympia, which proof was accepted by them and certificate for patent duly issued. On August 27, 1871, a patent for said land was issued. On January 9, 1860, after the expiration of the period of residence required by the donation act, Wilton and wife mortgaged the premises to S. McCaw and respondent Rogers to secure the payment of six hundred and one dollars due on January 1, 1862. Thereafter proceedings were instituted in the district court of the third judicial district of Washington Territory, and on the twenty-fifth day of May, 1866, a decree of foreclosure was duly made and entered therein. Pursuant to said decree, said mortgaged premises were sold, said

mortgagees becoming the purchasers at said sale, which sale was thereafter confirmed by an order of said court, and a deed to said premises duly executed by the sheriff. Subsequently, respondent Littlejohn succeeded to all of the interest of said McCaw in said premises. It further appears that some time in 1861 or 1862 said Wilton removed from the territory of Washington to Mexico; that thereafter his whereabouts was unknown to his former friends and acquaintances, who believed him dead. On the 18th of August, 1890, said Wilton conveyed said premises to the appellant, Miller.

The lower court found that the respondents "are now, and for a period of more than twenty years preceding the commencement of this action had been, in the possession" of the premises in question, and that they "are the owners in fee each of an undivided one-half of said premises. That the claim of the defendant [appellant] to said premises is without any right ⁸⁴ whatever, and the said defendant [appellant] has neither estate, right, title, nor interest whatever in said land or any part thereof."

The appellant contends that respondents did not plead adverse possession under color of title, and that the lower court erred in permitting any evidence thereof to be given. This contention we think is unfounded. The allegation of ownership in fee entitled the respondents to introduce proof of any title, including that acquired by adverse possession. Such was the holding of this court in *Raymond v. Morrison*, 9 Wash. 156, where it was said: "It would only have been necessary for them to allege that they were the owners in fee, and lawfully seised and possessed of it, in order to state a good title in themselves. They could then have proved, upon the trial, that their title was based upon an adverse possession maintained for the requisite period, since such possession is now generally held to confer upon the possessor the absolute legal title in fee of the estate."

The evidence of adverse possession was competent and sufficient. It is undisputed that for twenty-five years last past the respondents regularly listed said land for taxation; that it has, during all of said time, been assessed to them, and the taxes thereon have for said entire period been paid by them; that they continually and without interruption exercised the usual acts of ownership, selling timber to different persons and refusing to permit others to take timber therefrom, and suffering parties to go upon the land and refusing to extend like privileges to others, and for a portion of the time the property had been in the actual possession of their agent. We have examined the evidence sub-

mitted below, and think it amply sufficient to sustain the finding of the lower court in this ⁸⁵ regard, and that the case made by the evidence is much stronger than that presented by the record in *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, which was there held sufficient.

2. The description of the premises in the notification filed by Wilton in 1855 conflicts with the description given in the mortgage to McCaw and Rogers, heretofore mentioned, and the description contained in the certificate and patent also conflicts with both the description in the mortgage and notification; and it is contended by the appellant that the mortgage does not cover any of the premises described in the notification, excepting only ten acres. He further contends that, if this was due to a mistake in describing the premises in the mortgage, the latter should have been reformed prior to foreclosure, and that a deed founded upon such false and erroneous description is wholly insufficient to give color of title. From the proof it satisfactorily appears that Wilton entered but one piece of land under said donation act and had but one "land claim"; that his settlement thereon was made prior to the survey. In said mortgage the premises are described as "all of that certain parcel or quarter section of land known as Wilton's land claim, situated on what is known as The Narrows, at the entrance of Puget Sound, south and east side marked and bounded," etc. (then follows a more particular description). The act of Congress in question authorized the claimant, after the surveys were extended, to make his claim conform as nearly as practicable to legal subdivisions. What he undertook to mortgage, and did mortgage, was his "land claim," and the mere fact that a subsequent survey disclosed that the particular description of such "land claim" contained in the mortgage was, in fact, erroneous, ⁸⁶ cannot avail the appellant: *Vallejo Land Assn. v. Viera*, 48 Cal. 572; *Kernan v. Baham*, 45 La. Ann. 799.

3. Appellant also insists that the decree of the district court foreclosing said mortgage was and is void for want of jurisdiction, because the notice or summons issued to defendant in said cause was not in the form required by law, in this, that the time provided in said summons for the appearance of said defendant was therein stated to be three months after September 25, 1865, instead of two months, and that the words of the statute, "which will come on to be heard at the first term of the court," are not contained in said notice or summons. For a better understanding of this objection, it may be stated that all of the files in the foreclosure suit are lost, and none of them were produced upon the

trial of this cause below. Secondary evidence as to certain of the proceedings taken in said foreclosure action was offered and received.

We deem it unnecessary to determine whether a summons of the character so shown to have been issued in said cause was legally sufficient, in view of other considerations which seem to us of controlling importance, viz: 1. The decree itself recites that it appeared to the court therein that "service of the complaint and notice had been duly made according to law"; and 2. Assuming (without deciding) that the summons in question was legally insufficient, there nevertheless was ample time after the completion of the publication of such summons for another and entirely sufficient summons to have been issued and served, and, in the absence from the record of any such summons or evidence concerning it, this court would ⁸⁷ presume, in aid of the decree and as against collateral attack, that such was the fact.

"Every fact not negatived by the record will be presumed in aid of the judgment, and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it": *Munch v. McLaren*, 9 Wash. 676.

The court rendering the decree of foreclosure was a court of general jurisdiction having jurisdiction of the subject matter, and it became a question for it to determine the sufficiency of the service of summons in said case. That question, as we have seen, it did determine, and the decree expresses such determination, viz., that service of the complaint and notice had been duly made according to law.

"There having been time for another summons and for a valid service of the same, they will be presumed, in the case of such a finding": *Mulvey v. Gibbons*, 87 Ill. 367; *Miller v. Handy*, 40 Ill. 448; *Lyle v. Horstman* (Tex. Civ. App.), 25 S. W. Rep. 802.

The finding of the court, "that service of the complaint and notice had been duly made according to law," is not contradicted by merely showing that a summons which was legally insufficient had, in fact, been published.

"As much reliance ought to be placed on the finding of a court, as respects its jurisdiction, as to other facts in the case, unless contradicted by the record itself—otherwise opportunity might be afforded in many instances, by the destruction of the files by parties interested, or by mere accident, to defeat sales made in the utmost good faith. . . . It is conceded the summons to the July term of the county court was without authority of law, and that service upon it would have given the court no jurisdiction

over the person of the defendant. But between that term and the convening of the court for the August ^{ss} term there was ample time in which another summons might have been issued and served. It must have so appeared to the court, for it solemnly found defendant 'had due and legal notice' of the filing of the petition, from the return of the sheriff on the summons. There is nothing to show the court acted on the void summons to the July term of the court. The presumption is, the court knew that summons was void, as having been issued contrary to the provisions of the statute, and that service of it by the sheriff did not give the defendant 'due and legal notice' of the filing of the petition. How, then, did the court find it had jurisdiction of the person of the defendant? It must have been from a summons issued to the August term, upon which there was the proper return of service by the sheriff; otherwise, its finding on the question of jurisdiction would be absolutely untrue. All reasonable presumptions are in favor of the jurisdiction of the court, and the law will presume *prima facie*, at least, from the finding of the court, that such was the fact; that such summons, with the proper return on it, was before the court, and may have been abstracted or lost from the files": *Matthews v. Hoff*, 113 Ill. 90.

4. It appears that after this cause had been submitted to the court below upon the proofs and arguments of counsel, the court reopened the cause and received further testimony upon behalf of plaintiffs. This testimony was taken only after due notice to the appellant. We think, under the circumstances, that the course pursued was not an abuse of the discretionary powers of the trial court, and we have failed to find anything in the testimony so taken that could be considered as affecting the rights of parties.

Other points of error presented by appellant's brief has been examined, but we consider none of them of sufficient importance to warrant a reversal of the decree, which will be affirmed.

Anders, Scott, and Dunbar, JJ., concur.

^{ss} Hoyt, C. J., concurred in the result, but not in what is said as to adverse possession.

ADVERSE POSSESSION.—ACTS EQUIVALENT TO NOTICE. Extended note to *De Frieze v. Quint*, 28 Am. St. Rep. 159-162; note to *Downing v. Mayes*, 46 Am. St. Rep. 901.

JUDGMENTS—COLLATERAL ATTACK—PRESUMPTION AS TO PROCESS.—In a collateral attack upon a domestic judgment of a court of general jurisdiction, every presumption will be indulged in favor of the validity of the judgment: Note to *Sears v. Sears*, 44 Am.

St. Rep. 214; *Hardy v. Beatty*, 84 Tex. 562; 31 Am. St. Rep. 80, and note. See, also, the extended notes to *Morrill v. Morrill*, 23 Am. St. Rep. 113, and *Melia v. Simmons*, 30 Am. Rep. 748.

TRIAL—REOPENING CASE.—The refusal of a trial court to reopen a case after the close of the trial for the purpose of allowing additional evidence to be introduced is no abuse of discretion where no excuse is shown for not having produced the evidence at the trial: *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 95 Cal. 1; 29 Am. St. Rep. 85.

STALLCUP v. TACOMA.

[13 WASHINGTON, 141.]

JUDGMENTS—RES JUDICATA.—The supreme court of the state will take judicial notice of its records, and of what issues were presented for determination by the record in a given case, and will not entertain or consider an unfounded allegation of a complaint that certain questions were not presented for determination in such case.

JUDGMENTS—RES JUDICATA—MUNICIPAL BONDS.—In an action by a taxpayer, on behalf of himself and all others similarly situated, to restrain a city from issuing municipal bonds, a decision determining their validity is, in the absence of fraud or collusion, conclusive, in a subsequent action by another taxpayer to restrain the payment of interest thereon, especially when the same questions concerning the legality of the bonds are presented in both actions.

ELECTIONS—REGISTRATION.—The right to vote at any election, general or special, resides in those possessing the constitutional qualifications, subject only to compliance with such reasonable provisions respecting registration and regulating the exercise of the right, as the legislature may provide, but the mere failure or neglect of the legislature to make any provision for registration does not operate to deprive those having the constitutional qualifications from exercising the elective franchise.

MUNICIPAL BONDS—ISSUANCE—VALIDITY.—The motives which induce voters to authorize the issuance of municipal bonds, cannot be inquired into by the courts, when the propriety of becoming indebted for the purpose for which such bonds are issued, has been committed to such voters by the legislature of the state.

MUNICIPAL BONDS.—A JUDGMENT THAT NEGOTIABLE MUNICIPAL BONDS ARE INVALID, is not binding on holders for value before maturity who are strangers to the record.

B. Sheeks, F. H. Graham, and A. R. Titlow, for the appellant.

J. Wickersham, S. W. Gibbs, and Crowley, Sullivan & Grosscup, for the respondent.

¹⁴² **GORDON, J.** This action was brought by the appellant, a citizen and taxpayer of the city of Tacoma, for himself and all others similarly situated, against the respondent city, to enjoin it from paying the interest on seventeen hundred and fifty negotiable, interest bearing bonds of the denomination of one thou-

said dollars each, said bonds having been issued by the respondent city and delivered to one C. B. Wright and to the Tacoma Light and Water Company, a corporation (of which said corporation the said Wright is the principal stockholder), in exchange for a certain light and water plant, water supply, and equipment.

The lower court having sustained the demurrer of the respondent to appellant's complaint, and the appellant having elected to stand by his pleading, judgment ¹⁴³ was rendered below dismissing said action, from which judgment, and from the order sustaining said demurrer, this appeal is prosecuted. The complaint is very voluminous, comprising some twenty-one closely type-written pages. The conclusion reached by us renders it unnecessary to consider many allegations contained in it. Appellant assails the validity of the bonds for two principal reasons: 1. Because the election at which the voters of the city authorized their issuance was held without any registration, contrary to the provisions of the constitution of the state; and 2. That the aggregate amount of the bonds authorized at the election so held was in excess of the limit of indebtedness fixed by the constitution.

This is the third case which has been before this court involving the legality of said election. The first case was that of Seymour v. City of Tacoma and the Tacoma Light and Water Company, and is reported in 6 Wash. 138; the second cause was between the same parties, and is reported in 6 Wash. 427. The first of these cases was instituted prior to the time of holding the election, and for the purpose of having the ordinance which provided for the submission of the proposition to the voters adjudged invalid and void, and for the further purpose of enjoining and restraining the city and its officers from calling or holding said election, and from expending the funds of said city for that purpose. The second cause was instituted subsequent to the election, but prior to the issuing of the bonds. Its purpose was to enjoin the city and its officers from issuing said bonds, or from attempting to obligate said city for the payment thereof. Each of said causes was prosecuted by the plaintiff as a citizen and taxpayer in his own behalf, and in behalf of all other taxpayers ¹⁴⁴ of the city similarly situated. In the first case above referred to, this court construed the ordinance under which the proposition to purchase the plant and issue said bonds was submitted to the legal voters of said city; also the act of the legislature of March 26, 1890, authorizing cities to purchase waterworks and light plants; and upon the subject of registration the court then said:

"We have but one registration law in this state which is found in chapter 8 of the General Statutes. Section 467 declares that the provisions of the law shall apply to all elections for municipal and other officers; but we fail to find any application of it to elections of this kind. Section 9 of the charter [of respondent city] requires registration 'as provided by the general laws of the state'; and section 13 declares that no person shall be entitled to vote unless he is a qualified elector under the state laws, and has registered 'as provided by law.' But there being no state law requiring registration at elections of this character, these provisions of the charter are inoperative, and any elector can vote."

In referring to what was said by this court in that case, the learned counsel for the appellant herein say in their brief: "The court very properly decided that the registration statutes did not apply to elections of that character," and in appellant's complaint in this case it is alleged that "the legislature of the state of Washington has passed no law by which said pretended election (for voting on issuing bonds) could be held," because of its failure to make provision for registration. But appellant insists that the opinion in that case relating to registration was based on the statute alone, and that the counsel for the respective parties to that litigation suppressed the true facts in that case, and that the provision of the constitution ¹⁴⁵ of this state upon the subject of registration was not called to the attention of the court.

The provision of the constitution referred to is section 7, article 6, and is as follows: "The legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote; provided, that this provision is not compulsory upon the legislature, except as to cities and towns having a population of over five hundred inhabitants. In all other cases, the legislature may or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes."

It is conceded that said city of Tacoma now has, and at the time of the election herein referred to and for many years prior thereto had, a population exceeding twenty-five thousand. The appellant further insists that, inasmuch as the legislature of the state of Washington has not made provision for registration for elections of this character, there is no constitutional basis or authority for holding such an election, and that the bonds, for that reason, are absolutely void. The Seymour case first above cited was decided by this court before the bonds, which appellant here seeks to have adjudged invalid, were issued, and if the ques-

tion we are now discussing were the sole and controlling question in the decision of this case, we should, in view of the fact that the bonds of the city negotiable in form were thereafter issued, hesitate before promulgating a decision discrediting said bonds for any reason which existed at the time when said former case was pending, and which it would have been the right of parties to have urged therein.

This court will take judicial notice of its records, and of what issues were presented for determination by the record in a given cause, and will not entertain ¹⁴⁶ or consider an allegation of the character contained in paragraph 7 of the complaint herein, when it appears from an inspection of such record that the matters so alleged are unfounded.

Many of the allegations of the complaint herein relate to questions which were distinctively raised in the pleadings in the Seymour cases above cited, and extended arguments were made upon them in briefs of counsel therein, and such questions have been disposed of by this court in rendering judgment in said cases.

The contention of counsel that the constitutional necessity for registration was not urged upon the court's attention in the first Seymour case is unfounded. An inspection of the briefs in that case discloses that the question was discussed, and fourteen pages of the brief of the respondent therein were entirely devoted to the discussion of the claim that registration was essential to the validity of the then proposed election—said discussion treating of constitutional, as well as statutory, requirements—and while it is true that mention of the constitutional provision is not made in the opinion of the court in that case, it does not follow that it did not receive the consideration of the court. The rule is that "a decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon the the parties to the litigation and their privies, and they are not allowed afterward to revive the controversy in a new proceeding for the purpose of raising the same or any other questions. . . . Whatever the question involved, whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, the rule of finality is the same": Cooley's Constitutional Limitations, 5th ed., 58.

¹⁴⁷ It is true that the appellant was not a nominal party in Seymour v. Tacoma, 6 Wash. 138, 427, still it is also probably true that as a taxpayer he could not be heard to urge any objection to the validity of the bonds that could not be urged by the city, were the controversy between it and the holder of the

bonds. And it is familiar law that a judgment bars not only every defense actually raised or set up in the action, but also every other defense which might have been urged therein: *Cromwell v. County of Sac*, 94 U. S. 351; *Burlen v. Shannon*, 99 Mass. 200; 96 Am. Dec. 733; *Howard v. Huron*, 5 S. Dak. 539; *Hermann on Estoppel*, sec. 121.

And we think there is little reason and less authority for excepting municipal authorities from this general rule.

We do not mean to be understood as holding that parties are to be concluded by decisions obtained by others in fictitious controversies, or as a result of fraud and collusion, or where an imposition has been practiced upon the court.

But, as already noticed, the *Seymour* cases were brought by a taxpayer in behalf of himself and all others similarly situated, the city was the principal defendant there, as it is the sole defendant here, and there is identity in the subject matter of the litigation. In the first of said cases, it was urged that the ordinance passed by the city authorities for submitting the propositions to purchase the plant and to issue the bonds, which ordinance was set out in the complaint in that action, was void, and an injunction was asked restraining the officers of the city from calling an election to submit said propositions to the legal voters of the city, because of the alleged invalidity of the ordinance. ¹⁴⁸ This court, on appeal, held the ordinance valid and effectual.

In the second case, brought after the result of the election on the propositions so submitted to the electors had been declared, but prior to issuing the bonds, an injunction was sought for the purpose of restraining the city and its officers from issuing the bonds because of the illegality of the election and the invalidity of the bonds. The recitals expressed upon the face of the bonds were set out in the complaint, which complaint also contained the allegation that "the debt to be incurred by the issuance of said bonds . . . will be more than five per centum (the limit of indebtedness as fixed by the constitution) of the taxable property in said city, as ascertained by the last assessment made for city purposes." This court, upon appeal, held that the proceedings attending the election were regular, and that the bonds (excepting only as to seventy thousand dollars, which the court authorized to be deducted from the total amount to be issued) did not exceed the limit of indebtedness imposed by the constitution. Necessarily, the question of the validity of the bonds involved in

this controversy was decided in that case: *Gallagher v. Moundsville*, 34 W. Va. 730; 26 Am. St. Rep. 942.

We do not think that the complaint in this action charges such fraud in the conduct of the cases herein referred to as the *Seymour* cases as will operate to defeat the binding effect of the decisions rendered therein. For that purpose, we think the allegations of the complaint wholly insufficient, and especially so when considered in connection with what is disclosed by the records of this court.

But if we adopt the view that appellant has taken with regard to this court's decision in the first of the ¹⁴⁹ so-called *Seymour* cases, and proceed to the investigation and determination of this constitutional question, uninfluenced by anything determined in that case, we think that the contention of counsel, that no election for the purpose of issuing bonds can legally be held in a city or town of this state having a greater population than five hundred inhabitants, because of the failure of the legislature to make provision for the registration of voters at such election, is not well founded. The case differs widely from one where the legislature has made provision for registration and parties neglect to comply therewith. We think that the prohibition of the constitution against voting does not apply until after a registration law has been passed, and a compliance therewith made possible to the voter. If we are right in this view, it is easy to understand why it was not deemed pertinent to make mention of the constitution in the first *Seymour* case. But we think that additional reasons may be adduced to demonstrate the unsoundness of appellant's construction of article 6, section 7, of the constitution. By reference to that section, it will be seen that if registration is a *sine qua non* to the right to vote at an election of this character, the same would be true at all elections—general as well as special—elections held for the purpose of choosing state, county, or city officers, as well as elections of the character here in question.

"Constitutional provisions concerning the qualifications of voters apply to all elections, whether general or special": *McCreary on Elections*, sec. 14; *People v. Canaday*, 73 N. C. 198; 21 Am. Rep. 465.

Hence, if appellant's position is well taken, the conclusion necessarily is, that had the legislature entirely failed to pass any registration law (instead of merely passing a law requiring registration at elections for ¹⁵⁰ state and other officers)—an elec-

tion of any character within this state, or at least within towns and cities having a population exceeding five hundred—would have been legally impossible, inasmuch as the constitutional provision has reference to elections of the one kind as well as the other, and, until the legislature made provision for registration, no election for any purpose could be legally held. If this be the correct view of the constitution, we might well inquire, how (after the adoption of the constitution) was an election possible? We were then without a registration law, and, according to appellant's contention, could hold no election until one was passed. Without a legislature (the members of which the constitution required to be elected) no registration law could be passed, and without a registration law no legislature could be elected. Reduction ad absurdum. By parity of reasoning, all cities and towns in the state containing a population exceeding five hundred should have been excluded from participating in the election held for selecting members of Congress and state officers, and putting the machinery of the state government in motion.

In construing a provision of the constitution, as well as in the construction of a statute or contract, regard must be had to its several provisions and all of its parts. If any part of it be susceptible of two constructions, that one should be adopted which will not only best harmonize with other provisions, but also give effect to every agency which is provided by it to make the state government effective. Section 1, article 6, of the constitution provides that "all male persons, of the age of twenty-one years or over, possessing the following qualifications shall be entitled to vote at all elections," and while it may be that ¹⁵¹ section 7, article 6, of the constitution is binding upon the conscience of the legislature and imposes the duty of acting, nevertheless, the failure to act ought not to be construed so as to deprive the citizen, possessing the qualifications prescribed by section 1 of that article, of his constitutional right to vote. It would, of course, be competent for the legislature—either with or without constitutional mention of the subject—to provide by appropriate legislation for testing the voters' right, and preserving the purity of the ballot, but "when the constitution prescribes the qualifications, whoever possesses them has a constitutional right to vote, and of this right he cannot be deprived by legislative enactment": *McCrary on Elections*, sec. 17.

Our conclusion is, that the right to vote in this state at any election, general or special, resides in those possessing the quali-

fications prescribed by section 1, article 6, of the constitution, subject only to compliance with such reasonable provisions respecting registration and regulating the exercise of the right, as the legislature may provide, but the mere failure or neglect of the legislature to make any provision for registration does not operate to deprive those having the qualifications of the constitution from exercising the elective franchise.

Concerning the other objection above noticed, viz., that the amount of bonds authorized at the election was in excess of the limit of indebtedness fixed by the constitution, little need be said. As already noticed, that question was directly involved in the second Seymour case, 6 Wash. 427, where it received the extended consideration of this court, and was directly passed upon. For this reason, we decline to consider it further. Respondent contends, and we think justly, that parties purchasing such bonds have a right to ¹⁵² rely upon the law as declared in these decisions, and such has been the repeated holding of the supreme court of the United States: Lee County v. Rogers, 7 Wall. 181; Harshman v. Knox County, 122 U. S. 306; Gelpcke v. Dubuque, 1 Wall. 176.

We are unable to perceive how the question of the validity of the bonds is affected by the allegation that the treasurer defaulted with three hundred thousand dollars of the funds of the city. Nor do we think that the court should inquire concerning the motives which induced the voters of the city to incur this indebtedness, as, under the constitution of this state, the propriety of becoming indebted for procuring light and water is committed to such voters.

The remaining allegations of the complaint are directed to questions which, in our view, ought not to be considered by a court of equity without having all of the parties directly affected by the decree before it. These bonds were issued pursuant to legislative authority and the provisions of the freeholders' charter of the city of Tacoma. From an examination of the legislative enactments and the charter provisions, we think the bonds are in law what, in fact, they purport to be—negotiable bonds—that is, bonds having all of the incidents of negotiability, and which, in the hands of a holder for value before maturity, cut off defenses, and to the payment of which the faith and credit of the city are unquestionably pledged. Such being their character, the court would, it seems to us, be doing an idle and vain thing in decreeing them invalid. Such a decree could have no binding force as against strangers to the record: Board v. Texas

etc. Ry. Co., 46 Tex. 316; Hoppock v. Chambers, 96 Mich. 509. "No court can adjudicate directly upon a person's ¹⁵³ right, without the party being either actually or constructively before the court": Mallow v. Hinde, 12 Wheat. 193.

In *Shields v. Barrow*, 17 How. 130, it is said that the court "can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights."

This question engaged the attention of the supreme court of the United States in a very recent case—*California v. Southern Pac. Co.*, 157 U. S. 229—in which Chief Justice Fuller, speaking for the court, said: "Sitting as a court of equity, we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties, or at least so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the state and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?"

And the court decided in that case "that the bill must be dismissed for want of parties who should be joined."

The demurrer to the complaint was properly sustained, and the judgment of the superior court is affirmed.

Hoyt, C. J., and Scott and Anders, JJ., concur.

EVIDENCE—JUDICIAL NOTICE.—Courts will take judicial notice of the genuineness of their own records: Extended note to *Lanfear v. Mestier*, 89 Am. Dec. 688.

JUDGMENTS—RES JUDICATA.—The only matter essential to making a former judgment on the merits conclusive between the parties is that the question to be determined in the second action be the same question judicially settled in the first: *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71; *Burner v. Hevener*, 34 W. Va. 774; 26 Am. St. Rep. 948, and note; *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387.

JUDGMENTS—RES JUDICATA—MUNICIPAL BONDS.—A judgment in a suit brought by taxpayers to enjoin the issue by a town of certain bonds, by which it is adjudged that such bonds should issue, is binding on all the other taxpayers of the town, though not parties: *Harmon v. Auditor etc.*, 123 Ill. 122; 5 Am. St. Rep. 502. See, also, *Gallaher v. Moundsville*, 34 W. Va. 730; 26 Am. St. Rep. 942.

MUNICIPAL BONDS.—This subject will be found fully discussed in the extensive note to *Jones v. Camden*, 51 Am. St. Rep. 822-861.

ELECTIONS—REGISTRATION LAWS—VALIDITY OF.—Proper and reasonable registration laws are valid, not as imposing upon the electors an additional qualification created by statute, but as a method of proving the existence of the qualifications required by the constitution: *State v. Corner*, 22 Neb. 265; 3 Am. St. Rep. 267. The constitutionality of registration laws will be found fully treated in the notes to *Boyer v. Teague*, 19 Am. St. Rep. 568; *Daggett v. Hudson*, 54 Am. Rep. 843-846; *Spencer v. Board of Registration*, 29 Am. Rep. 589-591; *Capen v. Foster*, 23 Am. Dec. 642-651.

LEAKE v. HAYES.

[13 WASHINGTON, 213.]

PARTITION—PLEADING.—Partition must, of necessity, be made according to the interest of the respective owners of the land, and the court does not commit error in refusing to permit the defendant to withdraw an answer setting up the entire title in himself, and to file in its place an amended answer, setting up a cotenancy with others.

PARTITION—RECOVERY OF TAXES PAID.—A cotenant in possession is entitled on partition to recover such taxes paid by him as have inured to the benefit of the other cotenants.

APPELLATE PRACTICE.—An offer of a respondent to consent to a modification of judgment to correct error after an appeal has been taken does not affect the right of the appellant to a reversal of the judgment.

PARTITION—IMPROVEMENTS.—A cotenant who believes himself to be the owner of the entire premises, and in good faith places improvements thereon, is entitled, on partition, to be allotted that portion upon which the improvements are placed, so far as can be done consistently with an equitable partition; and if such division cannot be had, the property should be sold, and the value of the improvements awarded him out of the proceeds.

PARTITION—IMPROVEMENTS—PROFITS.—A cotenant who enters upon the common estate, which yields no profit, and so improves it as to make it productive, is entitled, on partition, to all the profits produced by means of such improvements, without making any allowance against him for the increase in value occasioned by his improvements.

COTENANCY—LIABILITY FOR RENTS AND PROFITS.—A cotenant in exclusive possession is not liable for use and occupation or rents and profits until after demand made therefor by his cotenants.

PARTITION—IMPROVEMENTS.—In an action for partition, the recovery for improvements made by the cotenant in possession is not limited to the rents and profits accruing during such occupancy.

PARTITION.—IF IMPROVEMENTS ARE MADE BY THE HUSBAND on land of which his wife is a cotenant under their joint belief that the property belongs solely to her; she is entitled, on partition, to recover the part improved, or, if such partition is impracticable, then to an allowance therefor out of the proceeds of a sale of the entire property.

C. C. Bitting, for the appellants.

F. Quinby, and Million & Houser, for the respondent.

²¹⁴ **ANDERS, J.** This was an action for partition of certain real estate situated in Skagit county, and which, it is conceded, was formerly the community property of Charles Washburn and Mahala Washburn, his wife, the latter being the defendant Mahala Washburn Hansen and the wife of Charles Hansen. In July, 1880, Charles Washburn died, leaving him surviving ²¹⁵ his widow, Mahala Washburn, and five minor children, of whom the plaintiff and respondent is one. Another child was born some two months after the death of the father. Subsequently, two of the minor children died. The remaining four are all parties to this proceeding, three of them being defendants.

Prior to his death, Charles Washburn made a will, by which he devised the whole of his property, real and personal, to his wife, Mahala Washburn, now Hansen. This will was duly admitted to probate, and the said devisee was appointed executrix by the probate court. Thereafter, a decree was entered declaring the said Mahala Washburn to be the owner of all the real estate in question by virtue of the provisions of the will of her said deceased husband. She remained in possession of the premises, with her children, after the death of her husband, and has ever since occupied the same, always believing, as she claims, prior to the judgment of the court herein, that she was the sole owner thereof. In the year 1882 she married the defendant Charles Hansen, who with her has occupied the premises ever since said marriage.

It is claimed by the defendants Hansen that, at the time of the death of Charles Washburn and up to the time of the marriage of said defendants, but a small portion of the land in controversy was capable of cultivation, and that the whole tract was of comparatively little value; but that since that time it has been, by the labor and means of the defendant Charles Hansen, rendered fit for cultivation and profitable use, and its value greatly enhanced. Plaintiff in her complaint alleged facts showing a tenancy in common between her and the other children of the deceased and her mother, the defendant Mahala Hansen. She also alleged that the defendants Mahala Hansen ²¹⁶ and Charles Hansen have for the last seven years had exclusive control and use of the premises described in the complaint, and have collected the rents and profits, the reasonable value of which is one thousand dollars; and prayed for a partition, and that said defendants be required to account for the said rents and profits.

The defendants Charles Haneen and Mahala Hansen answered, alleging, among other things, the making of the will by Charles Washburn, the probate thereof and the decree of the probate court, and averring that, by virtue of said will and decree, the defendant Mahala Hansen became the sole owner of the land sought to be partitioned, and that the plaintiff and the other children of said deceased had no interest therein, or title thereto. A reply was filed, denying all the material allegations of the answer. Upon the issue thus formed, the question of title was tried by the court.

At the trial, the court adjudged the will void as to the children of the testator, for the reason that it neither made mention of nor provided for them as required by law, and that the probate proceedings were likewise invalid. By consent of all parties, the defendants Hansen then filed an amended answer, setting out the death of Charles Washburn, the circumstances in which his family were left at the time of his death, the unfitness of the land to furnish subsistence for the family, the fact of the execution of the purported will of the deceased, the inability of the widow to employ or pay lawyers to advise her concerning said will, and her ignorance of the law concerning the same, the probate of the will, and the belief by the defendants that said Mahala Hansen was the sole owner of the property by reason of the will and the decree of the probate court, an account of the ²¹⁷ receipts from the land, together with the expenditures for the support of the family and the character and cost of the improvements, and asking for specific relief on account of such improvements.

A reply was filed to this amended answer, alleging affirmatively that the claim for improvements prior to the year 1891 was barred by the statute of limitations. The cause was then set for trial upon the question of rents, profits, and improvements, and, when it came on for hearing, the plaintiff objected to any claim for improvements, on the ground that "the defendants having held possession and claimed title to the property, they are not entitled to any improvements made, except in so far as they may offset the rents and profits," which objection was sustained, and the offer of the defendants to show the character and the value of their improvements rejected, counsel for plaintiff having admitted in open court that the value of the improvements equaled the value of the rents and profits. The defendants thereupon asked leave to withdraw the answer on which the ruling of the court was based, and to file an amended answer because of "mistake of former counsel," and "in aid of

substantial justice between the parties," which request was denied by the court, and exception taken.

It seems that the trial court disallowed all claims for taxes paid by the defendants on the land, and rendered judgment establishing the interests of the various parties, and for a partition according to such interests, excluding all claims for improvements and other relief asked for by the defendants, and appointing a referee to make partition and report his doings to the court, as provided by law. In determining the interests of the several parties in the land in dispute, the court found and adjudged that the defendant ²¹⁸ Charles Hansen had no individual interest therein, claim thereto, or lien thereon, by reason of labor performed or improvements made thereon by him. The defendants Hansen have appealed, and here allege and insist that the trial court erred in denying their request to withdraw their original answer, and in ruling that, because they had held the premises adversely, they were not entitled to compensation for improvements in excess of the rents and profits, and in refusing to permit them to show the character and value of the improvements, in accordance with the allegations of the amended answer.

As to the point that the court erred in refusing to allow appellants to withdraw their original answer, it is sufficient to observe that, in our opinion, the action of the court was right. In any event, it was the primary duty of the court to determine the respective rights and interests of all the parties to the action, and this would necessarily have been done if the answer had been such as appellants desired to file in lieu of the original one, for the reason that a partition must of necessity be made according to the interests of the respective owners of the land sought to be divided. The statute requires each defendant in proceedings for partition to set forth in his answer the nature and extent of his interest in the property (Code Proc., sec. 582), and this the appellants did in their original answer, according to their understanding and belief at the time.

But, even if it were conceded that the court erred in this ruling, appellants were not in the slightest degree injured thereby, for their real interests could not have been changed by their answer, and their amended answer put in issue all other questions deemed material by them. We think, however, that ²¹⁹ appellants, or at least Mrs. Hansen, was entitled to recover such portion of the taxes paid by appellants as inured to the benefit of the other owners of the property. This seems to be conceded by the respondent, in view of the ruling of this court in *McIn-*

erney v. Beck, 10 Wash. 515, but she claims that the judgment should not be reversed on that account, because she offered to allow it to be modified in accordance with that decision, although the offer was not made until after the judgment had been entered and the appeal duly taken. But we think the appellants were under no obligation, either legal or equitable, to submit to the proposed modification at that time. They had a perfect right to stand upon the record as made without thereby losing any of their rights in this court.

We also think that the court should not have awarded a partition of the premises without first having ascertained the value of appellants' improvements thereon. While it is a well-settled general rule of law that one tenant in common cannot, at his own suit, recover for improvements placed upon the common estate without the request or consent of his cotenant, yet a court of equity will not, "if it can avoid so inequitable a result, enable a cotenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the cotenant who has enhanced the value of a parcel of the premises the fruits of his expenditures and industry, by allotting to him the parcel so enhanced in value, or so much thereof as represents his share of the whole tract. 'It is the duty of equity to cause these improvements to be assigned to their respective owners (whose labor and money have been thus inseparably ²²⁰ fixed on the land), so far as can be done consistently with an equitable partition': Freeman on Cotenancy and Partition, 2d ed., sec. 509.

This principle is but an exemplification of the ancient and well-known maxim, that "he who asks equity must do equity." Now, if it be true, as appellants allege, that at the time of the death of Charles Washburn the land was almost wholly in a wild state, and, therefore, unproductive, and that they have not only put valuable and permanent improvements upon it, but have cleared it for cultivation and made it capable of yielding valuable profits, and have done all this in good faith, under the belief that Mrs. Hansen was the absolute owner, it seems to us that it would not only be extremely unjust and inequitable to allow them nothing for their expenditures and labor, but contrary to reason and the great weight of the authorities. The doctrine of the courts on this subject is well expressed by Mr. Pomeroy in the following language:

"Where two or more persons are joint purchasers or owners of real or other property, and one of them, acting in good faith and for the joint benefit, makes repairs or improvements upon

the property which are permanent, and add a permanent value to the entire estate, equity may not only give him a claim for contribution against the other joint owners, with respect to their proportionate shares of the amount thus expended, but may also create a lien as security for such demand upon the undivided shares of the other proprietors. Such an equitable lien has not always been confined to cases in which a contract to reimburse could be implied at law. The right to a contribution or reimbursement from the owner, and the equitable lien on the property benefited as a security therefor, have been extended to other cases, where a party innocently and in good faith, though under a mistake as to the true condition of the title, makes ²²¹ improvements or repairs or other expenditures which permanently increase the value of the property, so that the real owner, when he seeks the aid of equity to establish his right to the property itself, or to enforce some equitable claim upon it, having been substantially benefited, is required, upon principles of justice and equity, to repay the amount expended": Pomeroy's Equity Jurisprudence, secs. 1240, 1241. See, also, 1 Pomeroy's Equity Jurisprudence, sec. 393; 3 Pomeroy's Equity Jurisprudence, sec. 1389; Carver v. Coffman, 109 Ind. 547; Annely v. De Saussure, 17 S. C. 389; Scaife v. Thomson, 15 S. C. 337; Hall v. Piddock, 21 N. J. Eq. 311; Carter v. Carter, 5 Munf. 108; Worthington v. Hiss, 70 Md. 172; Green v. Putnam, 1 Barb. 500; 1 Story's Equity Jurisprudence, 13th ed., secs. 554, 555.

The respondent can lose nothing by the application of this just principle. The improvements have cost her nothing, and if the appellants are allowed their present value in case partition cannot be made without prejudice to the interests of the several owners, or are awarded the particular portion of the premises which are thereby enhanced in value, she will receive all she would have received if appellants had permitted the land to remain unimproved, and that is all she can justly claim. Of course, if it should be found to be a fact that the whole tract has been cleared and fitted for cultivation, the respondent, and each of the other heirs of the deceased, would, in the event of a division, necessarily receive a portion of the land so improved, for under no circumstances could she be deprived of her just proportion. The court below found that appellant, Mrs. Hansen, was the owner of eight-twelfths of the land, and, being a tenant in common with the respondent, she and her husband have at all times been rightfully in possession of the entire premises, and if the land was made productive solely by ²²² their indus-

try and enterprise, they are entitled to all the profits which have resulted from their efforts, especially if they have not excluded their cotenants from a like possession.

In *Nelson v. Clay*, 7 J. J. Marsh. 138, 23 Am. Dec. 387, the court declared the law to be that where one tenant in common enters upon the common estate which yields no profit, and so improves it as to make it productive, he is entitled to all the profits produced by means of such improvements, and without making any allowance against him for the increase in value occasioned by his improvements. And this is substantially the doctrine maintained by a decided preponderance of the authorities: See *Freeman on Cotenancy and Partition*, sec. 258; *Worthington v. Hiss*, 70 Md. 172; *Killmer v. Wuchner*, 79 Iowa, 722; 18 Am. St. Rep. 392; *Ford v. Knapp*, 102 N. Y. 135; 55 Am. Rep. 782.

Moreover, if appellants are liable at all for use and occupation, or rents and profits, their liability did not arise until after demand was made therefor by the respondent: *Johnson v. Pelot*, 24 S. C. 255; 58 Am. Rep. 253; *Scaife v. Thomson*, 15 S. C. 337; *Woodward v. Clarke*, 4 Strob. Eq. 167.

But the respondent contends that, if appellants are entitled to anything at all for improvements, the amount thereof should be limited to the value of the rents and profits as provided by the Code of Procedure, section 534, in actions for possession of real property; and such seems to be the rule in Alabama: *Sanders v. Robertson*, 57 Ala. 465. We are not disposed, however, to adopt that rule in this instance. This is not an action of ejectment; nor does the respondent in her complaint ask to be let into possession of any part of the land in controversy, or even allege that she ever ²²⁸ asked or demanded possession thereof. For aught that appears in the record, she has silently stood by for years without once claiming title or possession, and with full knowledge that her mother and step-father were patiently and laboriously toiling to make this land, which they claim was of no rental value whatever, fit for comfortable habitation and capable of yielding remunerative profits. But, be that as it may, she now not only asks the court to determine and set apart her portion of the land, but is unwilling to allow appellants the value of their own improvements or to refund the taxes paid for her benefit. This is unjust, and cannot be sanctioned by a court of equity.

As against the respondent, appellant Charles Hansen is entitled to no specific relief. He knew when he performed labor and erected improvements upon the land that he had no interest

or title in or to the premises so improved. He therefore stands, so far as respondent is concerned, in the position of a party who has voluntarily and knowingly improved another's property without request, and can claim nothing by way of direct compensation. But it does not follow that the improvements resulting from his labor and expenditure should be entirely disregarded in this proceeding. He believed that he was meliorating the property of his wife, and what he did was done with her consent and for her benefit as well as his own. His wife's belief was the same, and we perceive no substantial reason why she should not receive the benefit of all that was done on her account, to the same extent as if she had, by her own hands, improved the common estate.

Our conclusion, therefore, is that, if an equitable partition can be made, that portion of the premises ²²⁴ upon which buildings and other improvements, if any, have been erected, should be allotted to appellant, Mrs. Hansen; and if a division cannot be so made, then the land should be sold and the value of the improvements awarded her out of the proceeds. In either event, she will be entitled to recover the amount of taxes paid on that part of the property belonging to her cotenants.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

Hoyt, C. J., and Dunbar, Gordon, and Scott, JJ., concur.

COTENANCY—ALLOTMENT FOR IMPROVEMENTS ON PARTITION.—Where improvements have been made by a cotenant, partition should be so ordered that he may receive as his share the parcel upon which those improvements have been made, provided that by such division full justice can be done to the claims of the other cotenants: *Ferris v. Montgomery Land etc. Co.*, 94 Ala. 557; 33 Am. St. Rep. 146, and note; *Robinson v. McDonald*, 11 Tex. 385; 62 Am. Dec. 480, and extended note at page 484.

COTENANCY—IMPROVEMENTS—ALLOWANCE FOR.—Where one tenant in common enters upon the common estate, and so improves it as to make it productive, he is entitled to all the profits produced by reason of such improvements to the exclusion of his cotenant: *Nelson v. Clay*, 7 J. J. Marsh. 138; 23 Am. Dec. 387.

COTENANCY—LIABILITY OF COTENANT IN POSSESSION FOR RENTS AND PROFITS.—A tenant in exclusive possession of land is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, but not for what was rendered capable by his labor: *Hancock v. Day*, 1 McMull. Eq. 69; 36 Am. Dec. 293, and note. One tenant in common may maintain suit against his cotenant who has used and occupied the whole of the common property for an account of the rent and profits. *Early v. Friend*, 16 Gratt. 21; 78 Am. Dec. 649, and extended note. This subject will be found fully treated in the notes to the following cases: *O'Connor v. Delaney*, 39 Am. St. Rep. 603; *Flock v. Gosnell*, 35 Am. St. Rep. 421, and *West v. Weyer*, 15 Am. St. Rep. 555.

LORENCE v. ELLENSBURG.

[13 WASHINGTON, 341.]

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS.—A city having exclusive control of its streets, with power to raise money to keep them in repair, is bound to keep them in a reasonably safe condition for ordinary travel.

NEGLIGENCE CANNOT, AS MATTER OF LAW, BE IMPUTED TO A CHILD eight years old, and, *prima facie* he is incapable of exercising that care and caution which the law requires of an adult.

NEGLIGENCE—MINORS.—What care and caution a child of tender years must exercise to relieve himself of contributory negligence and recover for injury inflicted through the negligence of another, cannot be determined by any general rule, but must, in connection with the circumstances in each case, depend upon the intelligence, capacity, and judgment, which he is shown by the evidence to possess, and his capacity must be left to the determination of the jury under proper instructions.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—NOTICE.—The law imputes notice to a municipality of a dangerous defect in a public street, from its existence for such time, that the city authorities, by the exercise of ordinary vigilance, could and would have discovered it in time to prevent accident.

J. B. Davidson, for the appellant.

L. A. Vincent, A. Mires, and E. Pruyn, for the respondent.

³⁴¹ GORDON, J. This was an action brought by plaintiff in the superior court for Kittitas county, in this state, ³⁴² to recover damages for a personal injury sustained from a fall on a defective sidewalk. The complaint alleges that the defendant wrongfully and negligently suffered and permitted the sidewalk on a street in said city, known as "Third street," to become and remain out of repair for several months prior to the date of the injury, which was the 20th of February, 1892. The alleged defect consisted of a V shaped opening in the walk of about five inches in width, and about twenty-four inches in depth. The defendant city answered the complaint by denying generally and specifically all of the allegations contained in it, and upon the trial a verdict was rendered in favor of the plaintiff (respondent here) against the appellant (city) for the sum of eight thousand dollars; and from the judgment entered upon said verdict, and the order of the court denying appellant's motion for a new trial, this appeal is taken. The record is somewhat exceptional in this: It is not contended that any error was committed by the trial court in admitting or rejecting testimony at the trial, or in charging, or refusing to charge, the jury concerning the law of the case, nor was any objection made, either below or here, as to the sufficiency of the pleadings.

1. The principal contention made in the brief of appellant in this case is, that the city is not liable in actions for injuries received by reason of defective streets and sidewalks, and the first thirty-seven pages of said brief are devoted to the discussion of that proposition. After the preparation of the brief, but prior to the hearing of the cause, this court passed upon a like question adversely to such contention, in the case of *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, in which we held that "where a city has exclusive control of its streets, with power to raise money ³⁴³ to keep them in repair, it is bound to keep them in a reasonably safe condition for ordinary travel."

2. It is next contended that the court below erred in denying appellant's motion for a nonsuit, which motion was urged upon the ground that the evidence in behalf of the plaintiff showed her to have been guilty of contributory negligence. An examination of the record satisfies us that the nonsuit was properly denied. It appears from the evidence that plaintiff, at the time of the injury, was a child of about eight years; that she lived with her parents at a place near where the accident occurred; that during the forenoon of the day of the accident, while in company with an elder sister, on the way to Sabbath school, she ran into the opening in the walk already described, and suffered a severe fall. It appears that she had frequently traveled said sidewalk prior to the injury and subsequent to its becoming out of repair. She testified, however, that she did not know of its defective condition prior to the injury; and we think that, considering her tender years, negligence could not, as a matter of law, be imputed to her, but *prima facie* she would be incapable of exercising that care and caution which the law requires of an adult. Just what care and caution a child must exercise in order to be entitled to recover in this class of cases cannot be determined by any general rule, but must, in connection with the circumstances in each case, depend upon the intelligence, capacity, and judgment which he is shown by the evidence to possess, and his capacity must be left to the determination of the jury under proper instructions, which in this instance we are bound to presume were given: *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587; *Westerfield v. Lewis*, 43 La. Ann. 63; *Schnur* ³⁴⁴ *v. Citizens' Traction Co.*, 153 Pa. St. 29; 34 Am. St. Rep. 680; *Pratt etc. Iron Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751.

3. Counsel insists that there is no proof showing that appellant had notice of the defective condition of the sidewalk.

There was evidence tending to show that the walk had remained in the defective condition already described for three or four months preceding the time of the injury. Actual notice was not necessary; constructive notice is sufficient.

"If this dangerous hole was in existence for such a length of time that the city authorities, by the exercise of ordinary vigilance, would have discovered it in time to prevent the accident, the city cannot escape liability for want of notice. Under such circumstances, the law imputes notice. Failure to discover and remedy a dangerous defect in a public street within a reasonable time is itself negligence": *Sutton v. Snohomish*, 11 Wash. 24; 48 Am. St. Rep. 847.

4. Lastly, it is claimed that the verdict of the jury is excessive. From our examination of the evidence, we feel that we would not be warranted in disturbing the verdict upon this ground. It appears that, in consequence of the injury sustained from the fall, the infant plaintiff was obliged to undergo a surgical operation, in which a portion of the femur was removed, causing a shortening of the right limb from four to six inches. That she was confined to her bed for a period of about eighteen months, during which time she suffered great pain; and that, as a necessary result of the injury, she is destined to suffer more or less pain through life. From all the evidence, we are unable to say that the damages were given under the influence of passion or prejudice; and, no error appearing in the record, the judgment is affirmed.

Anders, Dunbar, and Scott, JJ., concur.

Hoyt, C. J., dissents.

IN THE CASE of *Roth v. Union Depot Co.*, 13 Wash. 525, the court stated the facts and its conclusions as follows: "The defendant is a railway terminal company in the city of Spokane. Its railway tracks and yards lie parallel with the Spokane river, near its north bank, in that city. North of the defendant company's yards and tracks there is an addition to Spokane city, on which lived, at the time the accident alleged in this case occurred, a number of families, variously estimated in the testimony at from twenty-five to fifty. The railway lines and switches of the appellant ran in a westerly direction across Washington street, at a right angle therewith, and near the north bank of, and parallel with, the Spokane river, and ran northerly from Washington street, thence in a northwesterly direction, making a short curve around a high bluff of rocks, and thence in a straight line to and beyond the east line of Mill street, of said city, extended north. At a point east of the east line of Mill street, so extended, the appellant had located a switch, from which diverged several side tracks, running parallel with each other, in an easterly direction,

around said sharp curve. The railway tracks on the said switches were located on a down grade from Mill street, in an easterly direction, around said sharp curve; and cars detached from an engine above the switches would, by reason of the down grade, run of their own momentum down to and across Washington street at a rapid speed. For many years before the construction of appellant's yards at this point, the people residing north of the appellant's right of way were in the habit of using several footpaths, which converged into a well-defined path as they reached the appellant's right of way near Howard street, and the people residing between Washington street and Mill street were accustomed to go to the south side of the river by these footpaths, which converged into one path near Howard street, and thence directly down the right of way of the appellant to Washington street; and there was also a path leading across the tracks of the appellant, running along the north bank of the river to Washington street; but, after the construction of appellant's tracks, the path leading from the tracks along the north bank of the river was abandoned as a footpath, and the people residing north of the tracks, after reaching the tracks, used the right of way of the company until they reached Washington street, it being a more convenient and shorter route to the city than any other way they could travel. It is insisted by the respondent, and the testimony shows without any doubt, that the appellant and its servants and agents operating its cars at this point, knew of the existence of this footpath, and that the people of all ages residing to the north of the track were accustomed, at almost every hour of the day, to use this footpath and the right of way of appellant from the point where the path entered the right of way to Washington street; that it was not only used by the people who lived north of the tracks, but that it was used indiscriminately. On the twelfth day of April, 1892, the plaintiff and respondent, Albert John Roth, a boy nine years of age, while going down through this path on the right of way of appellant was knocked down by a car, the wheels of which passed over one of his legs, crushing it so that amputation of that limb became necessary. It seems that the appellant's agents, in switching the cars, sometimes, when help was short, instead of sending an engine down with the empty car, would, in railroad parlance, "kick" the car, and let it go down the track unattended by a brakeman; that it was not the usual way to send the cars unattended by a brakeman, but that they sometimes did so; and it is conceded that that was the manner of switching the cars at the time of this accident. It seems that, at the same time that the respondent, who was in company with his sister and another boy about his own age, came down the path, two cars were "kicked" down the track behind them on appellant's tracks, and the respondent, in order to avoid being injured by one of these cars, started to cross one of the tracks, and in doing so was run over by a car going down the track which he was attempting to cross. By reason of the close proximity of these cars, he became confused, and, in attempting to escape from one, was run down by the other. Neither of these cars was attended by any person, but they were "kicked" down, through the cut, around the sharp curve, out of sight of the employees who "kicked" them, and they acquired a considerable

speed by reason of the down grade of the track. It is conceded that there was no brakeman or any person along the track to look out for the cars, or to warn any person who might be on the trackway of danger. The respondent, at the time of the injury, lived with his father and mother, north of the track, and was accustomed daily to go to the south side of the river to sell newspapers to support himself and his family. An action was brought in his interest by Frank Roth, his guardian ad litem, and a verdict was rendered for fifteen thousand dollars damages. Judgment followed, and an appeal has been taken to this court. The overwhelming weight of testimony is to the effect that for three or four years immediately preceding this accident, it had been the custom of the people north of the track, and of others, to use this right of way as a footpath; that from fifty to one hundred people passed over it daily; that this custom was known to the appellant; that it made no objection to it, and that it posted no notices warning people not to travel upon the path. A number of cases are cited by the appellant to sustain the contention that notwithstanding the fact that a railroad company acquiesces in such travel by the public, and does not take any steps to stop them, no implied consent to such use is established, and that such acquiescence does not vary the companies' duties as to trespassers, and it may be conceded at the outset that a railroad company does not owe any duty to a trespasser, for there is no presumption that a trespasser or a person without consent, actual or implied, will be upon the track." The court examined and reviewed the following cases cited by the appellant, and held them to be distinguished from the case at bar and as having no application to it: *Chenery v. Fitchburg R. R. Co.*, 160 Mass. 211; *Louisville etc. Ry. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155; *Gaynor v. Old Colony etc. Ry. Co.*, 100 Mass. 208; 97 Am. Dec. 96; *Philadelphia etc. Ry. Co. v. Hummell*, 44 Pa. St. 375; 84 Am. Dec. 457; *Davis v. Central Cong. Soc.*, 129 Mass. 367; 37 Am. Rep. 368; *Benson v. Baltimore Traction Co.*, 77 Md. 535; 39 Am. St. Rep. 436; *Plummer v. Dill*, 156 Mass. 426; 32 Am. St. Rep. 463; *Gibson v. Leonard*, 143 Ill. 182; 36 Am. St. Rep. 376; *Baltimore etc. R. R. Co. v. Schwindling*, 101 Pa. St. 258; 47 Am. Rep. 706; *Wright v. Boston R. R. Co.*, 142 Mass. 296.

"The case of *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112, seems to decide squarely in favor of the appellant's contention that the simple acquiescence of a railroad company in the use of its track or right of way by persons passing along it, as a footway, does not give such person a right of way over the track, and does not impose upon the company the duty of protecting or providing safeguards for persons so using its grounds; and this case was followed by the supreme court of Illinois in the case of *Blanchard v. Lake Shore etc. R. R. Co.*, 126 Ill. 416; 9 Am. St. Rep. 630; and *Baltimore etc. R. R. Co. v. State*, 62 Md. 479, 50 Am. Rep. 233. These cases hold that the relative rights of the railroad company and the injured party are not changed by reason of the acquiescence on the part of the company in the use of its track, or right of way, and it follows from the logic of the cases that the company would be held responsible only for such gross negligence as indicated willfulness.

The case of Illinois Cent. R. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112, cites, in support of its conclusion, the case of Philadelphia etc. R. R. Co. v. Hummell, 44 Pa. St. 375, 84 Am. Dec. 457, and Gillis v. Pennsylvania R. R. Co., 59 Pa. St. 129; 96 Am. Dec. 317. We think the Illinois supreme court mistook the logic of those cases, and such was the opinion of the supreme court of Pennsylvania, which reviewed Philadelphia etc. R. R. Co. v. Hummell, 44 Pa. St. 375, 84 Am. Dec. 457, and Gillis v. Pennsylvania R. R. Co., 59 Pa. St. 129, 96 Am. Dec. 317, in the case of Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269, 8 Am. Rep. 628, and in some subsequent cases, and distinguished them from a case where license by user had been established.

"Probably the strongest case supporting the views contended for by the appellant is the case of Glass v. Memphis etc. R. R. Co., 94 Ala. 581, where it was held that the fact that persons, living in the neighborhood of a railroad track, are accustomed to walk upon the track without objection of the company does not make them any the less trespassers; that where such track is used without the direct consent of the company, the company could be held only for negligence amounting to wantonness, or an intention to inflict injury; and further held that such wantonness and intention could not be inferred, unless the employes actually knew of the peril of the decedent, and failed to make reasonable effort to avert it. We think that all the cases cited can be distinguished possibly from the case at bar, so far as the doctrines announced are concerned, excepting this one, and this court, we think, went too far in holding that wantonness could not be inferred, unless the peril of decedent was actually known to the employees of the company. Conceding for the moment the doctrine that the plaintiff in this case was a trespasser, and conceding further that the defendant could be held only for gross negligence, we think that the circumstances of this case did most emphatically indicate gross negligence, and we are of opinion that, under the circumstances of the case, the defendant ought to be held to have presumed that when it threw a car out of its sight around a curve on a down grade in a thickly settled community, where it had knowledge that its track was used by from fifty to one hundred people a day, somebody's life would be imperiled by this careless mode of switching its cars, and that it carelessly and wantonly placed itself in a position where it could not see the peril of the passers-by. The evidence shows that it was not its general custom to switch its cars in this way, but that it did so only occasionally when short of men. The rule as laid down by many writers is, that such a duty is imposed upon a railroad company in operating its trains as would be imposed upon an honest man in the transaction of his business. It seems to us that no honest or humane person would be guilty of transacting his business in the reckless manner in which the appellant in this case transacted his. Duties are relative, and that which would not be a duty under certain conditions would become a most imperative duty under others. The people of modern times hold life and limb in too high regard to allow them to be weighed in the scale with mere convenience or selfish property interests. This is the sentiment of humanity, and a sentiment which ought to be reflected by the de-

cisions of the courts. This appellant, to save the expense of an employé for a few minutes, hurled not only one but two blind cars down this right of way, regardless of the fact, which it must have known under the circumstances as shown by the testimony, that they were liable to cause the death or permanent injury of some one; and we think that this fact alone establishes gross and willful negligence notwithstanding the fact that none of the employees saw the danger of the plaintiff in this case; and, of course, under all the authorities, a railroad company is not allowed to run down and destroy a naked trespasser who is upon its track, but is held to be responsible for an attempt to prevent his injury after his peril is discovered.

"Very much more in accordance with the plainest principles of humanity was the doctrine announced in *Railroad Co. v. Donovan*, 84 Ala. 141, viz., that those who are operating a railroad in a town or city, or through a thickly populated district where there is occasion for people to pass along the track, and a usage to that effect, owe the duty of keeping a vigilant lookout for such persons at such places: See, also, *Glass v. Memphis etc. R. R. Co.*, 94 Ala. 581. . . .

"In opposition to the doctrine announced by these few cases, however, we cite first the case of *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269, 3 Am. Rep. 628, where it was held directly that the company had the right to detach cars and send them on without a brakeman, out of sight around a curve; but that this would be different when, by license to others and by sufferance, they permitted the public to enjoy a privilege of passage which would bring them into danger. *Hooker v. Chicago etc. R. R. Co.*, 76 Wis. 542, was a case where a woman was walking across a high trestle, accompanied by two children. It was conceded that she was not there in the interest or for the benefit of the railroad company, but that she was there simply for the purpose of amusing and entertaining the children, and that they had to walk across this bridge or trestle on ties. While on the bridge they were overtaken by a passing train and were all killed. The testimony tended to prove that the bridge for many years and up to the time of the accident had been habitually and constantly used by men, women, and children going back and forth through that part of the city, as a foot pathway, without any objection or warning by the company that it should not be so used, until after the accident. The court held that, by reason of said acquiescence in the travel of the public, Mrs. Dacey, who was using the bridge with the children, was not a trespasser; that she was using it properly and lawfully, and that the defendant should be held to the ordinary rule of negligence.

"In *Swift v. Staten Island etc. Ry. Co.*, 123 N. Y. 645, it was held that the acquiescence of a railroad company in the habit of certain persons crossing its track at a place not a public highway, amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains so as to protect them from injury; that the sufficiency of the warning required at such crossings is a question for the jury.

"In the case of *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298, 6 Am. St. Rep. 521, the same principle was decided, and the court there, in discussing the proposition and noting the contention of the defend-

ant that the plaintiff's intestate was a trespasser in being wrongfully on the track, and that the injury was the result of his own wrong—in which case *Bacon v. Baltimore etc. R. R. Co.*, 58 Md. 482, was cited—said: 'We think that, upon a careful examination of the cases cited by counsel for the appellant, it will be found that in the most of them the injury was the result of the contributory negligence of the party injured, proximately causing it, and not resulting directly from the negligence of the defendant; and where they have gone beyond this, they are not in accord with the rulings of this court, nor in harmony with the current of authority'; citing *Byrne v. Railroad*, 104 N. Y. 362, 58 Am. Rep. 512, where it was said: 'That when the public for a series of years had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to cross at the point, and imposed the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains, so as to protect them from injury.' To the same effect are *Kelly v. South Minnesota Ry. Co.*, 28 Minn. 98; *Barry v. New York Cent. etc. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; *Philadelphia etc. R. R. Co. v. Troutman*, 11 Week. Not. Cas. 453; *Taylor v. Delaware etc. Canal Co.*, 113 Pa. St. 162; 57 Am. Rep. 446; *Delaney v. Milwaukee etc. Ry. Co.*, 33 Wis. 67; *Davis v. Chicago etc. Ry. Co.*, 58 Wis. 646; 46 Am. Rep. 667; *Townley v. C. M. & St. P. Ry. Co.*, 53 Wis. 628. In fact the overwhelming weight of authority seems to be to the effect that acquiescence creates a right which imposes upon the railroad companies the duty of ordinary diligence, and as the instructions of the court on this proposition were all based upon this theory, and the objections to such instructions were based upon the opposite theory, it is not necessary to specifically review them. It is sufficient to say that we think the instructions were given in accordance with the great weight of authority, and the instruction in regard to contributory negligence we think was also properly given. By the overwhelming weight of authority, a distinction is made between the responsibility of a child and that of an adult. It seems to us that it would be a monstrous doctrine, to hold that a child of inexperience—and experience can only come with years—should be held to the same degree of care in avoiding danger as a person of mature years and accumulated experience. In the simplest transactions of life we recognize this distinction. It is recognized by the law in all the turntable cases. It was recognized by this court in the case of *Ilwaco Ry. & Nav. Co. v. Hedrick*, 1 Wash. 446, 2 Am. St. Rep. 169, where it was held that the testimony of the company that it had been in the habit of leaving the turntables unlocked (in an action against such company for the death of a child of tender years) was not admissible. No court would hold that an adult, who would deliberately put his feet down between the wall and a turntable when it was in motion, so that they would be ground off, was not guilty of contributory negligence. His experience would naturally teach him better. But everybody, and especially people who are employing dangerous agencies, must deal with children just as they are, and must take notice of their lack of judgment and lack of experience. The care or caution required is according to the capacity of the child, and this is to be determined by the age of the child.

"In the case of *Mowrey v. Central City Ry. Co.*, 51 N. Y. 666, the court said: "The old, the lame, the infirm, or the young are entitled to have their condition and ability, mental and physical, considered in diminution of the degree of care exacted of them."

"The rule is, however, laid down by *Shearman and Redfield* on the Law of Negligence, section 73, as follows: 'It is now settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age.'

"Another point made by the appellant is, that it was not allowed to show that the accident was caused by the negligence of the parent. This being an action brought for the benefit of the child, and not for the benefit of the parent, the negligence of the parent cannot be imputed to the child." Judgment in favor of plaintiff for fifteen thousand dollars was affirmed.

MUNICIPAL CORPORATIONS—DUTY TO KEEP STREETS IN REPAIR.—It is the positive duty of a municipal corporation, having exclusive control of its streets and sidewalks, and having the means within its power, to keep them in reasonably safe condition: *Blyth v. Waterville*, 57 Minn. 116; 47 Am. St. Rep. 596, and note. The law imposes upon municipal authorities the imperative duty of keeping in proper repair the streets of the town: *Russell v. Monroe*, 116 N. C. 720; 47 Am. St. Rep. 823, and note. The duty to keep streets in repair is a ministerial duty devolving upon the municipality, for a breach of which an action lies in favor of a party injured by reason of such neglect: *Sutton v. Snohomish*, 11 Wash. 24; 48 Am. St. Rep. 847, and note; but see *Dunn v. Barnwell*, 43 S. C. 398; 49 Am. St. Rep. 843, and note.

MUNICIPAL CORPORATIONS—DEFECTIVE STREET—NOTICE FROM LONG EXISTENCE.—If a dangerous hole or defect in a street has existed for such length of time that the city authorities, by the exercise of ordinary diligence would have discovered it in time to prevent an accident, the city cannot escape liability therefor for want of actual notice. In such a case, it is deemed to have constructive notice, which is sufficient without proof of actual notice: *Sutton v. Snohomish*, 11 Wash. 24; 48 Am. St. Rep. 847, and note.

NEGLIGENCE—INFANTS.—A child four or five years of age is not, as a matter of law, chargeable with contributory negligence and barred from recovery in an action brought on his behalf for injury inflicted upon him by another because he did not exercise reasonable care to avoid the injury: *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587, and extended note.

NEGLIGENCE—LIABILITY OF CHILD FOR.—The law does not require one of tender years to exercise the same degree of care as a person of mature years. A child is only required to exercise that degree of care which one of his years would naturally and reasonably use in the same situation and under like circumstances. *Norton v. Volzke*, 158 Ill. 402; 49 Am. St. Rep. 167, and note; *City of Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114, and note.

REICHENBACH v. SAGE.

[13 WASHINGTON, 364.]

BUILDING CONTRACTS—DELAY IN COMPLETION—PENALTY OR DAMAGES.—A stipulation in a building contract for the recovery of a specified amount as damages for each day that the completion of the building is delayed after a certain time, is a provision for liquidated damages, and not for a penalty.

BUILDING CONTRACTS—DELAY—LIQUIDATED DAMAGES.—A contractor is not relieved from liability for liquidated damages for delay in the completion of a building by the fact that the delay was caused by the failure of a subcontractor to furnish material.

BUILDING CONTRACTS—DELAY IN COMPLETION.—Severity of weather is not alone sufficient to relieve a contractor from liability for liquidated damages for failure to complete a building within stipulated time, if the delay caused by such weather could have been avoided and the work carried on with safety and durability by the exercise of extra means or effort on the part of the contractor during the continuance of such weather.

Town & Dillon, for the appellants.

Taylor & McKay, for the respondent.

³⁶⁵ DUNBAR, J. On the eighth day of October, 1889, the respondent entered into a contract with the defendants Sage & Stratton, whereby Sage & Stratton agreed to erect and complete a certain two-story residence with a stone basement in the city of Tacoma, except the plumbing and gas-fitting, for the sum of seven thousand four hundred and fifty dollars. They contracted that the work should be commenced on or before October 10, 1889, and that the entire contract should be performed as rapidly as possible, consistent with durability and safety, and should be completed on or before February 10, 1890; that in case of failure to complete the contract by February 10, 1890, they would pay as damages a sum equal to ten dollars for each and every day said work and contract was delayed beyond said date through any fault or negligence of Sage & Stratton. The building was not completed until August 28, 1890, being a delay of one hundred and ninety-nine days, and plaintiff brings this action to recover ten dollars per day as stipulated damages. The trial of the case resulted in a verdict for the plaintiff in the sum of eleven hundred and sixty dollars, judgment was rendered, and an appeal taken from said judgment.

The main features of the answer were: 1. That the delay was caused by the plaintiff and his architect in this, that on account of the unusual ³⁶⁶ cold and wet weather they stopped the plas-

tering of said building, and that the contractors were not allowed to plaster during the cold weather, and that by such orders they were delayed and hindered, without their fault or negligence, and that the plaintiff thereby contributed to and caused such delay; 2. That the winter of 1889-90 was unusually and extraordinarily cold and wet, and that it was impossible to proceed with the ordinary work of building; 3. That the delay was caused by the failure of plaintiffs to furnish the plumbing and gasfitting for the house, and that the delay of plaintiff in this regard contributed to, and was, the cause of the delay complained of; 4. That they were unavoidably delayed in procuring millwork for the building; 5. That they were delayed by the failure of the plaintiffs to furnish the mantels, hearths, and tiles and the art glass for the building; 6. That the plaintiffs failed to furnish the details of the millwork at a proper time, and that they were delayed on that account.

We think the question which should be logically first settled in this case is, Was the contract to pay the damages specified a provision for a penalty or for liquidated damages? There has been some conflict of authority on this question, each case, however, necessarily being decided with reference to its own particular circumstances and the particular language of the contract. We are satisfied, however, that the overwhelming weight of authority sustains the contention that this contract provides for liquidated damages; there is nothing inequitable in the terms of this provision; the amount does not seem to us to be excessive or unreasonable; it does not provide for the payment of ³⁶⁷ a sum in gross on the failure to comply with the contract at the expiration of the time limited, but the damages accrue according to the length of time the breach continues; and, again, there is an element of uncertainty as to the real damages which would be maintained by the plaintiff which renders it more or less impracticable to be determined by a jury. Values of rents are fluctuating, and dwelling-houses of the character and description of this one are ordinarily not built for rent at all, but for the convenience and comfort of the owners, and inasmuch as the parties saw fit to settle in advance the question of damages, and it seems to be on an equitable basis, we do not feel justified in disturbing that contract and holding that it was a contract which the parties had no right to make.

In *Texas etc. Ry. Co. v. Rust*, 19 Fed. Rep. 239, it was held that: "A provision in a contract to build a railroad bridge that, in case of noncompletion of the bridge or providing a crossing

for trains by a given date, the sum of one thousand dollars per week should be deducted from the contract price of the bridge for the time its completion or provision for crossing trains is delayed beyond that date, is a stipulation for liquidated damages."

In *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716, it was held that "where the damages resulting from the breach of an agreement are in their nature entirely indefinite and uncertain, and the parties have mentioned a specific sum as liquidated damages, such sum will be regarded as damages, and not as a penalty, unless the amount be greatly disproportioned to any probable estimate of the actual damages."

To the same effect is *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230. In *Dwinel v. Brown*, 54 Me. 368 470, the court, in the course of its remarks sustaining the provisions of a contract similar to this one, said: "The parties themselves best know what their expectations are in regard to the advantages of their undertaking, and the damages attendant on its failure, and when they have mutually agreed upon the amount of such damages in good faith, and without illegality, it is as much the duty of the court to enforce that agreement as it is the other provisions of the contract. . . . It is not for the court to sit in judgment upon the wisdom or folly of the parties in making a contract, when their intention is clearly expressed, and there is no fraud or illegality. No judges, however eminent, can place themselves in the place or position of the parties, when the contract was made, scan the motives and weigh the considerations which influenced them in the transaction, so as to determine what would have been best for them to do, who was least sagacious, or who drove the best bargain. Courts of common law cannot, like courts where the civil law prevails, award such damages as they may deem reasonable, but must allow the damages, whether actual or estimated, as agreed upon by the parties. The bargain may be an unfortunate one for the delinquent party, but it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence, where these contracts are free from fraud and illegality."

The same doctrine is announced in *Clement v. Cash*, 21 N. Y. 253, and in the case of *DeGraff v. Wichman*, 89 Iowa, 720, which was a case where the amount of forfeiture was the same as in this case, viz., ten dollars for every day the house should remain uncompleted, the same being a dwelling-house; the court held that the sum named was liquidated damages, which might be re-

covered in case of a failure to complete the erection of the house according to the terms of the contract.

³⁶⁹ We think these contracts should be sustained, where no fraud or illegality appears, as a matter of policy, for it would frequently save expensive and troublesome litigation, if the parties could contract in advance with reference to damages, with the knowledge that such contracts would without question be enforced.

We have examined the testimony in this case in detail, and a great deal of it we think was plainly inadmissible, and was admitted over the objections of the plaintiff. A great deal of testimony was admitted with reference to the difficulties which beset the contractors in their efforts to procure stone for the foundation of the building. After admitting testimony of this character, however, the court instructed the jury that the failure of the defendants' subcontractors to procure and furnish the stone, or their failure to secure and furnish the sash and doors in time to enable the defendants to complete the building in the time mentioned in the agreement, furnished no excuse for the failure of the defendants to complete the building within the time prescribed. It seems too evident for the indulgence of argument that this was a proper instruction. The plaintiff contracted with the defendants to furnish the stone and the sash and doors, and he cannot be relegated to a suit against any subcontractors with whom the defendants may have seen fit to enter into a contract for furnishing these materials for the breach of the contract on the part of such subcontractors. The defendants' contract was to furnish these materials. It was for them to exercise good judgment with reference to the ability of the subcontractors to furnish these materials according to their contract, and they alone are responsible ³⁷⁰ for their delinquencies. The rule is thus announced by Shearman and Redfield on the Law of Negligence, section 14: "One who is personally bound to perform a duty cannot relieve himself from the burden of such obligation by any contract which he may make for its performance by another person. Therefore, the fact that he may have used the utmost care in selecting an agent to perform this duty, or that he has entered into a contract with any person by which the latter undertakes to perform the duty, is no excuse to the person upon whom the obligation originally rested in case of failure of performance. His obligation is to do the thing, not merely to employ another to do it."

It is next objected that the court erred in instructing the

jury that the severity of the weather was not alone a sufficient excuse for the failure of the contractors, if, regardless of this, the work could have been carried on with safety and durability by the exercise of extra means or effort on the part of the defendants during the continuance of such weather. This instruction we think was right. When this contract was entered into, it was known that it would necessitate the doing of this work by the contractors during the winter months. They bound themselves to do the work between the tenth day of October and the tenth day of February, and they knew that they must necessarily do the plastering, which work it was claimed was delayed by reason of the cold weather and rain, during the winter months. Presumably, they took this into consideration and demanded a higher price for their work by reason of these necessary inconveniences, and on account of the extra expenses incident to building in the winter. They might as consistently complain that the days were shorter in winter than in summer, and that they were delayed ³⁷¹ on that account. We think the authorities are substantially uniform so far as this proposition is concerned. In *Texas etc. Ry. Co. v. Rust*, 19 Fed. Rep. 239, it was held that the fact that the contractors were retarded in the work by high water, sickness of hands, etc., did not excuse them from performance of their contract, that they assumed these risks when they executed the contract without a provision exempting them from the consequences of such casualties; and in *Dermott v. Jones*, 2 Wall. 1, the supreme court of the United States, in passing upon this question, said: "It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him."

And in commenting upon the case of *School Trustees v. Bennett*, 27 N. J. L. 515, 72 Am. Dec. 373, where a gale of wind arose without any of the usual premonitory signs of a storm and prostrated the building, which, when rebuilt, fell down again solely on account of the condition of the soil, which was soft and miry, and where it was conceded that the defects of the ground were the cause of the second fall, the court held that the contractors having contracted to build and complete the building on a certain lot, the loss fell upon the contractors, and said: "The principle which controlled the decision of the case referred to rests upon a solid foundation of reason and jus-

tice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do."

Of course, these cases are all very much stronger, so far as any equities in the contractors were concerned, than the case at bar, where the parties are simply relying ³⁷² on the negligence or inability of their own subcontractors: See, also, 3 Am. & Eng. Ency. of Law, sec. 900, and notes.

The instructions of the court which were objected to, without mentioning them more specifically, were along these lines, and the instructions presented by the appellants and refused by the court presented the opposite view of the law. We think the instructions were substantially correct, and the jury, under the instructions of the court, gave the appellants the benefit of all the delays which were caused by the interference or neglect of the respondent; though we are not satisfied from the testimony that there were any such delays. It was testified by one of the contractors that the architect refused to allow them to proceed with the plastering, and that they were more or less delayed by the plumbers not doing their work on time, and further that they were delayed by reason of the architect's not having furnished them the details as readily as he should have done—but all these questions of delay by the architect's not furnishing details, by the plumbers not doing their work on time, and the question regarding the plastering, etc., were disputed facts, which were submitted to the jury. The plumber who did the work and the architect flatly contradicted the assertions made by the witnesses of the defendants. The architect swears positively that he did not forbid them to proceed with the plastering but that he told them that he would not receive the plastering if it was frozen—that they could put in "salamanders" which would warm the rooms, and proceed with their work. Indeed, the contractors themselves testified that it would have been possible to warm the rooms with "salamanders" so that the work could have proceeded with safety. Then, according ³⁷³ to their own testimony, the greater part of the delay was caused by the failure of their subcontractors to furnish them the rock for the foundation and the millwork. Mr. Sage, one of the contractors, testifies on page 3: "The principal cause was in getting in the foundation. It was almost impossible to get the stone there. The next cause after the stone was the weather."

As we have already seen, their failure to get the stone there, and the millwork, and the inclemency of the weather were matters which they could not plead in this action. The jury, hav-

ing heard all the testimony, and having considered it under proper instructions from the court, must be presumed to have reached the correct conclusion as to the amount of damages which should be awarded under the contract.

The judgment will, therefore, be affirmed.

Hoyt, C. J., and Anders, Scott, and Gordon, JJ., concur.

BUILDING CONTRACTS—DELAY IN COMPLETION—PENALTY OR LIQUIDATED DAMAGES.—Where, from the nature of a contract, the damages cannot be calculated with any degree of certainty, a stipulated sum will usually be held to be liquidated damages when so designated in the contract: *Henneasy v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267, and note. See, also, the extended note to *Williams v. Vance*, 80 Am. Rep. 23.

DONOHUE KELLY BANKING COMPANY v. PUGET SOUND SAVINGS BANK.

[13 WASHINGTON, 407.]

NEGOTIABLE INSTRUMENTS—LIABILITY FROM INDORSEMENT BEFORE DELIVERY.—A person, other than the payee, who writes his name on the back of a note after its execution and before delivery, is *prima facie* liable thereon as a joint maker.

Donworth & Howe and J. G. Barnes, for the appellants.

Bausman, Kelleher & Emory and Cox, Cotton, Teal & Minor, for the respondent.

⁴⁰⁷ **DUNBAR, J.** On August 2, 1893, the plaintiff, respondent in this case, the Donohue Kelly Banking ⁴⁰⁸ Company of California, wrote to the defendant bank, asking for a note of five thousand dollars to take up a certificate of deposit which the plaintiff then held against the defendant bank. The reference in the letter to the note was as follows: "In view of the temporary extension we are compelled to grant you in the matter of the loan of five thousand dollars, please supply us with security at once, in the form of a promissory note issued by the bank and indorsed by the directors and made payable, say one day after date."

In accordance with this request, an ordinary promissory note for five thousand dollars was drawn up in favor of the respondent bank, signed by the Puget Sound Savings Bank, the defendant, and indorsed by A. H. Jose, W. D. Perkins, H. S. Martin, Julius Horton, and J. Loring Whittington. The note was dated at Seattle, August 7, 1893, and was made payable in Seattle at the

Puget Sound Savings Bank. The note was indorsed as aforesaid after its execution and before it became due, was retained by the officers of the bank, who are the indorsers mentioned above, until the eighth day of August, and was then mailed to the respondent at San Francisco. In the course of time, suit was brought against the bank and the indorsers to recover the amount specified in the note. Judgment was obtained against the defendants in the court below, from which judgment Horton and Whittington appealed to this court. It may be said that upon the close of the testimony the court instructed the jury to find a verdict for the plaintiff.

The pertinent question in this case is, What is the liability assumed by a third person, or a person other than the payee, who writes his name on the back of a promissory note after its execution by the maker and ⁴⁰⁰ before the delivery to the payee? It is conceded by the appellants that the weight of authority is, that in the absence of special agreement, the law will imply an undertaking as maker, but they claim that the weight of reason is in favor of the liability as indorser. And it is also claimed by the appellants that the text-writers are uniform in support of this proposition. It may be said, however, in answer to this, that it is the adjudication by courts, rather than the personal opinion of text-writers, which settles the law in regard to questions of this kind. The text-writers, however, we find upon an examination, are not uniform in holding the liability of a signer of this kind to be that of an indorser. It is true that Mr. Daniels, in his work on Negotiable Instruments, section 714, states that his own view is, that the party who puts his name on the back of a negotiable note before it is indorsed by the payee should be presumed to be a first indorser. But the idea of Mr. Tiedeman, in his work on Commercial Paper, section 271, is that the liability is that of a guarantor; while Edwards on Promissory Notes inclines to the rule enunciated by the supreme court of the United States in *Rey v. Simpson*, 22 How. 341, viz., that the liability is that of a joint maker; and Randolph on Commercial Paper, section 831, says, in discussing this question: "The view which finds most support is probably that which holds the indorsement of a negotiable note by a stranger before or at the time of its delivery to the payee to be prima facie an original undertaking as joint maker, with an implied liability as such to the payee and all holders for value."

Mr. Daniels seems to think that the effect of the court's holding the parties liable as joint makers has been to mystify

the law and make its administration ⁴¹⁰ uncertain. It seems to us, however, that such a holding would tend to simplify the administration of the law and make certain the liability.

The confusion growing out of an attempt to determine the liability to be other than that of a joint maker is demonstrated by the fact that the New York, Pennsylvania, Tennessee, Alabama, Indiana, Mississippi, Wisconsin, and Oregon courts have held in accordance with the theory announced by Mr. Daniels, viz., that such signers were first indorsers; while California, Illinois, Kansas, Kentucky, Nebraska, and Nevada reflect the idea enunciated by Mr. Tiedeman, that their liability is that of a guarantor. On the other hand, the courts of Vermont, Massachusetts, New Jersey, Missouri, Maryland, New Hampshire, Michigan, Virginia, Colorado, Wisconsin, Texas, Utah, Ohio, Rhode Island, Louisiana, Minnesota, North Carolina, South Carolina, and the supreme court of the United States have decided squarely that the liability of a person, other than the payee, who signs the note on its back before it is due is that of a joint maker. The reasons for these respective decisions are so multifarious and have been so often repeated that it would serve no good purpose to indulge in an analysis of them here. But we are satisfied with the reasoning of the courts last mentioned, and hold with them that *prima facie*, at least, the liability in such case is that of a joint maker.

We do not think, however, that the decision of this proposition was really necessary in this case, for the whole circumstances of the case show so plainly that it was neither the intention of the plaintiff or the defendants that the defendant indorsers (and we use this word "indorser" simply to distinguish those who signed on the back of the note from those who signed ⁴¹¹ at the bottom) intended that their liability should be other than that of the liability of a maker, and that they waived their rights as indorsers or guarantors.

The circumstances surrounding the request for and the execution of this note make it absolutely impossible that the intention on either side was that the indorsers should have a right to demand and notice. Here was a note executed in Seattle in favor of a party who lived in San Francisco, one thousand miles away, and made payable one day after date; and the court will take judicial notice that if it had been mailed on the day it was executed it would have been a physical impossibility for it to have been delivered in San Francisco before it was due, much less to have been returned to Seattle and notice served upon the in-

dorsers before its maturity. And the canon of interpretation, invoked by the appellants and which was announced in the case of *Rey v. Simpson*, 22 How. 341, that "the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties," when applied to this case, precludes the appellants from the benefit of the defense which they claim; for the idea that they could intend that their liability depended upon notice and demand after maturity under the circumstances of this case is so absolutely contradicted by the circumstances themselves, that we are at a loss to know how to discuss the proposition.

We do not think there is any merit in any of the contentions of the appellants, and the judgment will therefore be affirmed.

Hoyt, C. J., and Anders, Scott, and Gordon, JJ., concur.

ON PETITION FOR REHEARING.

PER CURIAM. The attention of the court is called ⁴¹² by the petition for rehearing in this case to the fact that the appellants alleged as error the assessment of the amount of recovery, the same being too large. In the interest of the discussion of the main question involved in this case, this matter was overlooked. It is claimed by the appellants that the verdict exceeded the amount due on the note by thirty-seven dollars and fifty-one cents. As this claim was made in the brief of the appellants, and not controverted by the brief of the respondent, we will treat it as an accepted fact, without entering into a computation of the interest due on the note sued on. The original opinion will, therefore, be modified to the extent that the judgment will be affirmed upon the remittance by the respondent of thirty-seven dollars and fifty-one cents.

NEGOTIABLE INSTRUMENTS—LIABILITY FROM INDORSEMENT BEFORE DELIVERY.—Persons indorsing a negotiable instrument before delivery must be regarded as joint makers: *Bank v. Jefferson*, 92 Tenn. 537; 36 Am. St. Rep. 100, and note. A third person who indorses his name upon a note in blank at the time it is executed and before delivery, is, as to a subsequent bona fide holder for value, liable thereon as a joint maker: *Salisbury v. First Nat. Bank*, 37 Neb. 872; 40 Am. St. Rep. 527, and note. See, also, the notes to *Temple v. Baker*, 11 Am. St. Rep. 931; *Adrian v. McCaskill*, 14 Am. St. Rep. 794, and *Jones v. Goodwin*, 2 Am. Rep. 475.

BENEDIOT v. SCHMIEG.

[13 WASHINGTON, 476.]

NEGOTIABLE INSTRUMENTS—JOINT AND SEVERAL NOTES—PRESENTMENT.—To bind an indorser of a note joint and several in form, presentment for payment must be made to all the makers.

NEGOTIABLE INSTRUMENTS.—NOTICE OF PROTEST of a note to an indorser residing in the same city as the maker, by mailing such notice to him without giving the street and number of his place of business or his residence, is not equivalent to personal service.

A. R. Jones, for the appellant.

Condon & Wright, for the respondent.

⁴⁷⁷ HOYT, C. J. Appellant was sued as an indorser of a note joint and several in form, signed by two makers. The undisputed proof showed that no demand for payment ⁴⁷⁸ had been made upon one of the makers at the time notice of dishonor was sought to be given to the indorser. It further appeared that all the parties to the note lived in the city of Seattle; that the appellant had a place of business therein, well known to the bank with which the note was left for collection; that no attempt was made by said bank, acting for the owner of the note, or by anyone else, to serve personally upon the appellant notice of the dishonor of the note. The only attempt to give such notice was to deposit it in the postoffice directed to the appellant at Seattle, without giving as a part of such direction the street or number in said city to which it should be delivered. For the reason that it appeared from these undisputed facts that the necessary steps had not been taken to charge the appellant as an indorser of the note, he, at the close of the testimony, moved the court for a judgment in his favor. This motion was denied, and the cause submitted to the jury under instructions which authorized a verdict for the plaintiff, if it was found among other facts that presentment for payment to one of the makers was made upon the day the note fell due, and that notice of dishonor was deposited in the postoffice addressed to the indorser so that, in the ordinary course, it should have reached him on the day that the note was dishonored, or the day after. The verdict was for the plaintiff, and judgment was duly entered thereon.

If presentment to each of the makers of a joint and several promissory note was necessary, or if the deposit in the postoffice of a notice of dishonor, directed generally to the indorser living

in the same city was insufficient, the judgment must be reversed; and if the judgment is reversed for either of these reasons, the action should be dismissed as to appellant, unless, ⁴⁷⁹ by some affirmative action on his part shown by the proofs, he had made himself liable to pay the note.

There was some testimony tending to show that, at the time the note was discounted, he said that he would see it paid, but there was nothing tending to show that at any time after it became due he made any promise in relation to its payment. Any statement that he may have made at the time he discounted the note, which did not amount to an express waiver of demand and notice, could add nothing to the contract which he entered into by indorsing it. That the note must be presented to each of the "joint" makers in order that an indorser may be charged, is conceded by the respondent, but it is claimed that presentment to one of the makers of a note joint and several in form is sufficient. The ground of this contention is, that the holder of such a note may, at his option, treat it as the several note of any one of the makers; that the indorsement must be presumed to have been made in view of this right, and that for that reason the holder would bind the indorser by presenting it to any one of the makers whose several note he saw fit to consider it. It is doubtful whether the single contract of the indorser can be divided so as to in fact constitute as many separate contracts as there are makers to the note. It would be more reasonable to presume that the contract of indorsement was in reference to the note as an entirety, and was made upon the credit of all of the makers, and that the right of the holder to enforce it as the several contract of one of them does not include the right to divide the single contract of the indorser. It is suggested that by reason of different places of residence it is frequently impossible to present the note for payment to each of the several makers on the day the note becomes due. But this objection ⁴⁸⁰ applies as well to joint makers as to those joint and several. If the makers are so situated that it is not reasonable to require a presentment to each of them, that fact will excuse such presentment.

The respondent has cited but one case which fully sustains his contention, that of *Harris v. Clark*, 10 Ohio, 5, and the reasoning of the court in that was upon grounds conceded to be untenable. The reason there given why a presentment to one maker was sufficient was, that by signing the note together the several makers constituted themselves, so far as the making of the

note was concerned, partners, and for that reason service upon one, under well-settled general rules, was a service upon all.

Respondent also cites some of the text-writers, but, with the single exception of Judge Story, there is no attempt by any of them to give any reason for their claim that presentment to one of several makers should be sufficient, and even that distinguished author and jurist does no more than refer to the case above cited, and say that, though the decision therein could not be sustained upon the ground stated in the opinion, it might be upon the theory that it was only necessary to make presentment to one of the makers of a note joint and several in form.

The appellant cites a large number of cases tending to establish the rule that presentment to each of the makers is necessary. The respondent claims that but one of these is in point, for the reason that it does not appear that the notes which were under consideration were joint and several in form. As to some of them this is no doubt true, but the fact that in none was there any statement that tended to show that there was any difference in the presentment necessary to charge an indorser by reason of the "joint" or "joint and ⁴⁸¹ several" form of the note showed that no distinction on that account was recognized. In many of the cases in which from the facts it appears that the note was joint and several in form, the court speaks of the makers as "joint," from which it is clear that by the use of the word "joint" it was not intended to refer to the nature of the liability of such makers, but only as to the fact that they had joined in making the note. And from a careful reading of the opinions in other cases it is probable that the word "joint" was used in the same sense. Hence much force is taken from the argument to the effect that none of the cases which speak of "joint" makers and hold that presentment must be made to all of them are to be taken as authority in favor of the contention of appellant.

It is conceded that in the case of *Shutts v. Fingar*, 100 N. Y. 539, 53 Am. Rep. 231, the court was considering a note joint and several in form and that the decision fully supports the contention of the appellant.

The case of *Union Bank v. Willis*, 8 Met. 504, 41 Am. Dec. 541, not cited in the brief of appellant, is also directly in point. The principal question decided was as to whether one of the parties to the note was a maker or indorser; the court held that he was a maker; that he was one of the joint and several makers,

and further held that, for the reason that no presentment had been made to him, the indorsers were discharged. The opinion concludes as follows: "To apply the law to the facts as proved in the case before us, Thompson and Mirick & Co. stand in the relation of joint and several promisors. Payment of the note was demanded of Thompson, but not of Mirick & Co. The defendant is an indorser, liable only upon legal notice of a demand upon the promisors ⁴⁸² and a refusal by them to pay the note; and we are of opinion that he has a right to avail himself of this neglect to make demand on Mirick & Co., to discharge himself from his liability as indorser."

Other cases might be cited which either expressly or by necessary intentment establish the rule contended for by appellant; but in view of the fact that but a single case has been found expressly holding to the contrary, and of the fact that the reasoning of that case has been criticised by every court which has referred to it, we do not think it necessary to cite them. It is true that respondent claims that the case of *McClelland v. Bishop*, 42 Ohio St. 113, affirms that of *Harris v. Clark*, 10 Ohio, 5; but an examination will show that the language relied upon was qualified, and was only used by way of argument upon a point not necessary to the decision of the case. So that the rule in Ohio must be held to depend upon the single case of *Harris v. Clark*, 10 Ohio, 5. And that one has been in some degree discredited by the case of *Greenough v. Smead*, 3 Ohio St. 415. In this case, the question, as in the Massachusetts case above cited, was as to whether one of the parties to the note was a maker or an indorser, and the court, by one of the ablest jurists that ever graced the bench of that or any other state, Rufus P. Ranney, at considerable length discussed that question for the purpose of showing that he was an indorser, and that no presentment to him was necessary to charge the defendant who was also an indorser. Such discussion would have been entirely unnecessary, if the court had been content to rely upon the law as announced in the case of *Harris v. Clark*, 10 Ohio, 5. Under the law thus announced, no presentment to Greenough would have been necessary, for the form of the note which is set out in the opinion shows that, if he was ⁴⁸³ a maker, he was jointly and severally liable with the other maker. The form of the note was identical with that of the one indorsed by the appellant, and was clearly such that those who signed it became liable jointly and severally and not simply jointly. From the fact that such was the form of this note, the language of the court hereinafter

set out furnishes a good example of the practice hereinbefore referred to to speak of the joint makers of a note, not with reference to the character of their liability, but as to their having joined in its execution. The court having, after a full discussion, come to the conclusion that Greenough was an indorser, and not a maker, of the note, proceeded as follows: "This view of the subject makes it unnecessary to pass upon the question made, as to the sufficiency of the demand. It may not be improper, however, to say that if Greenough could be treated as a joint maker, we should be of the opinion that the demand made, or rather the excuse for not making a demand, would be insufficient to charge the indorsers. The question is not covered by the case of *Harris v. Clark*, 10 Ohio, 5, and we feel no hesitation in saying that the rule there adopted should be confined to the precise state of facts upon which the decision was made. A demand upon one of several partners in business is clearly sufficient, and the court, in that case, considered the several "makers of a joint and several promissory note in the light of partners in that particular transaction." But, assuredly, the principle could have no application after the death of one of the parties had terminated the implied agency of the survivor; and it could not be deemed due diligence in the holder to present the note at the residence of the deceased partner, when the survivor was within his reach."

On the whole, the weight of authority is so strongly in favor of the rule that presentment to all of the ⁴⁸⁴ makers must be made, not only when the note is joint in form, but also when it is joint and several, that we feel compelled to adopt it.

It is conceded by respondent that all of the older cases uphold the doctrine that service of notice of protest cannot be made by mail where the parties to whom the notice was to be given and the makers reside in the same city; but it is claimed that since the inauguration of the carrier system in the larger cities a new rule has grown up as to the service of notice in such cities, and some authorities are cited in support of this claim. They seem to be founded upon sound reason, but it is not necessary that we should now determine as to whether or not the old rule has been changed by these modern conditions. If service by mail in such cities is sufficient, it is for the reason that it is the duty of the postoffice officials to deliver it at the place of business or the residence of the person to be notified, so that it will be received by him in due course at such a time as would make it sufficient if then personally served.

But the notice in this case was not so directed as to make it

the duty of the employes in the postoffice at Seattle to so deliver it. It is true that some testimony was introduced tending to show that a notice directed as this one was would in due course have been delivered the day it was deposited in the office, or the succeeding day, but the duty to so deliver it was not so clearly shown that the appellant could be thereby deprived of his right to have a proper service made upon him. It is a regulation or custom of the postoffice department to require letters designed to be delivered by carrier to be directed to the street and number to which they are to be delivered, and, in the absence of such direction, letters are not sure of being placed in ^{the} hands of the carriers, but may instead go into the general delivery boxes of the office. Hence, it was not so clearly the duty of the postoffice officials to deliver a letter directed as was the one which contained this notice at the place of business of the appellant as to make the mailing of it equivalent to personal service.

The judgment must be reversed and the cause remanded with instructions to dismiss the action as to the appellant.

Dunbar, Anders, and Gordon, JJ., concur.

Scott, J., dissents.

NEGOTIABLE INSTRUMENT—JOINT NOTES—PRESENTMENT.—Demand of payment on a promissory note executed by several makers, not partners, must be made on all in order to charge an indorser: *Union Bank v. Willis*, 8 Met. 504; 41 Am. Dec. 541; *Shutts v. Fingar*, 100 N. Y. 539; 53 Am. Rep. 231. See, also, the note to *Berg v. Abbott*, 24 Am. Rep. 161.

NEGOTIABLE INSTRUMENTS—NOTICE OF PROTEST BY MAIL—SUFFICIENCY OF.—This question is discussed in the notes to *Mead v. Carnal*, 39 Am. Dec. 553; *Ransom v. Mack*, 38 Am. Dec. 608; *Vigers v. Carlon*, 33 Am. Dec. 576. Notice to a drawer should be fully and particularly directed to him at his place of residence: *Beckwith v. Smith*, 22 Me. 125; 38 Am. Dec. 290, and note; to the same effect, *Walker v. Stetson*, 14 Ohio St. 89; 84 Am. Dec. 362.

POLLOCK v. HORN.

[13 WASHINGTON, 626.]

JUDGMENTS AGAINST LUNATICS are neither void nor voidable.

JUDGMENT AGAINST AN INSANE SURETY on a forthcoming bond in attachment is not void, such surety not being insane at the time that the bond was given.

JUDGMENTS—INSANE PERSONS—COLLATERAL ATTACK.—Mere irregularities in proceedings, resulting in a judgment against a lunatic, cannot be raised in a collateral attack.

JUDGMENTS AGAINST LUNATICS.—The property of a luna-

tic is not exempt from the operation of an execution issued on a judgment not fraudulently or wrongfully obtained against him, although it was rendered after the fact that he is a lunatic had been legally established.

E. W. Taylor, for the appellant.

A. C. Arntson and R. F. Laffoon, for the respondents. .

⁶²⁷ DUNBAR, J. On the nineteenth day of November, 1890, in an attachment case of Wandell v. Miller, the latter furnished an undertaking signed by W. Pollock, the affidavit to the bond showing that the bondsman was William Pollock. In February, 1892, William Pollock was adjudged insane and committed to the Western ⁶²⁸ Washington hospital for the insane, and a guardian, Robert Pollock, was duly appointed. In the case of Wandell v. Miller the attachment was released, and judgment was entered against Miller and his bondsmen, including William Pollock, on May 20, 1892. Execution was issued June 18, 1892. On September 10, 1892, the real estate in controversy, being the property of William Pollock, was sold. The sale was afterward confirmed, and this action was brought in April, 1894, to set aside the sale and to have the judgment under which the sale was made declared null and void. The cause was tried by the court, who found in favor of the respondents, the defendants in the action, and dismissed plaintiff's action. From such judgment of dismissal this appeal is taken.

It is contended by the appellant that the judgment under which the property in question was sold was absolutely void, for the reason that Pollock was insane at the time of the rendition of said judgment. This contention cannot be sustained under the authorities. There is no claim that he was insane at the time the bond was given. By giving the bond he subjected himself to the jurisdiction of the court, and we held in the case of Park v. Mighell, 3 Wash. 737, that the court had jurisdiction to render judgment against the surety on a forthcoming bond in an attachment proceeding without notice to such surety. It would not have been necessary, then, to have given Pollock notice had he remained sane, and the rule of law is in any event that a judgment is not void when taken against a lunatic. Whatever may be said of the justice or injustice of this rule, the rule itself is so well established by the authorities that it cannot be gainsaid.

⁶²⁹ In Freeman on Judgments, fourth edition, section 152, the author says: "While an occasional difference of opinion manifests itself in regard to the propriety and possibility of bonding

femes covert and infants by judicial proceedings in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and more defenseless class of persons; but, by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them, it is said, are neither void nor voidable. . . . The proper remedy in favor of a lunatic being to apply to chancery to restrain proceedings, and to compel plaintiff to go there for justice. In a suit against a lunatic, the judgment is properly entered against him, and not against his guardian. A lunatic has capacity to appear in court by attorney. The legal title to his estate remains in him, and does not pass to his guardian": Citing a great many cases to sustain the text. See, also, Freeman on Executions, sec. 22; Withrow v. Smithson, 37 W. Va. 757. In the last-mentioned case, it was decided that a judgment against a person insane at its rendition is not for that cause void, and is a lien on land.

The judgment, therefore, not being void, and no appeal having been taken from it, mere questions of irregularity in the proceedings in that case cannot be raised in this collateral attack: *Belles v. Miller*, 10 Wash. 259. Therefore, we shall not discuss the many errors assigned by the appellant, which go to the irregularities of the former case.

The question, however, which has given us more trouble, is, whether or not this judgment, having been rendered subsequent to the establishment of William Pollock's insanity, would have the effect simply of establishing the claim of the judgment creditor to be ^{also} settled in due course of the administration of the estate, under chapter 15, title 12, of the Code of Procedure, entitled "Of the Guardianship of Idiots and Insane Persons." Section 1154 of that chapter provides that "the several superior courts shall have power to appoint guardians to take the care, custody, and management of all idiots, insane persons, and all who are incapable of conducting their own affairs and of their estates," etc. It is contended by the appellant that this act, and the succeeding section, would be meaningless if the estate of the ward could be sold on execution. But a perusal of the whole chapter, especially of section 1170, which seems to provide for the running of an execution against the property of a ward, leads us to conclude that it was not the intention of the legislature to exempt the property of a lunatic from the operations of an execution flowing from a legal judgment. It is not to be concluded that the lunatic or his estate is without remedy, but the remedy

is an action in equity to set aside a judgment, if the judgment has been fraudulently obtained. If the judgment has not been fraudulently or wrongfully obtained, then no harm is worked upon him, and, if it has, the courts will set it aside.

The complaint in this case failing to allege any fraud, and none appearing in the trial of the cause, we think the ruling of the court was correct, and the judgment will, therefore, be affirmed.

Hoyt, C. J., and Scott, Anders, and Gordon, JJ., concur.

JUDGMENT AGAINST INSANE PERSONS.—A lunatic properly before the court is bound by acts done by matter of record, as fines, recoveries, judgments, and the like: *Maloney v. Dewey*, 127 Ill. 895; 11 Am. St. Rep. 131, and note. A judgment may, by common law, be rendered against one non compos mentis upon contracts or liabilities by which he is legally bound: *King v. Robinson*, 83 Me. 114; 54 Am. Dec. 614. A judgment against a lunatic on process served on him alone, though erroneous, is not void: *Allison v. Taylor*, 6 Dana, 87; 82 Am. Dec. 68, and note.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

GREGORY v. SPEIKER.

[110 CALIFORNIA, 150.]

FRAUD, ACTION, WHEN DEEMED TO BE FOR—STATUTE OF LIMITATIONS.—If a person agrees not to manufacture or sell a specified medicine, and, in violation of his agreement, does manufacture and sell it under another name, concealing the fact that it is the same medicine, he is guilty of a fraud, and a suit to enjoin a further violation of his contract, and to recover for the fraudulent breach thereof, may be commenced within three years after the discovery by the plaintiff of such breach.

CONTRACT IN RESTRAINT OF TRADE NOT LIMITED AS TO TIME.—If the statute authorizes the seller of a business to agree with the purchaser not to carry on a similar business so long as the purchaser or his successor in interest carries on a like business, a contract which, on its face, is not limited in time, is not wholly void, but is enforceable to the extent that it does not transcend the permissive clause of the statute.

A CONTRACT NOT TO MANUFACTURE NOR SELL A DESIGNATED BITTERS is broken by the sale of the same bitters under another name, especially if the vendor represents to his customers that the bitters which he manufactures and sells are superior to the bitters which he had thus sold the right to manufacture and sell.

THE MEASURE OF DAMAGES FOR MANUFACTURING AND SELLING A MEDICAL COMPOUND which the defendant had agreed not to manufacture nor sell is not the profits which the defendant has realized in violation of his agreement, but the value of the business lost to the plaintiff thereby. The profit made by the defendant may be considered in evidence, if it should be shown to correspond in whole or in part with the loss of the plaintiff.

D. E. Alexander and Albert M. Johnson, for the appellant.

Armstrong & Bruner, for the respondent.

¹⁵⁰ BRITT, C. Action begun October 4, 1892, to enjoin the violation of a contract, and to recover damages for ¹⁵¹ the

fraudulent breach thereof. The following facts, among others, were alleged by plaintiff and found by the court below: Defendant owned a liquid compound known as "Robert's Kidney and Liver Bitters" and the formula for the manufacture thereof, and the goodwill of the business of making and vending the same; on January 7, 1884, while engaged in such business at the county of Sacramento, and having then a large sale of such bitters in said county and throughout this state, the defendant made a bill of sale to one Lee, by the terms of which he sold and transferred to Lee all right, title, and goodwill of the said bitters theretofore manufactured by him; also the receipt for manufacturing the same; and all labels, printing matter, boxes, etc., pertaining to the manufacture thereof. The instrument concluded as follows: "And I furthermore agree not to manufacture or sell any of said Robert's Kidney and Liver Bitters in this county. J. J. Speiker." Said Lee was the agent of plaintiff in this transaction and on the following day, January 8, 1884, he assigned to plaintiff the property and rights acquired by him under said instrument of January 7th. Thenceforward the plaintiff manufactured and sold said bitters, and is yet so engaged.

About February 5, 1884, defendant, with intent to injure plaintiff's business, combined and conspired with one T. M. Lash to manufacture and sell the same bitters under the name of "Lash's Kidney and Liver Bitters," and thereafter for several years such combination, first under the style of T. M. Lash & Co., and later under that of Lash's Bitters Company, manufactured and sold such bitters in said county and throughout the state; defendant then dissolved his connection with Lash, but, under the style of Lash's Bitters Company, continued, until the time of the commencement of this action, the same business of making and selling Robert's Kidney and Liver Bitters by the name of Lash's Kidney and Liver Bitters. Defendant fraudulently concealed from plaintiff the fact of his interest in the business of T. M. Lash & Co. and Lash's Bitters Company, and the fact ¹⁵² also that said Lash's Bitters were compounded of the same ingredients as the said Robert's Bitters, until he divulged such facts upon the trial of a certain action between him, Speiker, and said Lash in April, 1892, up to which time plaintiff was without knowledge or information thereof. By reason of false representations made by defendant to plaintiff's customers, to the effect that Lash's Bitters differed from, and were superior to, Robert's Bitters—he knowing that they were compounded of the same ingredients—said customers, or some

of them, were induced to purchase the former instead of the latter, whereby the profits of plaintiff's business were mostly cut off. Some further history of this same compound, and the dissensions of those concerned in its preparation and sale, may be found in *Spieker v. Lash*, 102 Cal. 38.

Defendant pleaded, among other matters, the bar of the statute of limitations—sections 337, 443, and subdivision 4 of section 338 of the Code of Civil Procedure. The court held that the action was not barred, and rendered judgment perpetually restraining defendant from manufacturing or selling in Sacramento county the said Robert's Kidney and Liver Bitters, or any preparation compounded of its constituents, and from conducting the sale of Lash's Bitters in such manner as to interfere with the goodwill of Robert's Bitters anywhere in the state, and from endeavoring to draw off plaintiff's customers; also that plaintiff recover all the net profits made by defendant in the sale of Robert's under the name of Lash's Bitters from February 5, 1884, to October 4, 1892; which profits were found, by means of a reference and accounting had under order of the court, to be the sum of fifty-one thousand eight hundred and seventy-two dollars. The appeal is on the judgment-roll, no evidence being brought up.

It is argued by appellant that plaintiff's cause of action lies solely in defendant's breach of contract; that the fraud charged and found is merely for the purpose of excusing delay in the commencement of the action, ¹⁵³ and is not the substantive ground upon which relief is sought; hence, that the action is not saved by the provision of section 338 of the Code of Civil Procedure, that in an action for relief on the ground of fraud, the cause of action is not to be deemed to have accrued until the discovery of the facts constituting the fraud. But we are of opinion that the facts as found by the court show that fraud was so ingrained with the breach of contract by defendant that the action, as regards the bar of the statute, at least, must be treated as one for relief on the ground of fraud. The breach was accomplished underhandedly, by secret confederacy with another, and the use of his name to cloak the movements of the defendant, and by deceit inducing third persons to believe that defendant's product differed from, or was superior to, that of plaintiff; deception practiced on one person to the injury of another may be actionable fraud as to the latter: *Blakeslee v. Starring*, 34 Wis. 538.

Sections 1673 and 1674 of the Civil Code read as follows:

"Sec. 1673. Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void."

"Sec. 1674. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein."

Here Spieker agreed "not to manufacture or sell any of said Robert's Bitters in this county"—not limiting his covenant to the time during which the buyer might carry on the business as provided in the latter section quoted; for this reason it is contended that his contract with Lee was void in this particular. We think it reasonably clear that no design to impose a limit on the time during which defendant was restrained from carrying on the business in Sacramento county is inferable ¹⁵⁴ from the contract, and in that respect it transgressed the statute. But the statute does not render the whole provision void; it avoids it only "to that extent," viz., the extent that it transcends the permissive clause of the statute; within that limit it is valid; this must be regarded as the settled construction of the statute: *Ragsdale v. Nagle*, 106 Cal. 336, and cases cited. The judgment here proceeds further, however, and in this regard the respondent concedes that it should be modified.

It is said that defendant has not used the trade name sold by him; that he did not part with the right to make and vend all bitters; and that so long as he did not apply to them such trade name, nor represent his product to be the same as plaintiff's, he did not violate his contract. But the contract purports to transfer "all right, title, and goodwill of the bitters known as Robert's Kidney and Liver Bitters"; this meant the liquid known when compounded as Robert's Bitters; not merely the name by which it was known. It may be that he retained some right to make and sell the same bitters by whatever designation other than "Robert's" he chose to give them: *Spieker v. Lash*, 102 Cal. 38; but by the terms of the contract he incapacitated himself to exercise this right at all in Sacramento county, and to exercise it anywhere to the impairment of the goodwill he sold to plaintiff: *Snow v. Holmes*, 71 Cal. 142; *Knoedler v. Glaenzer*, 55 Fed. Rep. 898; and it seems to us that representing to plaintiff's customers that the same preparation by a different name was su-

perior to Robert's Bitters tended to draw them from plaintiff, and to injure the goodwill he had bought and paid for.

The court adopted a false rule as to the measure of damages; it proceeded upon the theory that, as in trademark and patent cases, the defendant was compellable to render to plaintiff the net profits of the business of selling Lash's Bitters; trademark cases only are cited to support this branch of the judgment: *Graham v. Plate*, 40 Cal. 493; *El Modello Cigar Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537; *Avery v. Meikle*, 85 Ky. 435; 7 Am. St. Rep. 604. But here, though plaintiff alleged an infringement of his trademark by defendant, the court expressly found against that averment. In cases like the present, the damages are rarely susceptible of accurate proof; but the measure, expressed generally, is the value of the business lost to plaintiff—not the gain of defendant, which may be more or less than plaintiff's loss; though such gain may be considered in evidence, it should be shown to correspond in whole or in part with the loss of plaintiff: *Peltz v. Eichele*, 62 Mo. 171, 180; *Lashus v. Chamberlain*, 5 Utah, 140; *Howard v. Taylor*, 90 Ala. 241; *Warfield v. Booth*, 33 Md. 63; 2 Sedgwick on Damages, sec. 632. Nothing here appearing of the amount of plaintiff's loss, the allowance of damages beyond a nominal sum was error.

The judgment of the superior court should be reversed and the cause remanded for a new trial.

Belcher, C., and Vanelief, C., concurred.

For the reasons given in the foregoing opinion, the judgment of the superior court is reversed, and the cause is remanded for a new trial.

Harrison, J., Garoutte, J., Van Fleet, J.

FRAUD—LIMITATIONS OF ACTIONS.—One seeking relief on the ground of fraud, occurring more than three years prior to the filing of his complaint, must allege that he did not discover such fraud until within three years before such filing: *Castro v. Gell*, 110 Cal. 292, post p. 000, and note.

CONTRACTS IN RESTRAINT OF TRADE are not necessarily void by reason of universality of time or place. Their validity depends upon the reasonableness of the restrictions under the conditions of each case, and the test of reasonableness in contracts of this kind is the test of validity: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784, and note.

GOODWILL—REMEDIES FOR INJURY TO.—One engaged in trade may sell his stock and goodwill and make a valid contract with the purchaser, binding himself not to engage in the same business in the same place for a time named, and he may be enjoined from violating his contract: *Chapin v. Brown*, 83 Iowa, 156; 32 Am. St. Rep. 297; *French v. Parker*, 16 R. I. 219; 27 Am. St. Rep. 733; *Hall's Ap-*

peal, 60 Pa. St. 458; 100 Am. Dec. 534; note to *Fraser v. Fraser* Lubricator Co., 2 Am. St. Rep. 81.

FERNANDEZ v. BURLESON.

[110 CALIFORNIA, 164.]

MECHANIC'S LIEN, DESCRIPTION IN CLAIM OF.—A notice of a mechanic's lien declaring that it is upon a mining claim, and giving the metes, bounds, and monuments, with all improvements, wheels, pumps, and mining facilities and appurtenances situate thereon, and that the work for which the lien is claimed was done at the special instance and request of B. and P., owners of the premises, cannot be applied to a claim adjoining that specifically described, on the ground that of the two the latter is the one having thereon wheels, pumps, and mining facilities.

MECHANIC'S LIEN.—A DESCRIPTION of property sufficient for identification is indispensable to a mechanic's lien.

MECHANIC'S LIEN, REFORMATION OF CLAIM OF.—The notice of a claim of mechanic's lien is not an instrument susceptible of reformation.

Warren & Taylor and T. M. Osmont, for the appellants.

James F. Farraher, for the respondents.

¹⁶⁵ **BRITT, C.** Plaintiffs, eight in number, united in this action, under the permissive clause of section 1195 of the Code of Civil Procedure, to enforce liens claimed by them, respectively, for balances due from defendants on account of labor performed by plaintiffs, severally, at the request of defendants, on a mining claim in Siskiyou county. Defendants constitute a mining partnership under the name of Burleson & Parsley; they owned a mining claim called the "Bare Bar" claim, and employed plaintiffs to work thereon; their answer admitted that the balances alleged are due to the plaintiffs respectively, but denied that the work was done on the premises described in plaintiffs' several claims of lien. There was judgment for the plaintiffs—seven of them—directing the sale of said "Bare Bar" property, and the application of the proceeds to the payment of the demands of the successful plaintiffs, with costs and attorneys' fees; the correctness of the judgment depends upon the answer to the question whether the property thus directed to be sold is described at all in the claims of lien filed in the office of the county recorder under section 1187 of the Code of Civil Procedure. In this particular the notices were all in the same form; that of Fernandez, taken as an example, ¹⁶⁶ stated: "I . . . give notice of my intention to hold and claim a lien . . . upon

that certain mining claim situated in the Virginia Bar mining district, county of Siskiyou, state of California, particularly described as follows [giving a specific description by monuments, metes, and bounds], containing twelve acres, more or less, with all improvements, including wheels, pumps, and all mining facilities and appurtenances situated thereon. The said lien being claimed and held for work done upon said premises from the 27th day of June, 1892, to the 8th day of September, 1892, at the special instance and request of Burleson & Parsley, the owners and reputed owners thereof."

It is conceded that the description by monuments, metes, and bounds, thus stated, does not apply in any part to the "Bare Bar" property, where plaintiffs did their work, but does apply with entire accuracy to an adjoining mining claim known as the "Otto Bar" in which defendants had, with other persons, some interest, but which was not worked at all during the year 1892. It was in evidence, however, that there were no wheels, pumps, or mining facilities on the "Otto Bar" mining claim, while there were such on the "Bare Bar" claim; that mines in the vicinity were "generally known by the names of the parties running them"; that the "Bare Bar" claim was commonly called the Burleson & Parsley claim; that mining claims were somewhat numerous in that neighborhood, but defendants worked no other.

The court found that the claims of lien as filed contained a description of the property intended to be charged sufficient for identification, and that anyone familiar with the locality can readily identify the "Bare Bar" mine as the mining claim which plaintiffs intended to charge with their liens. We discover no evidence to justify this finding.

The contention of respondents' counsel, as we understand it, is that the boundaries given in the claim of ¹⁶⁷ lien may be disregarded, and that the other circumstances stated, viz., that the lien is claimed upon mining ground, in a specified mining district, with all improvements, including wheels, pumps, etc., situated thereon, for work done by the claimant between specified dates, at the request of Burleson & Parsley, the owners and reputed owners thereof, will "enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others," and hence is sufficient: *Willamette etc. Co. v. Kremer*, 94 Cal. 209. But, in the first place, there is no warrant in the law, or in the abstract equity of the case, for rejecting the boundaries by which the

notice of lien states that the property is "particularly described." One of the most important requirements of the statute governing the creation of such liens is, that the notice shall contain a description of the property to be charged sufficient for identification: Code Civ. Proc., sec. 1187. Without such description the notice would in some instances be of no value to the owner, and could rarely be of any use to creditors, purchasers, or other lien claimants dealing with the land: Phillips on Mechanics' Liens, sec. 378. If this were a case of mistake as to some incident of the description, the mistaken circumstance, like a false call in a deed, would be rejected: Willamette etc. Co. v. Kremer, 94 Cal. 209; but, on the contrary, the error is of the essence of the description. To reject the particular description and rely on the adventitious circumstances which accompany it would be to invert the maxim that the incident follows the principal, and not the principal the incident: Civ. Code, sec. 3540; the notice of lien is not an instrument susceptible of reformation: Goss v. Strelitz, 54 Cal. 640; therefore, the monuments and lines by which the property is said in the notice to be "particularly described" cannot be expunged from the notice, but must be read as part of it; so read it is misleading in a particular where it should be substantially true: Wagner v. Hansen, 103 Cal. 107. Secondly, were the ¹⁶⁸ particular description omitted and the other circumstances stated in the notice alone consulted, we do not think that a person familiar with the locality merely could thereby identify the premises with reasonable certainty to the exclusion of others; he would also need to know that the claimant worked on the premises, and when he worked there—knowledge of which matters cannot be implied from mere knowledge of the locality. Besides, the statute requires that the notice itself must describe the property on which the work was done: Code Civ. Proc., secs. 1183, 1187. A notice that the property to be charged is the property where claimant worked does not take the first step toward compliance with the statute. Nothing then remains except reference to pumps, wheels, and mining facilities, and to the names of the owners; it is shown affirmatively that the defendants claimed and were reputed to own an interest in the "Otto Bar" mine; and the reference to the wheels, pumps, etc., is—on our present assumption—to them as situate upon unascertained land. On these facts, at the very most, one might suspect that the "Bare Bar" mine was intended, but that he could identify it with reasonable certainty to the exclusion of other premises is incredible.

The judgment and order should be reversed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order are reversed.

Temple, J., Henshaw, J., McFarland, J.

MECHANIC'S LIEN—SUFFICIENCY OF NOTICE.—A mechanic's lien notice is sufficient, if it describes the premises and states the amount due, to whom, and from whom, and for what it is due: *Osburn v. Stephens*, 137 Ind. 683; 45 Am. St. Rep. 218, and note. The description of a building in the notice of a mechanic's lien is sufficient, if it enables a person familiar with the location to identify the building as the only one corresponding with such description: *Hughes v. Torgerson*, 96 Ala. 346; 38 Am. St. Rep. 105, and note. A notice of a mechanic's lien describing the property as all of a certain lot, except the west twenty feet thereof is insufficient, when the building also occupies a portion of another lot, although it is also described by a certain name and as being located at the northwest corner of two streets: *Whittier v. Stetson etc. Mill Co.*, 6 Wash. 190; 36 Am. St. Rep. 149, and especially note.

WULFF v. SUPERIOR COURT.

[110 CALIFORNIA, 215.]

CERTIORARI.—Whether a court has jurisdiction must be determined from the record taken as a whole.

PARTNERSHIP—JURISDICTION TO DIRECT SALE OF PROPERTY OF.—In an action for the dissolution of a partnership and an accounting, the court has power in advance of decreeing a dissolution to direct the sale of all the partnership assets, if it appears that they are not equal in value to the amount of the firm indebtedness, and that its business cannot be carried on except at a loss.

Paul C. Morf, for the petitioner.

John E. Budd and F. H. Gould, for the respondent.

216 GAROUTTE, J. This is a writ of review, to review the action of the superior court of San Joaquin county, in ordering a sale of certain partnership property now in the hands of a receiver, consisting of the stock and goodwill in a certain paint, oil, and wall-paper business in the city of Stockton.

The action of *Parsons v. Wulff* was for a dissolution of a partnership and an accounting. Wulff filed his answer, denying the allegations of the complaint, and the cause had not come to trial at the time the order for a sale of the partnership business was made. It is contended upon the part of petitioner that until a dissolution of the partnership had been decreed by the court, it

had no power to order a sale of the partnership business, and such is the question presented for our consideration. The record of the lower court is before us, including certain supplemental findings of fact made by it, and by that record, taken as a whole, this jurisdictional question must be determined: *Blair v. Hamilton*, 32 Cal. 52. The record discloses the petition for sale to have been filed by the receiver, and the petition states that the partnership is largely insolvent; that it is for the best interests of the creditors and the partnership that the business be sold, and that it be sold as a whole; that the business, since it came into the hands of the receiver, has been carried on at a loss, and that the loss will be still further increased if the business is continued; that the business has been conducted in a proper and skillful manner by the receiver, an experienced man; and that by a continuance of the business the assets will be dissipated and lost to the partners and creditors.

Taking into consideration the fact that the assets were not equal to the liabilities, that the first claim upon ²¹⁷ the assets rested with the creditors, and that their right to present their claims at any subsequent stage of the litigation was still existent, we think their interests were proper subject matter for the cognizance of the court in dealing with these assets, notwithstanding they were in no way parties to the record. And, taking all the facts into consideration, we see no excess of power exercised by the trial court in ordering the sale. It must be conceded that the court, by its receiver, had the power to sell perishable property, and, upon the showing here made, this business was clearly property of that character. The assets consisted of articles of trade and the goodwill of the business. The tangible assets were becoming dissipated and lost in spite of care and skill in the management of them, and without these assets the goodwill would seem to be entirely valueless. These two classes of property were indissolubly connected, and, if the court had the power to sell either, it had the power to sell both. Likewise, the book accounts; if any part of these assets could be sold, and it was for the best interests of the copartnership and the creditors that these accounts should go with the business, the court had the power to so adjudge.

A litigious partner, by means incident to litigation, might be able to delay the entry of a decree of dissolution for years, and thereby encompass the utter destruction of the entire partnership assets; and it would seem, in the interest of parties having claims upon these assets, that a court of equity was vested with the

right to give relief by converting them into money. But few cases in point have been cited upon either side. In *Crane v. Ford*, 1 Hopk. Ch. 130, the power of the court to sell partnership property pendente lite is fully recognized; and in *Marten v. Van Schaick*, 4 Paige, 479, the court said, in speaking of a newspaper partnership: "If a receiver is appointed, he must proceed and sell the establishment without delay, and, in the mean time, the business must be carried on by him as usual, so that the goodwill thereof may be secured to the purchaser ^{and} and the full value of the establishment realized by the partners on such sale. But the court will not take upon itself the responsibility of continuing the publication of a political paper by a receiver any longer than is absolutely necessary to prevent a sacrifice of the property." And, again, in *Williams v. Wilson*, 4 Sand. Ch. 380, the court said: "Then, as to the course to be pursued by the receiver, when vested with the goodwill of the concern, it is impossible for him to conduct an insane hospital or a lazaretto for foreign immigrants. The only practical course is for him to sell immediately the lease of the premises where the business was conducted, with the goodwill of the business, and the movables which belong to the institution. And, in order to give efficacy to the sale of the goodwill, either of the parties may become the purchaser." An analogous principle is recognized in *McLane v. Placerville etc. R. R. Co.*, 66 Cal. 629, 630.

In the cases cited the court held itself possessed of the power to sell, by reason of an actual present necessity of sale, in order that the assets might be preserved to the final good fortune of the parties interested therein. There was no more reason for a sale in those cases than in this case. The assets of the present partnership are rapidly depreciating in spite of the exercise of care and skill in their management, and it would appear to be a mere matter of time when they would become wholly lost.

We conclude that the facts in the present case are such that a power of sale in the court pendente lite existed.

For the foregoing reasons, the orders complained of, made by the trial court, were within its jurisdiction, and they are hereby affirmed.

Harrison, J., and Van Fleet, J., concurred.

JURISDICTION—EVIDENCE OF.—A recital in the record by the court that defendants in the proceeding named had been served with process is evidence that they had been so served, and that the court had jurisdiction of their persons: *Brickhouse v. Sutton*, 99 N. O. 108; 6 Am. St. Rep. 497, and note. It appearing upon the face of the record that summons in an action was served in a way ineffectual

to confer jurisdiction, it will not be presumed that a valid service was made in some other way: *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 336, and note. The jurisdiction of the court in a cause should ordinarily affirmatively appear from its judgment and the papers on file in the action: *Extended note to Morrill v. Morrill*, 23 Am. St. Rep. 113.

PARTNERSHIP—DISSOLUTION—SALE OF ASSETS.—An order for the sale of partnerships will be made by a court of chancery, where there is no provision for its disposition in the partnership agreement: *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198.

YORE v. BOOTH.

[110 CALIFORNIA, 238.]

INSURANCE, LIFE, CHANGE OF BENEFICIARIES.—One who procures a policy of insurance upon his own life, payable to his legal heirs, although he pays the premium himself, and keeps the policy in his exclusive possession, has no power to change the beneficiaries, unless the policy or the charter of the insurance company so provides.

INSURANCE, LIFE.—DECLARATIONS MADE BY THE ASSURED AFTER the issuance of a policy to him on his life payable to his legal heirs, are not admissible as evidence against them to prove the falsity of statements made by him in an application for such insurance.

INSURANCE, LIFE.—A DECLARATION purporting to be made by a wife in an application for insurance on the life of her husband in fact made by his signing her name to such application is not admissible against her in an action upon another policy of insurance on his life to which she is one of the beneficiaries.

INSURANCE, LIFE.—THE PRESUMPTION is that the statements made in an application for life insurance are true, and if the statement is as to the age of the person on whose life insurance is sought, such presumption is not overcome by statements made in proofs of death furnished by one of the beneficiaries under the policy.

Van Ness & Redman, for the appellant.

Forbes & Dinsmore and Mastick, Belcher & Mastick, for the respondents.

240 BEATTY, C. J. This is an action by the widow and children of Peter Yore, deceased, to recover the amount of a policy on his life issued May 10, 1886, by the Bankers' and Merchants' Mutual Life Insurance Association, and made payable to his "legal heirs." The defendant is receiver of said association, and is appealing from a judgment in favor of the plaintiffs, and from an order denying his motion for a new trial.

The policy in question was issued upon a written application made by Peter Yore, and the action is defended upon the ground

AM. ST. REP., Vol. LII.—6.

that in his application he stated that he was only fifty-six years of age when in fact he was older. At the trial the defendant, in order to prove the falsity of the statement as to age, offered in evidence: 1. An application made by the deceased to the Pacific Mutual Life Insurance Company in 1868, in which he stated that he was born in 1825; 2. A statement made in 1878, in an application to the Mutual Life Insurance Company of New York, that he was born in 1829; 3. An entry on the great register of Sierra county made in 1879, showing that he was born in 1822. All this evidence was rejected upon the ground of incompetency.

I was at first inclined to regard this ruling as erroneous, but an examination of a large number of cases has convinced me that it is sustained at all points by the decided weight of authority. It seems to be the settled doctrine, with but slight dissent in the courts of this country, that a person who procures a policy upon his own life, payable to a designated beneficiary, although he pays the premiums himself, and keeps the policy in ²⁴¹ his exclusive possession, has no power to change the beneficiary, unless the policy itself, or the charter of the insurance company, so provides. In other words, it is held that the beneficiary named in the policy, although he has parted with nothing, and is simply the object of another's bounty, has acquired a vested and irrevocable interest in the policy, which he may keep alive for his own benefit by paying the premiums or assessments, if the person who effected the insurance fails or refuses to do so.

It is contended, however, that this doctrine is inapplicable to a case in which the designated beneficiaries are the "legal heirs" of the person effecting the insurance, because a living person has no heirs, and, therefore, it is argued no interest can vest in anyone during his lifetime.

But this would seem to be a very technical ground for making a distinction in the application of a doctrine which, if it is a sound and wholesome one, ought to protect these plaintiffs, and others in like situation, as completely as if they had been named. It appears that when Peter Yore applied for his insurance he had a wife and a number of children living. If he had designated them by name, or the survivors of them, as his beneficiaries, and had added a proviso that any after-born child should come in for an equal share, we can see no reason why such designation would not have been effectual, and this, in legal effect, is what he did. If, in the case supposed, an interest in the policy would have vested in the named beneficiaries, as we think it would, the same

interest vested in these plaintiffs on the issuance of the policy, and it was not in the power of Peter Yore thereafter to change the beneficiaries or revoke his benefaction. This precise point was so ruled in *Weisert v. Muehl*, 81 Ky. 336, and we have not been referred to any case holding the contrary.

From this it follows that, as to these plaintiffs, any declarations of the deceased, not made at the time of procuring the policy, or as part of the *res gestae*, were ²⁴² hearsay and incompetent. The authorities in support of this proposition are numerous, and need not be cited here.

It is, however, claimed that the application to the Pacific Mutual should have been admitted, because it was signed by Eliza Yore (the widow.) But her name was so signed by her husband, and not by her in person. Undoubtedly, the statements made in that application would have been competent evidence against her in an action upon the policy issued thereon, but, in favor of a stranger, they are not evidence without proof that she was actually cognizant of them, and there was no such proof in this case.

The proof of death furnished by one of these plaintiffs was admitted in evidence, and contained a statement that the deceased was born in 1829. Appellant contends that, in the absence of any explanation or rebuttal, the court could not, in the face of this evidence, avoid finding that the statement of deceased that he was born in 1830 was false. We do not think, however, that this statement in the proof of death, wholly immaterial as it was, and evidently hearsay, was of such weight and cogency as necessarily to overcome the presumption in favor of the truth of the statement upon which the policy was issued. In view of these conclusions, the other points discussed by counsel became immaterial.

The judgment and order appealed from are affirmed.

McFarland, J., Garoutte, J., Harrison, J., Temple, J., and Henshaw, J., concurred.

Mr. Justice Van Fleet, deeming himself disqualified, did not participate in the foregoing.

INSURANCE, LIFE—DECLARATIONS OF THE INSURED.—In an action on a policy of insurance on the life of one for the benefit of another, the declarations of the insured before or after the insurance are not competent evidence, unless part of the *res gestae*: *Mobile etc. Ins. Co. v. Morris*, 3 Lea, 101; 31 Am. Rep. 631. The admissions of a person whose life is insured, as to his health, made after a policy has been procured on his life by his creditor, are not admissible in evidence in an action on such policy brought by such creditor:

Rawls v. American etc. Ins. Co., 27 N. Y. 282; 84 Am. Dec. 280, and note. See, also, **Swift v. Massachusetts etc. Ins. Co.**, 68 N. Y. 186; 20 Am. Rep. 522; and the extended note to **Continental etc. Ins. Co. v. Yung**, 3 Am. St. Rep. 636.

INSURANCE, LIFE—CHANGE OF BENEFICIARY.—A change in beneficiaries cannot be made except by a substantial compliance with the regulations of the society: **Jory v. Supreme Council**, 105 Cal. 20; 45 Am. St. Rep. 17; **McLaughlin v. McLaughlin**, 104 Cal. 171; 43 Am. St. Rep. 83, and note. A change of beneficiary cannot be made by the will of a member when the by-laws of the association point out a mode in which such changes can be made, and that mode was not adopted: **McCarthy v. Supreme Lodge**, 153 Mass. 314; 25 Am. St. Rep. 637. The beneficiary named in an insurance certificate issued by a benefit society may be changed by the insured when the power to make the change is conferred by the charter and by-laws, and is also recognized by the contract of insurance: **Rollins v. McHatton**, 16 Cal. 203; 25 Am. St. Rep. 260, and note. See, also, the extended note to **Bankers' etc. Assn. v. Stapp**, 19 Am. St. Rep. 790.

CASTRO v. GEIL.

[110 CALIFORNIA, 292.]

PLEADING FRAUD—STATUTE OF LIMITATIONS.—One seeking relief on the ground of fraud occurring more than three years prior to the filing of his complaint must allege that he did not discover such fraud until within three years before such filing.

THE DEED OF AN INSANE PERSON not under guardianship and whose incapacity has not been judicially determined is not void, but voidable merely.

STATUTE OF LIMITATIONS.—DISABILITIES occurring after the accruing of a cause of action do not stop the running of the statute of limitations.

A. Craig, W. H. Webb, and J. A. Johnson, for the appellant.

S. F. Geil and John J. Wyatt, for the respondents.

²⁹³ **HAYNES, C.** This action was brought by the plaintiff to quiet his title to a lot in the town of Monterey.

²⁹⁴ On December 14, 1882, Maria Antonia Pico de Castro, the mother of plaintiff, executed a deed purporting to convey said property to the plaintiff in fee simple. The deed was duly acknowledged, and two days thereafter was recorded. Said Maria Antonia Pico de Castro died December 12, 1883, intestate. The defendants, claiming as heirs at law of said intestate, answered the complaint, and, at the same time, filed a cross-complaint alleging "that at the time said Maria Antonia Pico de Castro signed said deed she was, from disease, old age, ignorance, weakness of mind and body, and from the undue influence and control exercised over her by said Juan B. Castro, mentally incompetent to

manage her property, or of transacting any business whatever, and was then and there incapable to comprehend or understand, and in fact did not comprehend or understand, the character, nature, or effect of said transaction," and that she was then and for a long time prior thereto had been, of unsound mind. Defendants further alleged that said Maria Antonia Pico de Castro died intestate on December 12, 1883, leaving surviving her, as next of kin and her only heirs entitled to inherit the premises described in the complaint, the plaintiff and the defendants; that as between the parties to the action the plaintiff was entitled to an undivided thirty-sixtieths thereof, and the several defendants, in different proportions therein stated, the remainder thereof; and prayed that said deed be set aside and canceled, and that the parties to this action be declared to be the owners in fee of said premises in the proportions above set forth, and that the plaintiff be required to convey to the defendants their said interest.

The plaintiff demurred to said cross-complaint upon the grounds: 1. That said cross-complaint does not state facts sufficient to constitute a cause of action; and 2. That the cause of action therein stated is barred by the provision of subdivision 4 of section 338 of the Code of Civil Procedure. This demurrer was overruled, and plaintiff answered the cross-complaint, putting in issue ²⁹⁵ all the material allegations thereof. The cause was tried upon the cross-complaint and the answer thereto, and findings and judgment were in favor of defendants, and this appeal is by the plaintiff from said judgment and an order denying his motion for a new trial. The demurrer should have been sustained.

Section 338 of the Code of Civil Procedure limits the time within which the actions there enumerated shall be commenced to three years. Subdivision 4 of said section is as follows: "4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

In *People v. Blankenship*, 52 Cal. 619, it was held that: "When the acts constituting the fraud occurred more than three years before the commencement of the action the plaintiff must allege the discovery thereof within three years in order to avoid the bar of the statute." That was an action to set aside a deed on the ground of fraud, and it was held the demurrer should have been sustained: See, also, *People v. Noyo Lumber Co.*, 99 Cal. 459, 460; *Boyd v. Blankman*, 29 Cal. 19; 87 Am. Dec. 146.

The cross-complaint alleges that the deed from Maria Antonia Pico de Castro to appellant was made on December 14, 1882, and that she died December 12, 1883. This cross-complaint was filed April 5, 1893, or more than ten years after the execution of the deed, and it contains no averment as to the date at which the alleged fraud and undue influence of appellant was discovered. It is contended by respondents, however, that it is alleged that at the time said deed was executed and for a long time prior thereto, said grantor had been of unsound mind, and that therefore the deed was void "without regard to any fraud or undue influence"—meaning thereby that the deed was wholly inoperative, and did not convey to or vest in appellant any title or seisin.

"The deed of a person non compos mentis, who is not ²⁹⁶ under guardianship, transfers a seisin and is merely voidable": Devlin on Deeds, sec. 73, and cases cited in note 4. To the same effect are the provisions of our Civil Code, section 38: "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family."

"Sec. 39. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code"; and section 40 provides: "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, or waive any right, until his restoration to capacity." In *More v. Calkins*, 85 Cal. 177, 190, it was said: "I think the demurrer to the second cause of action attempted to be stated in the complaint, based upon sections 38 and 39 of the Civil Code, was properly sustained. That A. S. More was 'entirely without understanding' is not directly or indirectly, definitely or indefinitely, stated in the complaint, and therefore the instrument executed by him was not void."

This language applies with equal force and propriety to the case before us. It is, therefore, conclusively settled that the deed in question vested the title in appellant, and that it could not be divested otherwise than by judicial action, or the voluntary conveyance of the grantee; and if by judicial action, that the complaint must allege facts which show upon the face of it that the action is not barred by the statute of limitations.

The doctrine of laches as applied in equity, need not be considered, as the statute of limitations here invoked applies to

equity cases: *Boyd v. Blankman*, 29 Cal. 19; 87 Am. Dec. 146; *Broderick Will case*, 21 Wall. 503, 520.

Respondents also contend that some of them are minors, and that they are not affected by the statute of ²⁹⁷ limitations. But the cross-complaint shows that these minors were not heirs of appellant's grantor when the deed was made, their parents, through whom they claim, being then, and for years afterward, in life; and subsequent disabilities do not stop the running of the statute: *Alvarado v. Nordholt*, 95 Cal. 116; *McLeran v. Benton*, 73 Cal. 329; 2 Am. St. Rep. 814.

It follows that the judgment and order appealed from should be reversed, with directions to sustain said demurrer, and with leave to all parties to amend their pleadings if they shall be so advised.

Searles, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with directions to the court to sustain said demurrer, with leave to all parties to amend their pleadings as they may be advised.

McFarland, J., Temple, J., Henshaw, J.

INSANE PERSONS—DEEDS OF.—The deed of a person non compos mentis is voidable, unless such person has a guardian, and, if so, the deed is void: *Walt v. Maxwell*, 5 Pick. 217; 16 Am. Dec. 391. The deed of a lunatic not under guardianship is not void, and cannot be avoided as against an innocent purchaser for value, in good faith, and without knowledge of the grantor's incapacity: *Odom v. Riddick*, 104 N. C. 515; 17 Am. St. Rep. 686, and note. But at common law the deed of a lunatic was void: *Estate of De Silver*, 5 Rawle, 111; 28 Am. Dec. 645.

LIMITATIONS OF ACTIONS—DISABILITIES.—When the statute of limitations has once commenced to run, no subsequent disabilities can check or impede it: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334, and note at page 342 in which the cases are collected: *Kistler v. Hereth*, 75 Ind. 177; 39 Am. Rep. 131, and note.

FRAUD—LIMITATIONS OF ACTIONS.—In cases of fraud, the bar of the statute of limitations begins to run only from the date of the discovery of the fraud: *Connecticut etc. Ins. Co. v. Smith*, 117 Mo. 261; 38 Am. St. Rep. 656, and note with the cases collected.

BUCKLEY v. GRAY.

[110 CALIFORNIA, 339.]

ATTORNEY, NONE BUT CLIENT CAN RECOVER FOR NEGLIGENCE OF.—A son cannot recover of an attorney damages suffered by him through the negligence of the attorney in the preparation of a will of the mother of the son, the employment being by the mother, not by the son.

NEGLIGENCE, THIRD PERSON CANNOT RECOVER FOR.—For an injury, however gross, there can be no recovery unless there exists between the person inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter.

CONTRACT, ACTION UPON BY THIRD PERSON.—The section of the Civil Code of California declaring that a contract made by one person for the benefit of a third, may be enforced by the latter, does not entitle the devisee under a will to maintain an action against the attorney of a testator, on the ground that the latter, acting under the directions of the testator to draft a will in the plaintiff's favor, was guilty of negligence and carelessness in the preparation of such will, by reason of which the testator's intention was not properly expressed, to the injury of the plaintiff.

A CONTRACT BETWEEN TWO PERSONS cannot be held to be for the benefit of a third from the mere fact that its breach, or negligence in discharging the duties undertaken by it, has resulted in injury to another.

Blake, Williams & Harrison, for the appellant.

Haven & Haven, for the respondent.

³⁴¹ **VAN FLEET, J.** Action to recover for negligence of attorney in drafting and executing a will.

The court below sustained a demurrer to the complaint, and plaintiff failing to amend, judgment was entered against him, from which he appeals.

The complaint alleges, in substance, that on October 5, 1883, defendant, an attorney at law, was employed by Mrs. C. M. A. Buckley, the mother of plaintiff, to draw her will, which she desired and directed to be so drawn as to leave all the residue of her estate (after certain specific legacies), to her two sons, then living, the plaintiff and one John P. Buckley, to the exclusion of the children of a deceased son of the testatrix; that in pursuance of such employment, defendant on said day drew a will for said testatrix, and superintended and directed the execution thereof; that in the preparation of said will, and in directing the execution thereof, the defendant was guilty of gross carelessness and negligence in the performance of his professional duties, in this, that said will was so drawn as not to legally express the desires ³⁴² or direction of

the testatrix as to the execution of said grandchildren, but in such manner that the latter were permitted under the will to take of her estate; and that, in directing the execution of said will, this plaintiff, although named in said will as one of the devisees thereunder, was caused by the defendant to become one of the subscribing witnesses thereto, thereby rendering the provisions of said will as to the plaintiff void.

It is further alleged that said John P. Buckley died before the testatrix; that thereafter, in May, 1891, said testatrix died without having revoked or altered said will; that the will was admitted to probate, and the estate of said testatrix duly administered, and that under the decree of distribution said grandchildren received one-half of said estate, amounting to eighty-five thousand dollars, in which amount plaintiff alleges himself damaged, and for which he asks judgment against defendant.

We think the demurrer was properly sustained. In our judgment, the complaint clearly fails to state a cause of action against defendant in favor of the plaintiff. It is to be observed that the action is not by the client, but by a third party, her son. It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone—that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act to the injury of another is liable therefor, without reference to any question of privity between himself and the wronged one. Where, however, neither of these elements enter into the transaction, the rule is ³⁴³ universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter: 2 Shearman and Redfield on Negligence, secs. 562, 574; Savings Bank v. Ward, 100 U. S. 195, and cases therein cited; Roddy v. Missouri Pac. Ry. Co., 104 Mo. 234; 24 Am. St. Rep. 333, and cases cited.

In Savings Bank v. Ward, 100 U. S. 195, the general rule above adverted to is exhaustively discussed, and its limitations

stated by Mr. Justice Clifford for the court. That was a case where a third party sought to maintain an action against the attorney for damages resulting to him from relying upon the correctness of a defective certificate of title to a piece of real estate furnished by the attorney to a client, upon the faith of which the plaintiff had loaned money on the property. In holding that the plaintiff could not maintain the action, it is there said: "Beyond all doubt the general rule is, that the obligation of the attorney is to his client, and not to a third party, and, unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained: Shearman and Redfield on Negligence, sec. 215. Conclusive support to that rule is found in several cases of high authority: *Fish v. Kelly*, 17 Com. B., N. S., 194." And after commenting upon the case of *Fish v. Kelly*, 17 Com. B., N. S., 194, and the case of *Robertson v. Fleming*, 4 Macq. 167, 209, from the latter of which cases Lord Wensleydale is quoted as saying that "he only who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms," the learned justice proceeds: "Analogous cases, involving the same principle, are quite numerous, a few of which only will be noticed. They show to a demonstration that it is ³⁴⁴ not everyone who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says Beasley, C. J., is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect: *Kahl v. Love*, 37 N. J. L. 5, 8. . . . Cases where fraud and collusion are alleged and proved constitute exceptions to that rule, and Parke, B., very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule: *Longmeid v. Holliday*, 6 Ex. 761-767. Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged

in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing. These cases, say the court in that opinion, occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made; and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party even if the father or friend of the patient contracted with the wrongdoer."

In *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333, it is said: "The right of a third party to maintain an action for injuries resulting from a breach of contract between two contracting parties has been denied by the overwhelming weight of authority of the state and federal courts of this country, and the courts of England. To hold ³⁴⁵ that such actions could be maintained would not only lead to endless complications in following out cause and effect, but would restrict and embarrass the right to make contracts, by burdening them with obligations and liabilities to others, which parties would not voluntarily assume"; Citing *Winterbottom v. Wright*, 10 Mees. & W. 109, and a large number of other cases. "The rule is put upon two grounds, either of which is unquestionably sound. One ground is given by the court in the opinion in *Winterbottom v. Wright*, 10 Mees. & W. 109, as follows: 'If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty.' The other ground is thus stated in the New Jersey case above cited: 'The object of parties in inserting in their contracts specific undertakings, with respect to the work to be done, is to create an obligation inter sese. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts. Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them.'"

No authority has been brought to our notice contravening the rule as stated in the foregoing citations. Some, which at first

glance might be so taken, will be found upon analysis to fall within one or the other of the exceptions noted, and not to infringe upon the general doctrine. Within such class fall the cases relied upon by plaintiff to support his general right to maintain the action. This case comes strictly within the general doctrine as above stated. No fact is alleged bringing it within any of the exceptions thereto. It is ³⁴⁶ not alleged that defendant did the act charged maliciously, or through any evil intent, or with any fraudulent purpose, or that he did it in any affirmative sense. The complaint proceeds solely upon the theory that it was through negligence arising either from ignorance or carelessness, or both; and this, although it may be conceded that the complaint discloses an instance of the grossest ignorance on the one hand, or unpardonable carelessness on the other, and shows very grievous injury to plaintiff as a result, does not, within the principles above announced, make a case entitling the plaintiff to maintain the action.

It is claimed, however, that the action can be maintained under the rule expressed in section 1559 of our Civil Code, that a contract made by one person with another for the benefit of a third person may be enforced by the latter, the argument being that the employment of defendant by plaintiff's mother to draw her will was clearly for plaintiff's benefit, inasmuch as the latter was one of the objects of her bounty, as expressed in her will; and a number of cases are cited which are supposed to bring the case within that rule. But in our judgment that provision has no application to this case. It is intended to apply to instances where the contract is made expressly for the benefit of the third person, not where the third person is or may be merely incidentally or remotely benefited as a result of such contract. Such is the language of the code, and such will be found to be the application of the doctrine in all the cases cited by counsel, or which have come to our attention. The terms of section 1559 are: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." This rule, we are told by Mr. Pomeroy (Pomeroy on Remedies and Remedial Rights, sec. 139), was originally adopted prior to the reformed procedure, being based partly upon considerations of convenience and partly upon a liberal construction of the nature of the contract, and the purpose of which was to avoid circuity of action, and to ³⁴⁷ enable the real party in interest to sue. That author proceeds to give us illustrations of its application, and each instance given is a case where the

contract was in express terms made for the benefit of the third party, and by reason of which the latter became the real party in interest. No such application of the doctrine as is here contended for is even remotely hinted at. The contract between the plaintiff's mother and the defendant, which was the subject of the breach, cannot be said in any legal sense to have been expressly made for plaintiff's benefit. It was a contract for employment of defendant's services as an attorney to draft the will of Mrs. Buckley, the immediate purpose of which was for the benefit of the latter, to enable her to make disposition of her estate in accordance with her desire. Remotely, it is true, she intended plaintiff to be benefited as a result of such contract, by providing for him in her will. Such provision, however, could create no vested right in plaintiff until the death of the testatrix. Until that event the will remained purely ambulatory, and the provision for plaintiff could be at any time changed or withdrawn. It therefore created a mere possibility in plaintiff—not a right which made him in law a privy to the contract. To hold that by reason of the provision for plaintiff in the will the contract is to be considered one made expressly for his benefit is to confound the terms of the will with those of the contract. The latter alone was the subject of the breach, and by defendant's negligence in carrying out that contract the testatrix alone suffered legal injury. Although the ultimate consequential injury to plaintiff would appear to have been great, it was, so far as defendant is concerned, *damnum absque injuria*, against which the courts are powerless to relieve. In this view, it is not material to notice the other objections made to the complaint. The demurrer having been properly sustained, it follows that the judgment should be affirmed.

It is so ordered.

Garoutte, J., and Harrison, J., concurred.

ATTORNEY AND CLIENT.—The right of third person to recover for the negligence of an attorney, whereby he is injured, is discussed in the extended note to *Peabody Building etc. Assn. v. Houseman*, 38 Am. Rep. 760.

NEGLIGENCE—WHO MAY SUE FOR.—A plaintiff seeking to recover for injuries received by him from the negligence of another, must show that the latter committed a breach of some duty owing to the plaintiff or imposed for his benefit: *Woolwine v. Chesapeake etc. Ry. Co.*, 36 W. Va. 329; 32 Am. St. Rep. 859, and note; *Williams v. Chicago etc. R. R. Co.* 135 Ill. 491; 25 Am. St. Rep. 397, and note. See, also, the extended notes to *Peabody Building, etc. Assn.*, 38 Am. Rep. 760-766, and *Devlin v. Smith*, 42 Am. Rep. 315.

CONTRACTS—WHO MAY SUE THEREON.—A person for whose benefit an express promise is made in a valid contract between others, may maintain an action thereon in his own name. The contract must have been made for his benefit as its object, and he must be intended to be benefited thereby: *Howsmon v. Trenton Water Co.*, 119 Mo. 304; 41 Am. St. Rep. 654, and note. This subject is thoroughly discussed in the extended note to *Linneman v. Morosa*, 89 Am. St. Rep. 531-535.

CAVALLARO v. TEXAS & PACIFIC RAILWAY CO.

[119 CALIFORNIA, 348.]

A CARRIER ACCEPTING FOR CARRIAGE GOODS DIRECTED TO A DESTINATION BEYOND its own route assumes, in the absence of an express contract upon the subject, the obligation to transport them to the place to which they are directed.

CARRIERS CONNECTING.—Where property delivered to a carrier, consigned to a place beyond its route, is, at the end of such route, received by another carrier for transportation to the place of destination, it becomes answerable to the owner for any negligence or misfeasance in completing the carriage, whether there is an express contract or not.

CARRIERS.—THE DUTY TO DELIVER GOODS RECEIVED BY A CARRIER for transportation is imposed by law as soon as he accepts them, and whether expressed or not, becomes a part of the contract.

A CARRIER DELIVERING GOODS TO A WRONG PERSON is not excused by any circumstances of fraud, imposition, or mistake. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods. Delivery to another, whether by innocent mistake or through fraud practiced upon the carrier, is a conversion by him.

CARRIERS.—NOTICE OF THE ARRIVAL OF GOODS at the place of destination given to a person who personated, and falsely and fraudulently represented himself to be, the consignee cannot reduce the liability of the carrier to that of a warehouseman.

THE LAWS OF ANOTHER STATE ARE PRESUMED to be the same as our own, and this presumption extends to its statutory as well as to its common law.

CARRIERS.—DELIVERY OF GOODS TO A PERSON OTHER THAN THE CONSIGNEE is not justified by the fact that such other person had procured and presented to the carrier a duplicate bill of lading, not assigned by either the consignee or the consignor.

JURY TRIAL.—EXCEPTIONS TO INSTRUCTIONS GIVEN BY THE COURT of its own motion are not sufficiently reserved by the statement of counsel made at the time that he saves an exception to each, every, and all instructions given by the court of its own motion. The exceptions ought to point out specifically the portions objected to, in order that the judge may have an opportunity to correct any error he may have inadvertently fallen into. This rule does not apply to instructions prepared and presented by either of the parties.

A CARRIER'S LIABILITY AS SUCH IS NOT TERMINATED by the fact that goods have not been called for, for two or three weeks after their arrival, if the consignee has not had notice of such arrival,

such notice having, in fact, been given to a person who fraudulently personated the consignee.

WAREHOUSE RECEIPTS are negotiable unless they have the words "non-negotiable" printed in red ink across their face, and a transfer in good faith passes title to the goods covered thereby.

A WAREHOUSEMAN DELIVERING GOODS TO ONE NOT ENTITLED THERETO because he presented a duplicate bill of lading therefor, not signed or indorsed by either the consignee or the consignor, is answerable to the owner for any resulting loss.

CARRIERS OR WAREHOUSEMEN—VARIANCE.—A plaintiff suing the defendant as a common carrier may recover against him as a warehouseman, in every proper case.

CARRIERS—PLACE OF DELIVERY.—Goods consigned generally to a designated consignee without stating his office or place of business are deliverable at the station or depot of the carrier, and a delivery of them at the building in which the consignee has an office to a person there fraudulently personating him is not a proper delivery, and cannot relieve the carrier from liability for such goods.

H. V. Morehouse, for the appellant.

William P. Veuve, for the respondent.

³⁵¹ **SEARLS, C.** This is an appeal from a final judgment in favor of plaintiff for twelve hundred and fifty-five dollars and ninety-six cents and costs, and from an order denying a motion of defendant for a new trial.

Defendant is a railroad corporation organized and existing under and by virtue of the laws of the United States, and is a common carrier of freight and passengers from El Paso, in the state of Texas, by the way of Fort Worth, to New Orleans, in the state of Louisiana. Plaintiff is a citizen and resident of the state of California.

On the twenty-fourth day of October, 1894, the plaintiff shipped from Oakland, California, forty barrels of white wine, by the Atlantic & Pacific Railroad Company, and on the twenty-fifth day of October he shipped from San Jose, California, by the same company, forty-one barrels of red wine, all consigned to "V. Lo Secco, New Orleans, La.," for which two shipments plaintiff received from the said Atlantic & Pacific Railroad Company separate duplicate bills of lading in the usual form.

One set of these duplicate bills of lading was forwarded by the plaintiff per registered letters addressed "V. Lo Secco, 29 Hospital street, New Orleans," and United States registered return receipts were in due time returned to him at San Jose, California, signed "V. Lo Secco, J. Lo Secco."

³⁵² The goods were forwarded under some regulations among the several companies, over the Southern Pacific Coast Line to

Mojave; Atlantic & Pacific to Albuquerque, thence to Atchison, Topeka & Santa Fé to Purcell, by Gulf Colorado & Santa Fé to Fort Worth, and thence by the Texas & Pacific, the defendant herein, to New Orleans, Louisiana.

There was evidence touching the proportion of freight received by each of these connecting companies, and as to their traffic association. The goods were received by the defendant at Fort Worth, and shipped thence to New Orleans, where the freight was collected by said defendant and the goods delivered.

There is no dispute as to these facts, and the crucial question is, Were they delivered to the consignee, and, if not, was the defendant guilty of such negligence as renders it liable in damages for the value of the property?

There was testimony tending to establish the following facts: V. Lo Secco, the consignee, was, and for many years had been, a commission merchant in New Orleans, whose principal business was receiving consignments of oranges and other fruit, which he sold on commission, and usually at public auction. He owned the premises at 29 Hospital street, and had his office in the rear of the building. The front part of the building was occupied by D. Lo Secco, a nephew of V. Lo Secco, as a grocery and saloon.

V. Lo Secco was a man of wealth and reputation, say sixty years of age, six feet high, weighing from two hundred to two hundred and fifty pounds, with gray hair. D. Lo Secco was a rather small man, say twenty-five to thirty years of age, with black hair, etc.

V. Lo Secco could not write, and never ordered the wine, or had any communication with plaintiff, but the latter knew the former by reputation, and shipped the goods to him to be sold on commission for account of plaintiff. One consignment reached New Orleans November 9, 1892, and was delivered November 25, 1892. The ~~353~~ other arrived November 4, 1892, and was delivered December 6, 1892.

When the first consignment reached its destination, defendant sent its messenger to 29 Hospital street, to notify the consignee, and, in answer to interrogatories, a man whom the messenger describes, and who was doubtless D. Lo Secco, professed to be such consignee, and in the name of V. Lo Secco signed an acknowledgment of notice of the arrival of the consignment. The same thing was repeated in the same manner upon the arrival of the second consignment.

A man answering to the description of D. Lo Secco, and not answering to the description of V. Lo Secco, called at the office

of defendant with one of the bills of lading November 25th, claimed to be the consignee, paid the freight, receipted for the goods in the name of V. Lo Secco, and took them away.

The same thing was repeated with the other consignment, December 6th, except that the bill of lading was not presented to defendant. There was evidence that the signature "V. Lo Secco" was in the handwriting of D. Lo Secco. D. Lo Secco disappeared from New Orleans soon after this transaction, and has never returned.

The consignee, V. Lo Secco, knew nothing whatever of the shipments to him, never received the bills of lading, or any notice of the shipment, and appears to have had no knowledge whatever of the transaction until after the goods disappeared.

The witnesses for the defense spoke of knowing one V. Lo Secco in connection with the shipment and delivery of the wine, but in every instance, in describing him, they gave a description of D. Lo Secco, and not one applying to V. Lo Secco.

The evidence is clearly to the effect that D. Lo Secco personated the consignee of the goods, V. Lo Secco, received, receipted for, and paid the freight thereon, and then disappeared. The evidence was amply sufficient on the head indicated to warrant the jury in finding a verdict in favor of plaintiff.

³⁵⁴ A number of contentions of appellant, without taking them up seriatim, may be answered in this wise: It is established law of England: 1. That when the carrier accepts for carriage goods directed to a destination beyond its own route, it assumes, by the very act of acceptance, in the absence of any express contract on the subject, the obligation to transport them to the place to which they may be directed. This was first decided in what is known as the "Muschamp case" (*Muschamp v. Lancaster etc. Ry. Co.*, 8 Mees. & W. 421), and has been ever since steadily adhered to. 2. As an apparent corollary of the first proposition, the English courts have also held that, in all cases included therein, the first carrier becomes exclusively responsible for the carriage and safety of the goods to their destination, and, no matter by whom injured or lost, the first carrier alone can be sued by the aggrieved party, and any attempt to hold the subsequent or connecting carrier liable must, notwithstanding the loss may have occurred through its negligence, fail for want of privity of contract between such carrier and the injured party: *Hutchinson on Carriers*, secs. 146, 147.

Upon the first of the foregoing propositions the American courts are divided. The majority of them, however, hold against

the English doctrine, as unjust to the carrier and as unnecessary upon grounds of public policy, and assert the true rule to be that in the absence of any contract, except such as is implied from the acceptance of the goods for carriage, the obligation of the carrier extends only to the end of his route, and a proper delivery there to the next succeeding carrier to further or complete the carriage. And, in order to be bound further, a positive agreement, either express or implied, is necessary. And this is called the American rule: *Hutchinson on Carriers*, sec. 149, and cases cited.

Upon the second proposition, the courts of the United States, both federal and state, are believed to be, with a single exception, a unit in holding that either with or without a contract under which the first carrier becomes ~~ass~~ liable for loss or injury to goods until they reach their destination, the owner may seek redress from any intermediate carrier who is in fault. The exception alluded to is the state of Georgia, and in that state the English rule is now mainly abrogated by statute.

The theory upon which the connecting carrier is held liable for his own default or misfeasance to the owner is based upon the ground that the receiving carrier is the agent of the owner to forward and deliver to the next succeeding or connecting carrier, who in turn becomes the agent of the principal, and not the subagent of the first agent, and hence liable.

Whatever may be the basis of the doctrine, it is one of well-nigh universal application in this country, and, as is said by *Hutchinson on Carriers*, at section 150: "The rule which allows the action against the carrier in fault, as well as against the one who is primarily responsible, certainly commends itself upon grounds of both justice and convenience, and, with the above exception [Georgia], is the universal law of this country."

The complaint in this case avers, among other things, the delivery of the property to defendant as such common carrier, and its receipt upon the agreement aforesaid (that is to say, to carry the same to New Orleans and there deliver it to V. Lo Secco), and its misdelivery, whereby it was lost to plaintiff. If the defendant, as a common carrier, received property consigned to a person in New Orleans to be carried over its road terminating in that city, it became liable to the owner for negligence or misfeasance, in doing so, under its common-law liability, whether there was an express contract or only such agreement as the law implies. In *Ohurch v. Atchinson etc. R. R. Co.*, 1 Okla. 44, relied upon by appellant, there was no allegation in the complaint

that the goods were ever delivered to or received by the defendant.

The last duty required of the common carrier is that of delivery. This is a duty imposed upon him by law; as soon as he accepts the goods, and whether so expressed ³⁵⁶ or not, it becomes a part of his contract. He must not only deliver goods intrusted to him to carry, but becomes also responsible for their proper delivery: Hutchinson on Carriers, sec. 338. The same author, at section 344, says: "No circumstances of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned. . . . If, however, the delivery be made to the wrong person, whether by an innocent mistake or through fraud practiced upon the carrier, such wrongful delivery will be a conversion": *Adams v. Blankenstein*, 2 Cal. 413; 56 Am. Dec. 350.

The contention of appellant, that its liability as a common carrier had ceased before the delivery, and that it became and was at the date of such delivery only liable as a warehouseman, cannot be maintained.

Under section 2120 of our Civil Code, a common carrier may reduce his liability to that of a warehouseman, as to goods which have arrived at the place of consignment, by giving notice to the consignee of the arrival, and, if the place of residence or business of such consignee is not known, the notice may be given by letter dropped in the nearest postoffice.

Appellant sought to serve notice in the present case upon the consignee in person, but, by mistake and through the fraud of D. Lo Secco, the notice was served upon him and not upon V. Lo Secco, the consignee. This was no notice to the consignee, and did not have the effect of changing the liability of the carrier to that of a warehouseman: *Wilson v. California Cent. R. R. Co.*, 94 Cal. 166.

³⁵⁷ If it be claimed that the determination in this case turns upon the law of the state of Louisiana, and not upon that of California, the answer must be: 1. In the absence of proof to the

contrary, the laws of another state will be presumed to be the same as our own, and this presumption extends to statutory as well as to the common law: *Hickman v. Alpaugh*, 21 Cal. 225; *Shumway v. Leakey*, 67 Cal. 460; *Marsters v. Lash*, 61 Cal. 624; *Mortimer v. Marder*, 93 Cal. 172. 2. The rule requiring notice to be given is but a declaration of the law as it existed prior to the statute in a majority of the states and in England: *Wilson v. California Cent. R. R. Co.*, 94 Cal. 166; *Hutchinson on Carriers*, secs. 373, 374, and notes.

This is not a case of the delivery of goods at the residence or place of business of the consignee. The freight was consigned to V. Lo Secco, New Orleans, Louisiana, and hence the station or depot of the defendant was the place of delivery, and the fact that D. Lo Secco, to whom the goods were delivered, had procured and presented a duplicate of the bill of lading to defendant, which was not assigned or indorsed by either the consignor or consignee, was no excuse or justification to defendant for delivering the goods to him without further identification.

"A carrier is exonerated from liability for freight by delivery thereof, in good faith, to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer": Civ. Code, sec. 2131.

This section of the code has no application to the case in hand, because the bill of lading was not made to bearer, and was not indorsed by the recipient to whom it was issued. Numerous questions arise, and some of them difficult ones, in relation to assignments, mortgages, hypothecation, etc., of bills of lading. None of these questions are involved here, as there is no evidence in the record upon which to predicate them, except the mere fact that D. Lo Secco possessed and presented the defendant an unindorsed bill of lading, which did not, and could not under our law, give him ³⁵⁹ any title to the freight therein described: Civ. Code, sec. 2127.

The uncontradicted evidence of the witnesses Leland and Sterne, supplemented by the deposition of Toomey, and by the bills of lading introduced by consent, and the way bills, were sufficient to authorize the jury to conclude that the through bills of lading were authorized by the defendant.

The court, upon its own motion, instructed the jury at considerable length. The only objection or exception to the instructions thus given is as follows: Counsel for defendant said: "We desire, if your honor please, to save an exception to each, every, and all of the instructions given by the court of its own motion."

It is objected, on the part of respondent, that this exception is not sufficiently specific to warrant this court in scrutinizing the instructions given by the court upon its own motion. The current of authority seems to render it imperative that we sustain the objection of respondent, and decline to examine and pass upon the legality of the court's instructions.

The theory of the rulings is, that exceptions to the charge of a court to the jury ought to point out specifically the portions excepted to, and be made at the time of trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in drawing up the charge in the hurry and perplexities of the trial: *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103; *Sill v. Reese*, 47 Cal. 294; *Rider v. Edgar*, 54 Cal. 127; *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Brown v. Kentfield*, 50 Cal. 129; *Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409; *Sukeforth v. Lord*, 87 Cal. 399.

The doctrine of these cases, and of others of like import, have established a rule of practice in this state from which we do not feel at liberty to depart. This rule, of course, has no application to the special instructions asked by the parties and given or refused ³⁵⁹ by the court, concerning which a general exception has always been held sufficient.

There was no error in the refusal of the court to give the instructions asked on behalf of the defendant, numbered from 1 to 7, both inclusive. The first of these instructions involved the proposition that if the two shipments of wine reached New Orleans on the ninth and fifteenth days of November, 1892, respectively, and were not called for or demanded until the twenty-first day of November and the sixth day of December, respectively, then the defendant's liability, if any, was not that of a common carrier, but that of a warehouseman, and that plaintiff could not recover.

The answer to this proposition is two-fold: 1. The evidence showed clearly that V. Lo Secco, the consignee, had no notice whatever, either in fact or such as is provided by statute, of the arrival of the goods, and until notice thereof defendant held the same as a common carrier and subject to its liability as such; 2. Even as a warehouseman, defendant was not authorized to deliver the goods to a stranger who presented a bill of lading not indorsed, and who was not identified in any way as the consignee, or as having any right to the bill of lading, or the goods of which it was a symbol.

Warehouse receipts are negotiable unless they have the word "non-negotiable" printed in red ink across their face, and when negotiable an indorsement of the receipt operates as a valid transfer of the property represented by such receipt: *Stats.* 1877-78, p. 949.

A transfer of a warehouse receipt in good faith, etc., passes the title to the goods covered by the receipt: *Davis v. Russell*, 52 Cal. 611; 28 Am. Rep. 647. There is no difference between a warehouse receipt and a bill of lading in this respect: *Davis v. Russell*, 52 Cal. 611; 28 Am. Rep. 647; *Bishop v. Fulkerth*, 68 Cal. 607; *Civ. Code*, secs. 2127-2131.

The second instruction is to the effect that the defendant, in the absence of other instructions, had a right to deliver the first shipment of wine to the person who presented the bill of lading and surrendered it, and the ~~300~~ third is to the effect that if the same person who delivered the bill of lading presented himself as the true consignee of the second shipment of wine, and in both instances claimed to be the true consignee, and so receipted for the wine, and paid the freightage thereon, and that the bills of lading had been sent by the consignor to V. Lo Secco, and the person who claimed and received the wine lived and carried on business, including the selling of wines at 29 Hospital street, New Orleans, and that defendant notified him there of its arrival, then the jury should find for the defendant.

In the absence of some act or conduct on the part of the consignor, whereby he is estopped, of which there is no evidence, these instructions are not an embodiment of the law, unless an unindorsed bill of lading, in the hands of a stranger thereto, is sufficient evidence of ownership to warrant the delivery by a common carrier to the person so holding such bill of lading. We have hereinbefore stated that such a delivery does not excuse the carrier.

The fifth instruction is covered by what has been said of the third and fourth.

The sixth instruction is covered by the instructions given by the court, and it was not necessary to repeat it.

The seventh instruction goes upon the false theory that the goods were consigned to 29 Hospital street, New Orleans, when they were not in fact so consigned, and then seeks to gauge the duty of the defendant on that hypothesis. This was not proper to be done.

Different considerations frequently arise in cases where goods are consigned to a given number and street, and are there deliv-

ered to a person apparently the person to whom they are consigned, but, in this case, questions of that character are not properly involved.

We are of opinion that the defendant, whether regarded as a common carrier or as a warehouseman, is liable for the misdelivery of the goods in question, and that the plaintiff who had counted upon the liability of ³⁶¹ defendant as a common carrier may, in every proper case, recover against such carrier as a warehouseman: *Hoyt v. Nevada County etc. R. R. Co.*, 68 Cal. 644; *Wilson v. California Cent. R. R. Co.*, 94 Cal. 166.

The judgment and order appealed from should be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

CARRIERS, CONNECTING—LIABILITY.—A railroad company receiving goods consigned to a place beyond the terminus of its own lines, undertakes to convey the same safely to the point of destination, and will be liable for loss of such goods on connecting lines: *Falney v. Georgia R. R.*, 76 Ga. 597; 2 Am. St. Rep. 58, and note. See, also, the note to *Savannah etc. Ry. Co. v. Harris*, 23 Am. St. Rep. 558.

CARRIERS—LIABILITY FOR DELIVERY OF GOODS TO WRONG PERSON.—It is the duty of a railway company, as a common carrier, to deliver the goods to the true owner or his assignee at its peril, and its failure to so do constitutes a conversion for which suit may be maintained without previous demand: *Missouri Pac. Ry. Co. v. Heldenheimer*, 82 Tex. 195; 27 Am. St. Rep. 881, and note. See, also, the extended note to *Weyand v. Atchison etc. Ry. Co.*, 9 Am. St. Rep. 513, 514.

CARRIERS—PLACE OF DELIVERY.—A railway company's liability as a common carrier terminates when the goods are safely stored in its depot: *Railroad v. Kelly*, 91 Tenn. 699; 30 Am. St. Rep. 902, and note; *Gregg v. Illinois Cent. R. R. Co.*, 147 Ill. 550; 37 Am. St. Rep. 238, and note.

CARRIERS.—THE DUTY OF A CONSIGNEE to receive and take goods is as imperative as the duty of the carrier to deliver them. He cannot at his option continue the stringent liability of the carrier, but must act promptly in taking the goods. If he does not, the liability of the carrier as an insurer nevertheless ends: *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350, and note; to the same effect see *Kirk v. Chicago etc. Ry. Co.*, 59 Minn. 161; 50 Am. St. Rep. 397, and *Gregg v. Illinois Cent. R. R. Co.*, 147 Ill. 550; 37 Am. St. Rep. 238. See, also, the note to *Scheu v. Benedict*, 15 Am. St. Rep. 429.

WAREHOUSE RECEIPTS—NEGOTIABILITY OF.—A certificate or receipt issued by a warehouse and storage company is negotiable, and a purchaser thereof in good faith, and without notice of any fact to put him on inquiry, is entitled to receive from the company the property described on payment of lawful charges: *Hanover Nat. Bank v. American Dock etc. Co.*, 148 N. Y. 612; 51 Am. St. Rep. 721,

and note. See, also, the extended note to *Rice v. Cutler*, 84 Am. Dec. 752-754.

EVIDENCE—PRESUMPTION AS TO LAWS OF OTHER STATES.—In the absence of proof, the statutory law of another state is presumed to be the same as this: *Chapman v. Brewer*, 43 Neb. 890; 47 Am. St. Rep. 779, and note; contra, *Kelley v. Kelley*, 161 Mass. 111; 42 Am. St. Rep. 389.

IN RE WALKER.

[110 CALIFORNIA, 387.]

WILLS.—THE OMISSION OF ANY OF THE STATUTORY REQUIREMENTS for the execution of a will is fatal to its operation as such because the right to dispose of property by will is conferred by legislative action, and must be exercised upon the terms prescribed thereby.

WILLS—MISTAKE OF WITNESS IN SIGNING HIS NAME.—If a witness undertaking to attest the execution of a will, and intending to sign his own name as a witness thereto, inadvertently writes, instead of his own name, his own initials, followed by the surname of the testator, the will is not properly witnessed, and must be denied probate, if the statute requires that every will must be attested by two witnesses, each of whom must sign his name as a witness at the end of the will.

IN CONSTRUING A STATUTE, the duty of the court is simply to ascertain and declare what is in terms or substance declared therein, not to insert what has been omitted nor to omit what has been inserted.

C. G. Warren and F. C. Lusk, for the appellant.

William H. Schooler and Beardon & White, for the respondent.

³⁸⁹ **HENSHAW, J.** Appeals from the judgment revoking the probate of a will, and from the order denying a motion for a new trial.

The facts disclosed by the evidence without conflict are as follows: The will of Ozius Walker, deceased, was written by C. G. Warren, the attorney at law of the testator, and was executed in the presence of H. C. White and C. G. Warren, who were requested by the testator to attest, as witnesses, its execution. The requirements of the statute were complied with in all respects, saving that the witness C. G. Warren, in signing his name as a witness at the end of the will, inadvertently wrote the ³⁹⁰ name C. G. Walker, thus employing his own initials but the testator's surname.

Upon this showing, the court revoked the probate of the instrument, and the propriety of its action in so doing is the sole question presented upon this appeal.

At the outset of this consideration, it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes. In conferring that right, the legislature has seen fit to prescribe certain exactions and requirements looking to the execution and authentication of the instrument, and a compliance with these requirements becomes necessary to its exercise. As has been said (In re O'Neil, 91 N. Y. 520, 521): "While the primary rule governing the interpretation of wills when admitted to probate recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case, courts do not consider the intention of the testator, but that of the legislature."

As a prerequisite to the exercise of the testamentary right in this state, the legislature has prescribed for the execution and authentication of wills such as this the following requirements: 1. It must be subscribed at the end thereof by the testator himself, or some person in his presence, and by his direction must subscribe his name thereto; 2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority; 3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and 4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence: Civ. Code, sec. 1276.

It is not for courts to say that these requirements, or ³⁹¹ any of them, are mere formalities which may be waived without impairing the status of the instrument. It is not for courts to say that a mode of execution or authentication, other than that prescribed by law, subserves the same purpose, and is equally efficient to validate the instrument. The legislative mandates are supreme, and there is no right to make testamentary disposition except upon compliance with those mandates.

It may be freely conceded that the question under consideration is of a nature purely technical, but it is to be remembered that the whole subject matter of the execution and authentica-

tion of wills is technical and nothing else; and it must not be forgotten that the technicalities are those which the law-making power has the right to impose and has imposed upon the maker of a will.

It will be noted in the section of the code above quoted that the duty enjoined upon the testator is to subscribe the will, while that imposed upon the attesting witnesses is that each must sign his name as a witness. The difference is neither immaterial nor accidental. A testator may be illiterate, or he may, by reason of paralysis, or other disabling cause, be incapacitated from signing his name, and the law has wisely and liberally provided for the due execution of a will by one so situated. It has required of him that he shall subscribe, and, while the word unquestionably has for one of its significations the signing of a name, it is a verb of comprehensive meaning. Any form or kind of underwriting is a subscription, and, generally, it has been held that any mark or writing by the testator meant by him to be his name, or to take the place of his signature, or to serve for his identification, will answer the requirements of a statute which calls merely for subscription or signing.

The same liberality of construction and interpretation has been put by the courts upon statutes which require the witnesses merely to subscribe or to sign.

³⁹² There are thus numerous cases under such statutes which hold, in effect, that any signing by which alone or by which, aided by parol evidence, the identity of the subscriber may be ascertained, substantially complies with the statute.

The case of the appellant upon this proposition cannot be more strongly stated than in the following extracts from the learned work of Mr. Jarman, discussing the Victorian Wills Act:

"Examining the requirements common to the statute of frauds and the Wills Act in their order, the next condition prescribed for the validity of a will is, that it should be signed, which suggests the inquiry, What amounts to a 'signing' by the testator? It has been decided that a mark is sufficient, and that notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice. And it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark), or that against the mark was written a wrong name": 1 Jarman on Wills, 6th ed., *79.

"The next statutory requisition, which is common to the old and the present law, is that the will be 'attested and subscribed' by the witnesses. A mark has been decided to be a sufficient subscription. . . . The initials of the witnesses also amount to a sufficient subscription, if placed for their signature as attesting the execution. . . . A witness need not sign his own name if the name actually subscribed be intended to represent his name; or a description (without any name) is sufficient if intended to identify him as a witness. . . . In fact, there seems to be no distinction in these respects between the word 'sign' and 'subscribe'; any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness": 1 Jarman on Wills, 6th ed., *85, *86.

²²³ An examination of the cases bearing upon the interpretation of the English statute shows that the text of the learned author is fully supported.

The reasoning by which the conclusions are reached may be thus summarized:

To subscribe is to attest or give consent or evidence knowledge by underwriting, usually (but not necessarily) the name of the subscriber. But the place of the writing is immaterial, since a still more general meaning of the word "subscribe" is to attest by writing, in which definition the locality is wholly disregarded. This is the reasoning of the leading English case of *Roberts v. Phillips*, 4 El. & B. 450.

To sign, in the primary sense of the word, is to make any mark. To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made. And while, by long usage and custom, signature has come generally to mean the name of a person written by himself, and thus to be nearly an exact synonym of autograph, that signification is derivative, and is not inherent in the word itself any more than it is in autograph, which strictly conveys no more than the idea of a specimen of an individual's writing.

Any mark may be a signature, and that species of mark which we call a cross (independent of an accompanying name) was early used as a signature of assent, and indeed was designated signum. While marksmen have become fewer with the spread of education, the mark of the cross is still recognized by statute law as a method of signing.

Therefore, as the Wills Act required only a signing by the testator, and as this requirement of signing only was also found

in the statute of frauds, the courts early decided not to be bound by any narrow definition of signing or signature as meaning the writing of one's name, but to give to the word its broadest possible scope and significance, and thus held that any mark or signature made with the intent to bind the maker (in the ³⁹⁴ case of the statute), or to be a sign (in the case of wills), should be deemed sufficient. As the English courts had still further obliterated from the word "subscription" the idea of place or locality, there was left no measurable distinction between the requirement upon the testator to sign and that upon the witness to subscribe.

In the decisions this broad rule is repeatedly asserted. In *Goods of Susanna Clarke*, 4 Jur., N. S., 243, the will of an illiterate person was executed by her mark, against which was written her maiden name, instead of that properly borne by her in marriage. Says the court: "There is enough to show that the will is really that of the person whose it proposes to be. Her mark at the foot or end of it is a sufficient execution, and what somebody else wrote against the mark cannot vitiate it."

In the *Goods of James Clark*, 2 Curt. 329, the testator had made his mark and requested the vicar to sign for him, which he did with his own name and not that of the deceased. Says the court: "The statute allows a will to be signed for the testator by another person, and does not say that the signature must be in the testator's name. Here this gentleman, at the testator's request, signed the will for him, not in the testator's name, but using his own name. I incline to think this is a sufficient compliance with the act."

In *Goods of Bryce*, 2 Curt. 325, the testatrix signed her will by a mark, her name nowhere appearing. Says the court: "Although the name of the testatrix does not appear upon the face of the instrument, the affidavit sufficiently accounts for the manner in which the will was signed. The statute does not say that the name of the testator shall appear at the foot of the will. The paper is identified as being the will of the deceased. . . . I am of opinion that the statute is sufficiently complied with."

The foregoing cases deal with the "signing" by the testator. Coming to the subscribing by the witness, it is said in *Goods of Eynon*, 3 L. R. Pro. & D. 92: "No particular form of attestation is necessary, but the act ³⁹⁵ done by the witness must be intended by him to evidence his attestation of the will. I must find that I can draw an inference from what occurred that the witness made a mark of some kind, with the intention to evidence his attestation."

In *Goods of Christian*, 2 Rob. Ecc. 110, it is said: "The attesting witnesses to the so-called codicil have affixed their initials only; however, I have no doubt in the matter, although I believe this is the first instance under the act of the witnesses so signing. I am not aware that the witnesses can be required to sign their names. I am of opinion that there is a sufficient subscription on their parts, and, therefore, I decree probate as prayed."

In *Goods of Oliver*, 2 Spinks, 57, it is said: "The statute says the witnesses 'shall attest and subscribe the will.' It does not say shall write their own names, so that a mark is held to be a good subscription."

These cases are quoted that there may be no room for misunderstanding of the English decisions or of the text of the book writers. But, as the matter is wholly statutory, they have no value as authority, unless there be an identity in the statutory requirements of this state and England. But there is no such identity. Indeed, our statute seems to have been drawn with the express intent to foreclose and shut out the interpretation given to the English law. Thus, the English statute requires subscription. That word had been judicially declared not to have reference to the place of writing. Our statute says that the will shall be subscribed at the end thereof, thus expressly making locality of writing an element of the subscription.

The English statute required a signing. As interpreted by the court, this did not necessitate the signing of the name. By express language our statute commands that a witness shall sign his name. In England, therefore, a witness may sign in any one of a multitude of ways; by our law his signing is limited to the expression of his name.

The case of *Meehan v. Rourke*, 2 Bradf. 385, is in no ³⁸⁸ way opposed to, but rather is in full accord with, this view. The statute of New York, from which ours was taken, likewise requires that the witnesses should sign their names. *Eliza Green*, one of the witnesses to the will under consideration, was unable to write. Her name was correctly written by the doctor, and she then made her mark across it, and acknowledged it to be her mark and signature. The court said that before the revised statutes a witness might attest a will by a mark; as in this state it may be done under section 14 of the Civil Code. The opinion declares: "Our statute requires the witness to 'sign his name.' . . . Where another person writes the name of the witness and then the witness acknowledges the signature

—puts his mark to it, his signum—he literally signs; and what he signs is his name, i. e., he signs his name, while a mark alone (the learned judge significantly adds) would not be sufficient.” Yet a mark alone is held sufficient under the English statute.

I conclude, therefor, that as our law has seen fit to prescribe that the testator shall subscribe his will at the end thereof, so it has seen fit to require that attesting witnesses shall sign and shall sign only in one way, that is to say, by affixing their names. In construing a statute, the duty of the court is simply to ascertain and declare what is in terms or in substance declared therein, not to insert what has been omitted, or to omit what has been inserted: Code Civ. Proc., sec. 1858. It cannot be said that some other mode of subscription will answer the purpose, or subserve the statutory requirement, when in truth it does not. As well could it be said that the requirement of two attesting witnesses is not mandatory, and that this will, having been duly attested by one witness, should be admitted to probate.

That the overthrowing of any will works a hardship upon the devisees and legatees is obvious; but the law is no more tender of their claims than it is of the rights of the natural heirs. When a will is proved every exertion ³⁹⁷ of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with.

The judgment and order appealed from are affirmed.

Harrison, J., Temple, J., and Beatty, C. J., concurred.

Judges McFarland, Garoutte, and Van Fleet each filed a separate dissenting opinion, conceding that the right to dispose of property by will was statutory, but claiming that it had, by long practice and approval in all civilized nations, become an almost inalienable right. Each contended, however, that the legislature never intended by the expression that a witness shall sign his name at the end of a will, to preclude a man from being a witness who was unable to sign his name, and who must therefore attest by his mark, nor did it intend to reach a case like that before the court, of a mistake of a witness in writing his name, but that all the statute contemplated was that a witness should sign a name with an intention thereby to attest the will as a witness in the presence and at the request of the testator; and it was suggested that if the opinion of the majority of the court was correct, the will of a testator might be defeated without his knowledge by a person, whom he called as a witness, intentionally or corruptly misrepresenting his own name, and signing a name assumed for that occasion only, and for the purpose of thwarting the intention of the testator.

WILLS—REQUIREMENTS.—Testamentary paper which does not meet the requirements of the Pennsylvania wills act of 1833 is not a will: *Wall v. Wall*, 123 Pa. St. 545; 10 Am. St. Rep. 549. Statutory requisites in executing a will must be substantially complied with to render it valid: *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85; 40 Am. Dec. 225.

WILLS—SIGNING BY ATTESTING WITNESS.—A witness may attest a will by his mark where the testator signs his name: *Garrett v. Heflin*, 98 Ala. 615; 39 Am. St. Rep. 89, and note. A subscribing witness to a will devising real estate must make some kind of a mark upon the instrument in order to make it his signature thereto: *McFarland v. Bush*, 94 Tenn. 538; 45 Am. St. Rep. 760. See, also, the note to *Padgett v. Lawrence*, 40 Am. Dec. 232.

STATUTES MUST BE CONSTRUED according to their plain and obvious meaning: *Lippitt v. Huston*, 8 R. I. 415; 94 Am. Dec. 115, and note.

CURTISS v. BACHMAN.

[110 CALIFORNIA, 433.]

INJUNCTION BONDS, ELEMENTS OF DAMAGES.—If the condition of an undertaking is that if an injunction shall issue and remain in force, plaintiff will pay the defendants such damages as they may by reason of such injunction sustain, if the court shall decide the plaintiff was not entitled thereto, moneys paid to defendants' attorneys, and costs incurred in the action, and loss of time or injury to business, are not elements of damages within the terms of the undertaking, unless such damages were caused solely by reason of the injunction.

INJUNCTION.—ATTORNEY'S FEES INCURRED by the defendant by reason of a preliminary injunction are part of the damages for which he has a right to indemnity, but only such fees as may be incurred after the injunction has been issued and prior to the determination of the action can be considered as within the rule. If defendant, instead of attempting to remove the preliminary injunction, seeks rather to prevent the issuing of a permanent injunction, or directs his efforts to defeating the action of the plaintiff, the expense of counsel fees incurred is an incident of the suit, and is not recoverable as damages sustained by reason of the injunction.

INJUNCTION.—ATTORNEY'S FEES for services rendered in preparing for the trial or defense of a suit, and in resisting an order to show cause why the restraining order should not continue in force until the determination of the suit, and in prosecuting an unsuccessful motion to dissolve the injunction, are not recoverable under an undertaking to pay the damages which the defendant may sustain by reason of an injunction.

Charles F. Hanlon, for the appellant.

W. B. Sharp, for the respondents.

⁴³³ **HARRISON, J.** In an action brought in the superior court of San Francisco against the appellant by one Nettie Gilman, a preliminary injunction was issued by the court, and the

respondents herein were the sureties in an undertaking given on her behalf upon the issuing of said injunction. The condition of the undertaking is: "In case said injunction shall issue and remain in full force and effect, the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of five thousand dollars, as such parties may, by reason of the said injunction, sustain, if said superior court finally decide that the said plaintiff was not entitled ⁴³⁶ thereto." The present action was brought to recover from the respondents the damage sustained by reason of the issuance of the said injunction. Upon a former appeal in this cause (Curtiss v. Bachman, 84 Cal. 216) a judgment that had been rendered in favor of the plaintiff was reversed, with directions to sustain the defendant's demurrer to the complaint. Upon the going down of the remittitur, the plaintiff amended his complaint, and the cause was tried by the court without a jury, who found that the plaintiff had not sustained any damage by reason of the issuance or continuance of the injunction, and rendered judgment for the defendants. The plaintiff moved for a new trial, upon the ground that this finding was not sustained by the evidence, and, upon the denial of his motion, has appealed therefrom, and also from the judgment.

The action of *Gilman v. Curtis*, 66 Cal. 116, was for the purpose of determining the ownership of a certain policy of life insurance, and was commenced March 26, 1880. On the next day, the court granted a restraining order by which the plaintiff herein was enjoined from collecting the money due upon the policy, and from transferring or delivering the policy, or the money due thereon, to any other person, and was directed to show cause on a succeeding day why the order should not be continued in full force until the final judgment and decree in the case. An undertaking in the sum of five hundred dollars was executed by the respondents herein upon the issuance of the said restraining order. On April 16th this order to show cause came on for hearing, and the court on that day ordered that the said restraining order be continued in full force and effect until the termination of the suit. Subsequently, the defendant, appellant herein, moved to dissolve the injunction, and on July 30th his motion was denied. On the same day, the court ordered that the plaintiff file a bond in the sum of five thousand dollars, and thereupon the undertaking sued on herein was executed by the sureties to the original undertaking. The cause was tried in April, 1881, and ⁴³⁷ judgment rendered in favor of the plaintiff. That judgment was afterward reversed by this

court (*Gilman v. Curtis*, 66 Cal. 116), and upon a new trial a judgment was rendered by the court dismissing the action.

The damages for which the plaintiff seeks to recover herein, and of which he gave evidence at the trial, consisted of moneys which he had paid to his attorneys, the costs incurred in the action of *Gilman v. Curtis*, 66 Cal. 116, and the loss of time and injury to his business necessitated by the suit. We are of the opinion, however, that neither of these elements of damage is within the terms of the obligation of the defendants, and that the plaintiff failed to establish any right of action against them. The liability of the defendants is measured by the terms of their contract, and in the present action is limited to the damages that the plaintiff might sustain "by reason of the said injunction." Whatever expenses he was subjected to by reason of the suit, as distinguished from those sustained by reason of the injunction, are not damages within this contract of the defendants; and, as it rested upon the plaintiff to establish a cause of action against them, it was necessary for him to show, not only that he had sustained damage, but that the damage which he had sustained was caused solely by reason of the injunction.

Counsel fees incurred by a defendant by reason of a preliminary injunction are recognized as a part of the damages for which he has a right to indemnity, and are within the undertaking which the plaintiff is required to give as a condition of procuring the injunction; but only such counsel fees as may be incurred after the injunction has been issued, and prior to the determination of the action, can be considered as within the rule. If the defendant, instead of attempting to remove the temporary injunction, seeks rather to prevent the issuance of a permanent injunction, or directs his efforts to defeating the action of the plaintiff, the expense of counsel fees thus incurred is an incident of the suit, and is not recoverable as damages sustained by reason ⁴³⁸ of the injunction. "The allowance of counsel fees in suits on injunction bonds is exceptional, and should not be carried beyond the point to which former decisions have taken it": *Mitchell v. Hawley*, 79 Cal. 301; *San Diego Water Co. v. Steamship Co.*, 101 Cal. 216. Counsel fees rendered in resisting a motion for a preliminary injunction are not within the terms of the undertaking, since they are not expenses made necessary "by reason of the injunction" (*Sweet v. Mowry*, 71 Hun, 381; *Whiteside v. Noyac Cottage Assn.*, 84 Hun, 555), but are expenses incurred in the action as much as are counsel fees rendered in attempting to prevent the issuance of a permanent in-

junction (*Thurston v. Haskell*, 81 Me. 303); and an unsuccessful motion to dissolve an injunction does not authorize a recovery for the expense of counsel fees in making the motion: *Langdon v. Gray*, 22 Hun, 511; *Randall v. Carpenter*, 88 N. Y. 293. An exception to this rule is recognized when the court itself suspends its decision upon the motion until the hearing of the cause: *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282.

The counsel fees of which evidence was offered at the trial herein, other than those rendered in preparation for the trial or in defense of the action, were those rendered for the plaintiff upon the order to show cause why the restraining order should not be continued until the termination of the suit, and those rendered upon a subsequent unsuccessful motion on his part to dissolve the injunction. It is well settled that the services of counsel rendered in the trial of the cause are not a portion of the damage sustained by reason of the injunction: *Bustamente v. Stewart*, 55 Cal. 115. When the plaintiff, at the commencement of the action, applied for the injunction, the court deemed it proper that the defendant should be heard before granting the writ, and made an order to that effect. Upon this application, the judge was authorized to restrain the defendant "in the mean time": Code Civ. Proc., sec. 530. The provision in the order restraining the defendant "until the ⁴³⁹ further order of the court" had no other meaning than "in the mean time," or until the decision upon the order to show cause: *Sweet v. Mowry*, 71 Hun, 318. When this order to show cause was made upon the defendant, it was at his option to appear upon the day fixed for the hearing and resist the motion at that time, or to allow an injunction pendente lite to be granted, and seek at the trial to defeat a recovery by the plaintiff, and prevent a permanent injunction. The services of counsel that were employed by him to resist the motion were rendered by virtue of the order to show cause why the injunction should not be granted, and not by reason of the injunction: *Sweet v. Mowry*, 71 Hun, 318. The restraining order made at the commencement of the action would expire by its own terms at the hearing of this motion, and, although it was then continued until the termination of the suit, the order so continuing it was in fact a new and distinct restraint, and itself constituted the preliminary injunction asked by the plaintiff (*San Diego Water Co. v. Steamship Co.*, 101 Cal. 216), and for which the undertaking sued on was given.

It is not shown by the record upon what grounds the subsequent motion to dissolve the injunction was made, or was de-

nied by the court, but, as the preliminary injunction was granted upon notice to the defendant, and after hearing thereon, the proper course for the defendant to take was to appeal from the order (*Natoma etc. Min. Co. v. Parker*, 16 Cal. 83), and the court in all probability denied the motion upon the ground that the defendant was not authorized to make it. "Costs and counsel fees on a successful motion to dissolve an injunction are considered the natural consequences of its existence, and are properly damages, but there is no reason why the party obtaining the injunction should pay the expenses of ill-directed experiments to get rid of it. To allow such a charge would be a premium for the employment of unskillful counsel": *Childs v. Lyons*, 3 Robt. 704. Especially is this rule applicable if the services were rendered upon a motion unauthorized ⁴⁴⁰ either in practice or by statute. It does not follow that because the plaintiff failed to sustain his action at the trial the preliminary injunction was not properly issued. It is one of the provisional remedies authorized by the Code of Civil Procedure, and the right of a party to such remedy is the same as is the right to a permanent injunction; but, if he is to be mulcted in damages for every unsuccessful attempt to secure its dissolution, the privilege would be a barren one. If the plaintiff obtains an injunction *ex parte*, and before the hearing of the cause the defendant can secure its dissolution, either by reason of a defect in the original application, or upon a counter showing on his part, he thereby obtains a decision of the court that the plaintiff was not entitled to this provisional remedy, even as a matter of discretion (see *Hicks v. Michael*, 15 Cal. 107); but if, instead of seeking such decision of the court, he prefers to defeat the plaintiff in the action, he waives his right to recover from the sureties any damages that he may sustain by reason of its issuance.

It does not appear that any portion of the expenses contained in the cost bills offered in evidence was incurred except upon the trial of the action; and the costs incurred upon the appeal, and subsequent to the rendition of the judgment in the superior court, are not within the terms of the undertaking: *Lambert v. Haskell*, 80 Cal. 611. The loss of time and injury to the business of the appellant were clearly outside of the undertaking of the sureties.

Certain exceptions to rulings excluding evidence were taken by the appellant, but, as the evidence offered related only to such

damages as were not recoverable from the respondents, the exclusion was proper.

The judgment and order are affirmed.

Garoutte, J., Van Fleet, J., Beatty, C. J., Henshaw, J., and Temple, J., concurred.

McFarland J., dissented.

INJUNCTIONS—DAMAGES—ATTORNEYS' FEES AS ELEMENT OF.—In an action on an attachment or injunction bond to recover for the wrongful suing out of the attachment or injunction, attorneys' fees are not a proper element of damages: *Springfield v. Hirsch*, 94 Tenn. 425; 45 Am. St. Rep. 733. See, also, the extended note to *Winkler v. Walker*, 8 Am. St. Rep. 161.

INJUNCTIONS.—DAMAGES which may be recovered upon the dissolution of an injunction is discussed in the note to *Hubble v. Cole*, 29 Am. St. Rep. 718.

SCHLICKER v. HEMENWAY.

[110 CALIFORNIA, 579.]

PRACTICE—MISJOINDER OF PARTIES.—A complaint stating a cause of action against the defendant personally and also against him as executor or administrator, no joint liability being shown, is demurrable for misjoinder of parties defendant.

EXECUTORS, LIABILITY OF ESTATE FOR MONEYS RECEIVED BY.—If an executor having authority to sell real property at public auction receives a bid for it at a private sale, together with a deposit of money on account of such bid, his action in so doing is entirely unauthorized, and cannot be regarded as in his official capacity. The estate, therefore, cannot be held liable for such deposit, unless it is shown to have been actually made a part of the assets of the estate by being used for its benefit, or accounted for to it.

J. P. Rodgers, for the appellant.

Haskell & Meyer, for the respondent.

580 **TEMPLE, J.** This is an appeal taken from a judgment rendered because defendants declined to answer after their demurrer was overruled.

The action is brought against defendant individually, and as executor of the estate of Greenbury Hinkston, deceased, to recover seven hundred and fifty dollars, received by Hemenway under the following circumstances, as set out in the complaint:

An order of sale was made in the estate, authorizing and directing the executor to sell certain real estate at public auction. The executor negotiated a private sale to plaintiff, and reported

it to the court as a private sale. In the probate court, when the matter of the confirmation came up, plaintiff increased his bid from six ⁵⁸¹ thousand dollars to six thousand eight hundred dollars. The sale was then confirmed to him. At the time of making the bid, he put up, as required, seven hundred and fifty dollars. Plaintiff refused to complete his purchase, and, therefore, the order of confirmation was vacated, and the property resold. The complaint does not show whether it brought more or less than the offer of plaintiff. Plaintiff demanded the return to him of the seven hundred and fifty dollars, and, as the defendant declined, he brought this action.

The complaint was demurred to on various grounds, and, among others, on the ground that there is a misjoinder of parties defendant, in that Hemenway, as an individual, is joined with the representative of the estate of Hinkston, when the complaint not only fails to show a joint or joint and several liability, but shows that both cannot be liable. Also, that there is a misjoinder of causes of action, with specifications very nearly as above. Also, that the complaint is ambiguous, because it cannot be ascertained therefrom whether it is sought to charge Hemenway or the estate. Also, uncertain for the same reason.

The demurrer should have been sustained on all these grounds. The complaint is also specially demurred to on the ground that it does not state a cause of action against Hemenway, and separately that it does not state a cause of action against the representative of the estate. The cause of action is based, generally, upon the proposition that because the return of the sale made by the executor shows that the land was sold at private sale, and not at public sale as directed in the order of sale, the court had no jurisdiction to confirm it, or, at least, that the sale was void on the face of the record. I think this must be conceded.

Then did the executor receive the money in his representative capacity? If he had taken the money to make good a bid which he had a right to receive, it might have been contended with some plausibility that he received it in his representative capacity. But, inasmuch ⁵⁸² as he had no right to demand or to receive the money, because the sale in that mode was void, I think the estate is not liable unless it be further shown that it has been actually made a part of the assets of the estate, through being accounted for to the estate, or actually used for its benefit. Suppose, for instance, the executor had been required to give no bonds and was irresponsible and had embezzled the money, could the plaintiff have sued his successor in

office and compelled the estate to pay it? If so, why? The bid was not authorized by the order of sale. As executor he had no right to receive the money, and it was not received in the discharge of any official duty.

I do not concede that, even had the executor received the money in his official character, the estate would be liable for it; but, waiving that question, I think it evident that here the estate cannot be held.

Judgment reversed, and cause remanded with direction to sustain the demurrer.

McFarland, J., and Henshaw, J., concurred.

Of the Liabilities of the Estates of Decedents upon Contracts, and for Torts of Executors and Administrators.

The Relations of Executors and Administrators to the Estates of their Decedents were very different at common law from what they are under the statutes now prevailing in the greater number of these United States. At common law, the title to the personal property of the decedent vested in his executor or administrator, to hold it in trust for the purpose of settlement of the affairs of the decedent, including the satisfaction of debts due from him. At an early day, whatever remained after such satisfaction became the property of the executor absolutely, he being regarded as entitled to retain it as compensation for his services in the discharge of the duties of his office. At a later day, when the interest of the heirs of the decedent was recognized, and the executor or administrator was under obligation to account to them for the surplus of personal estate remaining in his hands after the satisfying the obligations of the decedent, the legal title was still deemed to be vested in the executor or administrator, who had power by virtue of his office to dispose of the personal estate otherwise than by will: Schouler on Executors and Administrators, secs. 100-204; note to Hubbard v. Ricart, 23 Am. Dec. 200-203; Babcock v. Booth, 2 Hill, 181; 38 Am. Dec. 578; Petrie v. Clark, 11 Serg. & R. 377; 14 Am. Dec. 636, and note; Wheeler v. Wheeler, 9 Cow. 34; Bogert v. Hertell, 4 Hill, 492; Kane v. Paul, 14 Pet. 331; United States v. Walker, 100 U. S. 258. An executor or administrator was, by the common law, as to personal property, a trustee holding the legal title thereto, charged with the duty of appropriating it to the purposes of the trust, and for any misappropriation he was liable to the persons interested, and the person receiving the property, with notice of the title by which it was held, was answerable to the beneficiaries therefor. "The executor, though holding the title to the personal assets, is not absolute owner of them. They are not liable for his debts, nor can he dispose of them by will. He holds them in trust to pay the debts of the deceased, and then to discharge his legacies; and, as in all other cases of trust, he is personally responsible for any breach of duty. Any property thus held, acquired from him by third parties with knowledge of his trust and his disregard of its obligations, can be

followed and recovered. The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may be reasonably supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril": *Smith v. Ayer*, 101 U. S. 327; *Miller v. Williamson*, 5 Md. 219. Real estate, on the other hand, descended to the heir at law, and the executor or administrator had no title thereto, and no power over it, except such as might be conferred by the will of the testator: *Schouler on Executors and Administrators*, sec. 509.

Legislation In many of the United States has increased the power of executors and administrators over the real, and decreased it over the personal, property of decedents, and, while not giving them the legal title to either class of property, it has conferred upon them the right of possession of both, with power to receive the rents and profits, and to make such sales as may be necessary to the settlement of the estate and to carry out the directions of the testator: *Tate v. Norton*, 94 U. S. 746. With respect to sales, however, their discretion in making them is usually subject to the control of some court, and the sales are required to be preceded by an order of authorization from such court, and, sometimes, to be followed by an order of confirmation, and often by both. The authority of executors and administrators is dependent upon the statutes and upon the provisions of the wills of their testators. Whatever they are competent to do under the statutes of the state in which they are appointed, or by virtue of the wills of their testators, they may doubtless bind themselves to do by contract, and such contracts are subject to enforcement to the same extent as are other valid contracts, except that it is not probable that any action can be maintained to recover damages for their nonperformance, payable out of the assets of the decedent. If, however, a contract is one the specific performance of which may be compelled if it were made by an individual, it may also be compelled when made by the executor or administrator having authority to make it, as where it is to release a mortgage: *Sanford v. Story*, 38 N. Y. Supp. 104; 15 Misc. Rep. 536; to assign a judgment: *Johnson v. Wallis*, 112 N. Y. 230; 8 Am. St. Rep. 742; or to sell and convey real property: *Bostwick v. Beach*, 103 N. Y. 414. On the other hand, if an executor or administrator enters into a contract not authorized by law, or in contravention of his trust, it is obvious that equity will not aid in its enforcement, and that if he attempts to make a disposition of the property not warranted by the trust, such disposition will be of no avail, if his grantee or donee has notice of the trust and of such facts as charge him with knowledge of the misconduct of the trustee: *Miller v. Williamson*, 5 Md. 219; *Thomasson v. Brown*, 43 Ind. 203; *Miller v. Helm*, 2 Smedes & M. 687; *Schouler on Executors and Administrators*, sec. 352; *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448; 36 Am. Rep. 338.

Estates are not Liable at Law for Contracts of Executors and Administrators.—An executor or administrator, in discharging the functions of his office as provided by law, or in carrying out directions made,

and exercising powers conferred, by the will of the testator, must do many acts and enter into many contracts for which the estate is ultimately liable. This liability must, however, usually be pursued in the probate or surrogate courts by the presentation of accounts on behalf of the administrator or executor, in which he seeks and obtains credit for claims created by him against the estate in the discharge of his duties. The liability in such cases in favor of persons dealing with the administrator is against him personally, and it is doubtful whether any instance can be conceived in which an administrator or executor can be sued as such upon a contract entered into by him, and a judgment recovered payable out of the assets of the decedent, when no liability existed against such decedent in his lifetime. A number of English cases have been cited, and to some extent followed in America, in support of the doctrine that upon a promise or contract made by an executor or administrator, and which he was authorized to make for the benefit of the estate, an action may be prosecuted against him in his representative or official capacity, and a judgment recovered, not against him personally, but against him officially, and payable in due course of administration: *Dowse v. Cox*, 3 Bing. 20; 10 Moore, 272; *Powell v. Graham*, 7 Taunt. 581; 1 B. Moore, 305; *Ashby v. Ashby*, 7 Barn. & C. 441; *Haynes v. Forshaw*, 11 Hare, 93. A more careful consideration of the subject in the mother country has, however, led to a decision in which it was shown that in each of the earlier cases "the consideration for the promise of the executor was a contract or transaction with the testator," and therefore that the contract enforced was, in effect, a contract of the testator, though also supplemented by the promise of the executor. In this later case it appeared that an executrix kept an account as such with a bank, and, having power under the will to mortgage the real estate in aid of the personalty, she deposited with the bank the title deeds of part of the testator's real property as security for the balance. The account was overdrawn by the executrix, and the moneys, to a great extent, misapplied, the bank, however, being ignorant of the misapplication. It sought to enforce against the estate a liability for the balance remaining unpaid, and to that end applied for leave to prove as creditor of the estate for the amount of such balance. Lord Chief Justice James said: "In this case, it seems to me quite clear that there was no legal debt due from the estate to the bank. The executrix borrowed money as executrix, says that she is executrix, and the bank debits her as executrix. To say that this charges the estate would give executors power to create debts to an unlimited extent. The executor has the power to realize the personal estate, to pledge specific assets, which is one mode of realizing them. Here the executor has also power to pledge the realty; and I have myself, by a formal order, given the bankers the full benefit of the charge they had on part of the real estate, and held them not answerable for any devastation the executrix committed as to the money raised by that mortgage. But to say that the executrix can, by borrowing money, enable the person who has lent it to stand as a creditor upon the estate is a position supported by no authority and no principle. The contract is with the

executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate." Lord Justice James also said: "I am of the same opinion. It appears to me to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the estate": *Farhall v. Farhall*, L. R. 7 Ch. App. 123. The great weight of authority is in accordance with the rule thus stated in the later English adjudication, and affirms the proposition that an action at law will not lie against an administrator or executor as such, though upon a contract made by him for the benefit of the estate, and that the liability of an administrator or executor upon such a contract is personal, and a judgment may be recovered thereon against him personally, though the contract is in writing, and he purports to execute it in his capacity as executor: *Greening v. Sheffield*, Minor, 276; *Adams v. Adams*, 16 Vt. 228; *Luscomb v. Ballard*, 5 Gray, 405; 66 Am. Dec. 374; *Fitzhugh v. Fitzhugh*, 11 Gratt. 300; 62 Am. Dec. 658; *Vandeveer v. Ware*, 65 Ala. 606; *Kerchner v. McRae*, 30 N. C. 219; *Lovell v. Field*, 5 Vt. 218; *Beaty v. Gingles*, 8 Jones, 302; *Schmittler v. Simon*, 101 N. Y. 554; 54 Am. Rep. 737; *Davis v. French*, 20 Me. 21; 37 Am. Dec. 86; *Steele v. Steele*, 64 Ala. 438; 38 Am. Rep. 15; *Succession of Mansion*, 34 La. Ann. 1246; *Rich v. Sowles*, 64 Vt. 408; *McEldery v. Mackenzie*, 2 Port. 83; 27 Am. Dec. 643; *Pearce v. Smith*, 2 Brev. 360; 4 Am. Dec. 588; *Winter v. Hite*, 3 Iowa, 142. Therefore the administrator is liable personally, and no action can be maintained against him in his official capacity upon an acceptance purporting to be made officially: *Perry v. Cunningham*, 40 Ark. 185; nor upon a covenant for quiet enjoyment inserted by him in his conveyance of real property of the estate: *Osborne v. McMillan*, 5 Jones, 109; nor upon a note or other contract for money borrowed or for services rendered for the estate: *Ness v. Wood*, 42 Minn. 427; nor by an agreement to sell real estate at a specified sum, or to procure an order of court granting him authority to do so: *Stuart v. Allen*, 16 Cal. 473; 76 Am. Dec. 551; nor upon a covenant of warranty inserted in a conveyance made by him in his official capacity: *Lynch v. Baxter*, 4 Tex. 431; 51 Am. Dec. 735. If a promissory note is executed by A B administrator, or C D executor of an estate named, the words added after the name of the maker will be treated as surplusage or as descriptive of his person, and he will be held liable personally thereon, and not in his official capacity, and no judgment therefor can properly be rendered against him payable out of the assets of the decedent: *Higgins v. Driggs*, 21 Fla. 108; *McFarlin v. Stinson*, 56 Ga. 396; *Rittenhouse v. Ammerman*, 64 Mo. 197, 27 Am. Rep. 215; *Germania Bank v. Michaud* (Minn.), 30 L. R. Ann. 286; *First Nat. Bank v. Collins*, 17 Mont. 433; post, p. 000, although the note was given to procure money to satisfy the testator's debts: *Morehead Bank v. Morehead*, 116 N. C. 413; *First Nat. Bank v. Collins*, 17 Mont. 433; or to pay expenses which the executor was authorized to incur in the administration of the estate; *Lynch v. Kirby*, 65 Ga. 279; or to relieve the property of the estate from an en-

cumbrance: *Winston v. Young*, 52 Minn. 1; or as evidence of debts which he was authorized to create: *Boggs v. Wann*, 58 Fed. Rep. 681.

In performing his duties by caring for the estate, collecting moneys due it, and otherwise transacting its business and managing its affairs, an administrator or executor must necessarily employ other persons whose compensation for services rendered should be paid out of the estate. Whether it shall be so paid and the just amount to be allowed are questions for the court having jurisdiction of the settlement of the estate. The administrator or executor cannot make any contract which will control the court or place the estate under obligation to pay any specific amount, unless it shall be found to be just and reasonable. The remedy of the person with whom the administrator or executor contracts is against him personally, and no judgment can be sustained against the estate, though the claim be conceded to be valid and just: *Bott v. Barr*, 95 Ind. 243; *Baker v. Moor*, 63 Me. 443; *Austin v. Munroe*, 47 N. Y. 860; *Johnson v. Leman*, 131 Ill. 609; 19 Am. St. Rep. 63; *Steele v. Steele*, 64 Ala. 451; 38 Am. Rep. 15. The same rule applies where property has been purchased by an executor or administrator for the use and benefit of the estate: *Harding v. Evans*, 3 Port. 221; 29 Am. Dec. 255; *Halleck v. Smith*, 50 Conn. 127. In Texas, however, it was said in a case in which the question was not necessarily involved, that where a third person performs services for an administrator of such a character that the latter is entitled to charge the estate therefor, such third person may present his claim to the administrator in the same manner as if it had accrued in the lifetime of the decedent, and, if allowed, that it becomes an established claim against the estate. If, on the other hand, it is not allowed by the administrator, no action can be sustained thereon against the estate: *Price v. McIver*, 25 Tex. 769; 78 Am. Dec. 558.

Attorneys at Law may be employed to assist and advise executors and administrators who, on their part, are entitled to be compensated for moneys necessarily paid for such services: Note to *Lucich v. Medin*, 93 Am. Dec. 393-397. The duty of compensating the attorneys rests primarily on the executor or administrator, who is liable to a personal action therefor: *De Vane v. Royer*, 7 Jones, 426; *McGloin v. Vanderlip*, 27 Tex. 366; *Bowman v. Tallman*, 2 Robt. (N. Y.) 388; *Clopton v. Gholson*, 53 Miss. 466; *Wait v. Holt*, 58 N. H. 467; *Tucker v. Grace*, 61 Ark. 410; *Thomas v. Moore*, 52 Ohio St. 200; *Van Kamp v. Searle*, 79 Hun, 134; 29 N. Y. Supp. 757. It follows from this rule that the amount of compensation to be paid to an attorney cannot be definitely fixed, as against the estate, by an express contract between him and the administrator.

It follows from what we have said that an administrator or executor cannot bind an estate by a contract with an attorney or with any other person that for services rendered he shall receive a contingent fee or compensation consisting of any portion of the estate or of the sum recovered: *Estate of Page*, 57 Cal. 238; *Teal v. Terrell*, 48 Tex. 509; *Danielwitz v. Sheppard*, 62 Cal. 339; *Platt v. Platt*, 105 N. Y. 488; contra, *McKie v. Howland*, 3 App. D. C. 461; *Jack v. Casson* (Tex. Ct. App.), 28 S. W. Rep. 832; *Williams v. Howard* (Tex. Ct. App.), 31 S. W. Rep. 835.

Declarations and Admissions of an Executor were held to be admissible against the estate and against him in his official capacity; and it was said that if the estate which he represented was injured thereby, the remedy was by some proceeding against him to compel him to make compensation for injuries suffered by it or by the persons beneficially interested in it: *Lawson v. Powell*, 31 Ga. 661; 70 Am. Dec. 296. It does not occur to us that the making of declarations and admissions against a decedent is within the duties confided to executors or administrators, and we believe that in an action against an executor or administrator in his official capacity, the judgment in which is payable out of the assets of the decedent, no promise or admission on the part of such personal representative should be received in evidence against the estate, nor, if received, should it be deemed conclusive: *May v. May*, 7 Fla. 207; 68 Am. Dec. 431; *Shepherd v. Young*, 8 Gray, 152; 69 Am. Dec. 242.

Acknowledgment of Outlawed Debts.—If, before the death of a testator or intestate, a claim against him has become barred by the statute of limitations, it has been held that an administrator or executor may, after his death, revive such claim, and make it enforceable against the estate, by an acknowledgment of the continuing liability of the decedent or by the express promise to pay it: *Briggs v. Starke*, 2 Mill Const. 111; 12 Am. Dec. 659; *Hord v. Lee*, 4 Mon. T. B. 36; *Northcut v. Wilkinson*, 12 B. Mon. 406; *Manon v. Felton*, 13 Pick. 203; *Fisher v. Metcalf*, 7 Allen, 209; *Shreve v. Joyce*, 26 N. J. L. 44; 13 Am. Rep. 417; *Cobham v. Administrators*, 2 Hayw. (N. O.) 6; 2 Am. Dec. 612. It is true that, notwithstanding the statute of limitations, a debt remains, and the giving effect to an acknowledgment or promise by the personal representative of a decedent is not permitting him to make a new contract, or to expose the estate to liability for an obligation which did not exist in the lifetime of the decedent. But if all remedy upon the contract had ceased in such lifetime, the representative, by his new promise, if it can operate at all, revives the remedy, and the prejudicial effect upon the estate is not less than the creating of a new contract or the making of a gift of like amount or value. The decided preponderance of authorities denies the personal representatives of the decedent the power, by an acknowledgment or new promise, to revive an obligation against which the statute of limitations had completely run in their lifetime: *Thompson v. Peter*, 12 Wheat. 556; *Moore v. Hillebrand*, 14 Tex. 312; 65 Am. Dec. 118; *Henderson v. Isley*, 11 Smedes & M. 9; 49 Am. Dec. 41; *Waul v. Kirkman*, 25 Miss. 620; *Sanders v. Robertson*, 23 Miss. 391; *Clark v. Clark*, 8 Paige, 152; 35 Am. Dec. 676; *Fritz v. Thomas*, 1 Whart. 66; 29 Am. Dec. 39; *Peck v. Botsford*, 7 Conn. 172; 18 Am. Dec. 92; *Pease v. Phelps*, 10 Conn. 68; *Hanson v. Towle*, 19 Kan. 273; *Sevier v. Gordon*, 21 La. Ann. 373; *Huntington v. Babbitt*, 46 Miss. 528; *Cape Girardeau Co. v. Harrison*, 58 Mo. 90; *Seig v. Acord*, 21 Gratt. 305; 8 Am. Rep. 605; *Fisher v. Duncan*, 1 Hen. & M. 563; 8 Am. Dec. 605; *Bloodgood v. Bruen*, 8 N. Y. 370; *McLaren v. McMartin*, 36 N. Y. 88. If, however, such statutory defense has not become perfect in such lifetime, an executor or administrator may, after his appointment, make an acknowledgment or new promise, and thereby furnish a new period

or date from which the running of the statute may be computed: *Bishop v. Harrison*, 2 Leigh, 532; *Selig v. Acorn*, 21 Gratt. 365; 8 Am. Rep. 605; *McLaren v. McMartin*, 36 N. Y. 88; *Warren v. Childress*, 23 La. Ann. 184; *Succession of Romero*, 29 La. Ann. 493; *Griffin v. Justices*, 17 Ga. 96.

An action cannot be maintained against an executor as such for money had and received by him after the death of the testator: *Halley v. Wheeler*, 4 Jones, 159; *Selig v. Drach*, 14 Pa. St. 353.

Notwithstanding the great weight of authority affirming that an executor or administrator is not liable in his official capacity, except upon a contract or liability created by testator or intestate, there are a few cases in which judgments have been sustained upon liabilities created by executors or administrators. These cases are chiefly founded upon the text of *Williams on Executors*, which, in turn, as has been shown in *Farhall v. Farhall*, L. R. 7 Ch. App. 128, was founded upon a misconception of earlier English decisions. In a comparatively early case in Mississippi, it was said: "Whenever the subject matter of the action may, when recovered, be assets, the executor may sue in his representative character. The converse of the rule that where the state is liable, the action may be against the executor in his representative capacity, seems to follow as legitimate conclusion. The case of *Sims v. Stilwell*, 3 How. (Miss.) 181, is in accordance with this view of the subject. The promise of an executor is there said to bind him personally, unless it clearly appear that it was made for a debt or liability of the testator. The liability of the estate would produce the same result. From these principles it follows that an action against an executor upon a promise made by him as such, when the debt is created after the testator's death, can only be maintained when it affirmatively appears that there was a clear and just liability on the part of the estate": *Steele v. McDowell*, 9 Smedes & M. 193, 200. In this case, however, the judgment against the administrator was reversed because of the refusal of the trial court to receive evidence tending to show that the goods, in consideration of which the contract was given, were furnished for the individual use of the administrators, and, therefore, what was said as to the point here specially considered was a dictum. In *Palmer v. Moore*, 82 Ga. 177, 14 Am. St. Rep. 147, a judgment was sustained against an executor who, under a direction in the will of the testator to keep the estate together and to manage and control and keep up the farming interests thereof, had created debts such as would ordinarily be incurred by a prudent farmer in conducting farming operations. This, and perhaps a few other decisions in harmony with it, were written without much or any consideration of the precise legal question involved, and apparently upon the assumption that, as the estate was equitably liable in some form of proceeding for the amount sued for, it was not material what the form of action was, so long as the liability of the estate was established. There are a few cases in which judgments have been sustained against executors or administrators for liabilities, whether founded upon tort or contract, where moneys had been received and placed among the assets of the estate, and therefore the estate might be regarded as under equitable obligation

to repay them, though it was conceded that an action was also maintainable against the executor or administrator personally. An administrator took possession of and sold, as assets of his intestate, certain personal property, and thereupon an action was brought against him to recover the value thereof. Judgment having been rendered in favor of the plaintiff in the trial court, it was affirmed upon appeal, the supreme court in its opinion saying: "The proceedings show that the property was taken and claimed by the defendant as administrator, and that he sold the same as administrator. The defendant sets up no claim to the property in any other capacity. It appears, then, that the controversy is about property which the administrator claims belonged to the estate, and which he sold as administrator. He was chargeable as administrator with the proceeds of the property, and it is very plain that the estate, and not the defendant, should pay plaintiff the amount recovered in this action. The judgment, therefore, was properly rendered against the defendant as administrator. If the judgment in this form is erroneous, it is difficult to see how it can be prejudicial to the defendant. Unless prejudice be shown, the judgment cannot be disturbed. The counsel for the defendant insist that if the cattle did not belong to the estate, the defendant wrongfully took them, and the estate cannot be liable for his tort. But this statement does not present the whole case. The estate received the benefit of the proceeds of the cattle, and ought to restore the amount realized to the plaintiff. It is not shown that defendant realized by the sale of the cattle less or more than their value. It will be presumed that he sold them for their value. The action is not to recover damages for the tort of the defendant, but for the value of the property, and the verdict and judgment were for the value. The position of defendant's counsel possibly would be correct if the judgment were for damages on account of the wrongful act of the defendant. No other questions are presented in the case. The judgment of the circuit court is affirmed": *Simpson v. Snyder*, 54 Iowa, 557. In an earlier case in the same state, a judgment against an administrator *de bonis non* as such was affirmed, though based upon a claim for moneys loaned by the plaintiff to defendant's predecessor in office, and used for the purpose of paying expenses of administration, and for which a promissory note had been given to the plaintiff by the original administrator. It was conceded that there could be no recovery upon this note as such; but it was held that there could be a recovery upon the original cause of action, to wit, for the moneys so furnished and used for the payment of expenses of administration. The judgment was affirmed upon the ground that it affirmatively appeared that no prejudice could have resulted to the appellant by reason of error of the trial court, if any: *Dunne v. Deery*, 40 Iowa, 251.

Property may come into the possession of an executor or administrator, or moneys be collected by him in the discharge of his duties, in which case it is clear that the estate ought not to be able to retain the benefit of such moneys or property when not equitably entitled thereto. Yet it seems equally clear, on the other hand, that it ought not to be answerable therefor if embezzled or otherwise mis-

appropriated by the executor or administrator; and this result might follow if an action at law were sustainable against him as such, in which a judgment might be recovered, payable out of the assets in his hands or otherwise chargeable against the estate of the decedent. In *De Valengin v. Duffy*, 14 Pet. 282, it appeared that the decedent held a claim for certain property destroyed, indemnity for which was sought of the government of Brazil, and that a part of such claim was held by the decedent in trust for a third person. After his death, his administrator prosecuted this claim, and finally received payment thereof. Thereafter an action was brought by the third person against the administrator of the decedent to recover his proportion of the moneys collected, and in sustaining this right of recovery the supreme court of the United States said: "There are doubtless decisions which countenance the doctrine that no action will lie against an executor or administrator in his representative character, except upon some claim or demand which existed against the testator or intestate in his lifetime; and that if the claim or demand wholly accrued in the time of the executor or administrator, he is liable therefor only in his personal character. But upon a full consideration of the nature of the various decisions on the subject, we are of opinion that whatever property or money is lawfully recovered or received by the executor or administrator after the death of his testator or intestate in virtue of his representative character, he holds as assets of the estate, and he is liable therefor in such representative character to the party who has a good title thereto."

The statement frequently found in the reports that an executor or administrator is not liable as such upon causes of action not existing against the decedent in his lifetime does not imply that such cause of action must at or preceding his death have reached a state at which an action of law could have been sustained upon it. At the common law, torts did not survive the person guilty of their commission, and therefore no action commenced after his death could be maintained to recover damages suffered from his tort, though it was maintainable to recover profits realized therefrom and constituting part of the assets of the decedent: *Phillips v. Homfray*, L. R. 24 Ch. Div. 454. This rule has, in most of the states, been subjected to statutory modification under which liability to make compensation for damages resulting from certain torts is continued in force after the death of the tortfeasor, and, where there are statutes of this character, there may doubtless be actions against executors or administrators as such for torts committed by the decedent in his lifetime. Contracts, on the other hand, did not, unless of a very exceptional character, lose any of their obligation upon the death of any, or even all of the contracting parties. Actions at law, therefore, may be sustained thereon against an executor or administrator of either party who happens to be in default: *Smith v. Wilmington etc. Mfg. Co.*, 83 Ill. 498; *Krell v. Codman*, 154 Mass. 454; 26 Am. St. Rep. 280; *Janin v. Browne*, 59 Cal. 45; *Chamberlain v. Dunlop*, 128 N. Y. 45; 22 Am. St. Rep. 807, and note 811-815. If at the death of a contracting party, something remains to be done according to the stipulations of a contract entered into by him, a default, though oc-

currence after his death and attributable to the omission of an executor or administrator, nevertheless creates a perfect cause of action against him in his official capacity, the judgment in which is enforceable out of the assets of the decedent. Therefore, if a decedent has sold goods or contracted to build a house, or to do any other act, and the time for the delivery of the goods or the doing of the other act occurs after his death, any default in respect thereto creates a cause of action against his estate, and consequently against his personal representative in his official character: *Wentworth v. Cook*, 10 Ad. & E. 42; *Cooper v. Jarman*, L. R. 3 Eq. 98; *Quick v. Ludburrow*, 3 Bulst. 30; *Taylor v. Taylor*, 3 Bradf. 54. A like result follows when a lease or conveyance is made containing a covenant of title or for quiet enjoyment, and after the death of the lessor or grantor there is a breach of such covenant for which, if it occurred in his lifetime, he would have been answerable: *Tilney v. Norris*, 1 Ld. Raym. 553; *Tremeere v. Morrison*, 1 Bing. N. O. 89; *Reid v. Tenderden*, 4 Tyrw. 111; *Hovey v. Newton* 11 Pick. 421. If, however, the contract was one of a strictly personal nature, the death of the contractor terminates it, and his administrator or executor cannot as such be answerable for any breach thereof not committed in the lifetime of the decedent: *McGill v. McGill*, 2 Met. (Ky.) 258; note to *Chamberlain v. Dunkin*, 22 Am. St. Rep. 812.

In the cases where the cause of action becomes perfect through a default occurring after the death of a contracting party, and while his estate is under process of administration, it may seem at first as though the cause of action is founded on a neglect or omission of the executor or administrator. Such is not the case, however, for, as we shall hereafter see, no action can be maintained against an executor or administrator as such for his negligence in the management of the affairs of the property of the decedent. When the action can be maintained at all, it is because the decedent has, in effect, contracted to do something, the doing of which may fall within some period after the termination of his life, and the default is one against which he has, in substance, contracted, whether he shall have an executor or administrator or not, and for which his estate is equally liable, though when the default occurred, no executor or administrator had yet been appointed.

There have been, and may again be, cases in which it is difficult to determine whether the cause of action sought to be enforced is one for a failure to perform a contract entered into by decedent, or is for a wrong done by his executor or administrator after his death. Thus an action was commenced against executors alleging that their decedent had sold a lot of wood trees lying upon his land, and had received payment therefor prior to his death; that thereafter defendants refused to permit plaintiff to enter upon the land or to split or sell the wood, but took charge of it themselves, and appropriated the proceeds to the account of the decedent's estate. The court held that to determine whether the action was maintainable, inquiry must be made to ascertain whether or not the decedent had perfectly performed the contract on his part in his lifetime, or whether performance was yet due from him or his executors. In the latter event, the

estate would be liable for a default occurring while it was in the hands of the personal representative. If, on the other hand, the contract had been perfected by the decedent in his lifetime, and the wood delivered to the plaintiffs, or if the circumstances of the case were such that they had a right to take it without any formal delivery, then the only cause of action which could exist against the executors would be for some tortious act in interfering with the wood, which act, not being within the sphere of their duties, the consequences of it could be charged against them personally, but not against the estate which they represented. The court said: "The defendants were sued in their representative capacity, it being claimed that as executors they refused to allow the plaintiffs to enter the land and haul the wood. The defendants denied that they were liable as executors. In our opinion, their liability would depend upon whether the delivery of the wood was completed in the lifetime of the testator. If some of the wood was actually received from the testator, and no act remained to be done by him to complete the delivery of the residue, title to the residue, as well as to the part received, vested immediately in the buyers; and if, after his death, his executors, whether acting professedly in their representative capacity or not, prevented the buyer by any wrongful act from entering upon the land, and converting the trees into cordwood, and removing the same therefrom, this would be a mere personal tort by the executors, for which they would be liable personally, but not in their representative capacity. If they merely objected to an entry upon the land, without doing or threatening to do any violent act to prevent it, the plaintiffs could and should have disregarded the objection, because the law is, that where an owner sells trees lying upon the ground they are personal property, and by the act of selling them he gives the purchaser an implied license to enter upon the land and remove them, if the purchaser does so within a reasonable time. Having sold the trees and received the purchase money for the same, the title vests in the purchaser, and the implied license to enter upon the land and remove the trees is irrevocable, either by the seller or his personal representatives": *Parker v. Barlow*, 93 Ga. 700, 705.

Subrogation.—It does not follow from the rule of law that persons performing services for executors or administrators, or advancing money or selling property to them for the benefit of the estate, cannot sustain any action at law therefor, except against the administrator or executor, leaves them wholly without redress in cases where he on his part has a right to reimbursement out of the estate in his hands. If he is insolvent, or, for any other reason, such third persons can obtain no adequate remedy as against him, they are not to be deemed mere volunteers or intermeddlers in the affairs of the estate, and therefore, upon well-settled legal principles, they are entitled to be subrogated to the remedies of the executor or administrator, and may, by appropriate proceedings in equity, compel him to enforce his claim against the estate for their benefit, thus indirectly enforcing compensation in their favor out of the assets of the estate: *Clopton v. Gholson*, 53 Miss. 466; *Mosely v. Norman*, 74 Ala. 422; *Dickinson v. Conniff*, 65 Ala. 581; *Norton v. Phelps*, 54 Miss. 467; *Hewitt v. Phelps*,

105 U. S. 393. If a testator by his will directs a business to be carried on, and indicates an intention to subject his legal assets to the debts of the business, and authorizes his executors to contract debts therein binding on his general estate, and they, after contracting debts on behalf of the estate, become insolvent, equity has jurisdiction to entertain a bill on behalf of the holders of such debts to subject the general assets of the decedent to the discharge thereof: *Willis v. Sharp*, 113 N. Y. 586; *Fairland v. Percy*, L. R. 3 Pro. & D. 217. In fact, cases may be found in which actions were permitted to be sustained against executors or administrators not based upon any contract of the decedent, nor upon any liability existing in his lifetime which accomplished directly and improperly what might have been accomplished indirectly and properly by a proceeding in equity to enforce a right of subrogation. It may seem at first that it is of little consequence in what form of proceeding relief is sought, and this is true if the two classes of proceedings are conceded to be governed by the same equitable rules. A proceeding for subrogation, however, being equitable in its character, must fall within the domain of the rule of equity, that relief will not be granted to a complainant, unless his equity is of a superior character to that of the defendant. Subrogation, therefore, can take place only when there is still something equitably due to the executor or administrator, or when the estate has received the benefits of labor done or moneys advanced, and may, without injustice to it, be required to make payment therefor to the person who, under some agreement with its representative, had performed the services or made the advances. If it be true that an executor or administrator is liable as such to third persons with whom he makes contracts for the benefit of the estate, then it should follow that such third persons may recover thereon against him personally, and procure a judgment payable out of the assets of the decedent, though the estate does not owe its representative anything. While there are isolated cases sustaining judgments against executors and administrators as such, both upon contracts and for torts made or occurring after the death of the decedent, we believe there are none sustaining such recoveries when to do so would have been inequitable to the estate or the persons interested in it. They have, on the whole, been but applications of the rule, that neither an estate nor its beneficiaries will be permitted to reap profit from the wrongs of their personal representative.

Tortious and Unauthorized Act—As an executor or administrator derives his authority from the law and is not subject to the control of the heirs or other persons interested in the estate committed to his care, it is obvious that when he acts outside of the authority conferred upon him by his office, he must act individually and be responsible only in his individual capacity to persons injured thereby. Neither an executor nor an administrator can as such commit a tort. If he omits to perform some duty, his omission is not that of the estate nor of the persons interested therein. They are, therefore, not estopped by his mere silence or acquiescence or his omission to assert some right or title which he ought to have asserted for their benefit: *Lewis v. Lusk*, 35 Miss. 696; 72 Am. Dec. 153. It is not material

whether he purports to act in his official capacity or not, for, if his acting is unauthorized by law, all persons dealing with him must take notice of the law and of the limitations upon the powers conferred upon him thereby, and if they deal with him beyond those limits, they must know that they deal with him personally, and cannot hold the estate answerable for his acts or omissions. If he comes into possession of, and collects, a policy of insurance not constituting any part of the estate of the decedent, he is liable for its proceeds in his individual capacity: *Heydenfeldt v. Jacobs*, 107 Cal. 878. If, as in the principal case, he receives money bid for lands of the deceased at a private sale when his only authority was to sell it at public auction, he does not receive it officially, and therefore the estate which he assumes to represent is not liable therefor. In an action against executors, to recover damages sustained from the falling of a building, the court said: "Upon what rule the defendants were sued in their representative capacity, and by what rule of law their liability in such character can be maintained, is not satisfactorily shown. The question was reserved upon the trial, and no authority has been adduced to change the opinion expressed by the court, that an action cannot be maintained against an executor or administrator in his representative character for a wrong act which was not, and could not be, committed by him in his official capacity, but which, because it was a wrong act, was in excess of his authority": *Boston Beef etc. Co. v. Stevens*, 12 Fed Rep. 279; 20 Blatchf. 443. "An estate can neither be charged nor can it charge others by means of illegal and fraudulent acts of its legal representative": *Crayton v. Munger*, 9 Tex. 286.

Such cases as seem to support the rule that an executor or administrator may as such be held liable for wrongs done or obligations incurred by him, and therefore that a judgment may be recovered against the estate therefor, are applications, sometimes made in an improper form of action, of the rule that an estate and its beneficiaries cannot profit by his wrongs. If he makes a misrepresentation inducing a sale of property, damages resulting therefrom cannot sustain a claim against the estate he misrepresents, nor, on the other hand, can it hold the advantages accruing to it from such misrepresentation; and it may, therefore, sustain a claim for rescission: *Able v. Chandler*, 12 Tex. 88; 62 Am. Dec. 518; or be offered in evidence in support of a plea of failure of consideration in an action upon a promissory note given for property sold through such false representation: *Buckels v. Cunningham*, 6 Smedes & M. 353.

Whether an action may be sustained against an executor as such for property belonging to the plaintiff and wrongfully withheld from him should depend upon whether or not such property was in the possession of the decedent in his lifetime, and was wrongfully withheld by him. If so, there is no difficulty in sustaining an action against his executor or administrator personally: *Brewer v. Strong*, 10 Ala. 961; 44 Am. Dec. 514; *Catlett v. Russell*, 6 Leigh, 344. In such case, it is said that the plaintiff may elect to sue the executor or administrator either personally or in his official capacity: *Robbins v. Walters*, 2 Tex. 130. If a promissory note is in the hands of an intestate at the time of his decease, for safekeeping, and after his death

It goes into the hands of his administrator, the latter holds it upon the same trust as the decedent, but if he refuses to surrender the note to the party entitled thereto, it has been held in Massachusetts that, while he is individually liable for such conversion, "his wrongful act in retaining and withholding the note cannot take away the right to receive the debt from the assets of the decedent," and as if the intestate in his lifetime had refused to surrender the note, an action of assumpsit could have been maintained against him to recover the amount thereof, such an action may also be sustained if the administrator wrongfully refuses to make such surrender: *Prescott v. Ward*, 10 Allen, 208. There may be many cases in which an application of this rule would work an injustice to the estate and its beneficiaries not contemplated by the law prescribing the duties and powers of executors and administrators. If, on the other hand, the wrongful detaining of property did not exist in the lifetime of the testator or intestate, but is due to the act of his personal representative, then the action for redress should be against the latter in his individual capacity only, and no recovery should be permitted for which the estate can be held answerable, except, perhaps, when that which has been wrongfully withheld has been appropriated to the use of the estate, and the recovery cannot operate inequitably as against it: *Mobley v. Runnells*, 8 Dev. L. 808; *Leigh v. Cockwood*, 4 Dev. 677.

An administrator is answerable in trover in his personal capacity for the conversion of personal property, though he received it as part of the estate of the decedent, if he has been guilty of unlawfully withholding it from the owner after demand therefor, or after any other act which, in contemplation of law, may be regarded as a conversion: *Underhill v. Morgan*, 33 Conn. 105; *Denny v. Booker*, 2 Bibb, 427; *Thompson v. White*, 45 Me. 445; *Farrelly v. Ladd*, 10 Allen, 127. Under such circumstances, an action may also be sustained against him in his official capacity. If, on the other hand, the decedent had not been guilty of any wrongful act, and the wrong done was inflicted by the personal representative, he is not answerable officially; nor can the estate be made responsible therefor in any form of action, unless it be to recover fruits of the wrong which have been made and are yet retained as part of its assets: *Parker v. Barlow*, 93 Ga. 700.

Negligence.—If the estate of the decedent could be held answerable for any tort whatever, chargeable to its executor or administrator, it would seem that negligence in the care and management of its property resulting in injury to third persons ought to be included, for such third persons, unless able to recover compensation out of the assets of the estate, must be without redress in all cases in which the executor or administrator in default is insolvent. But with respect to this class of cases, the decisions are, we believe, unanimous in affirming that no liability exists except against him personally. Thus real property in his care or the streets or highways adjacent thereto may become out of repair, and in a condition likely to inflict injury upon third persons lawfully using such highway, or lawfully in or near some building or other structure upon the property; and from some defect against which it was the duty of the executor or administrator

to guard, personal injuries may be received by some third person falling through a sidewalk or into some excavation in the street or highway, or from such building or other structure falling upon him, or his property situate adjacent thereto. In all such cases, it is clear that personal liability exists against the executor or administrator, but that he cannot be successfully pursued in his official capacity, nor can the estate, by any proceeding, whether direct or indirect, be made answerable for the damages suffered: *Boston Beef etc. Co. v. Stevens*, 12 Fed. Rep. 279; 20 Blatchf. 443; *Ferrier v. Trepanmel*, 24 Can. S. C. 86; *Belvin v. French*, 84 Va. 81. In an action against an administrator in his official capacity, to recover damages for personal injuries alleged to have been sustained by the plaintiff in consequence of the neglect of the defendant to keep in repair a portion of a public street upon which fronted a lot of ground belonging to his intestate, and of which, as such administrator, he was in possession by his tenants, the court, in determining that no recovery could be had, said: "Assuming, however, that it was the duty of the defendant, as administrator, to repair the defect in the street, and that his neglect of that duty occasioned the injury to plaintiff complained of, do the damages resulting therefrom constitute a legal or valid claim against the estate of defendant's testator. The foundation of this action is the personal tort of the defendant, and not of his testator. The defect in the street, from which the injury resulted to plaintiff, is not alleged to have existed anterior to the death of such testator; hence, no obligation was incurred by the testator in his lifetime, in respect thereto, which could serve as a basis for a valid claim against his estate, or a right of action against the administrator of his estate. And it is a general rule of law that no action will lie against an executor or administrator to which his testator of intestate was not liable: 2 *Williamson Ex'rs*, p. 1478, The duty alleged to have devolved upon the defendant, and which was cast upon him by virtue of his possession and official or representative relation to the estate of his testator, was strictly a personal duty and obligation, voluntarily assumed, and a personal injury, resulting from a neglect of that duty by him, renders him personally liable for a tort; but we are not aware of any principle of law by which the estate he represents could be charged with the result of that negligence. It cannot be sustained upon the principle of respondeat superior or principal and agent, for the simple reason that no such relation exists between heirs, legatees, or creditors of the estate and the administrator. The administrator is not in the employ or subject to the control of any superior other than the probate court, in the performance of any duty imposed upon him, as such, by law. Nor can the estate be held responsible upon the ground of a nuisance erected, or permitted to exist, or continue upon the premises belonging to it, as the sidewalk in which the defect existed was not upon, or appurtenant to, lands the property of the estate, or erected and kept up for the benefit and use of any premises belonging thereto. Although, after notice in writing served upon the administrator to repair, the estate is generally liable in account with its administrator for the expenses of such repair, if made by the administrator, and if not made by him within the time

required by law, the premises adjoining were liable to assessment to the extent of the contract price of making the repair, under the direction of the street superintendent, yet there is a marked and wide distinction between the liability of the estate for the expenses of the repairs and its liability for the personal tort of its administrator, not selected by or in any manner directed by or under the control of parties interested in the estate, in neglecting to perform a personal duty imposed upon him by law. The very nature of the action imports a culpable delinquency or misfeasance of a sentient being, and a personal liability in consequence thereof, a delinquency or misfeasance which cannot be affirmed of an estate; and when such liability is established, and the extent thereof determined by the judgment of a competent court, it is enforced against the individual perpetrator of the wrong." The court further considered the language of the statute imposing liability for a delinquency or wrong consisting of the failure to keep in repair a public street in front of property or to guard the public from excavations in such a street, and determined that the duty imposed was a personal one for which only the person or persons in default were made liable for injuries resulting from neglect. The court then added: "The estate, represented by a person upon whom this duty is cast, is no more liable for his neglect of a personal duty than it would be for a fine which might be imposed upon him by a criminal court for assault and battery committed by him while in possession of such estate: *Crayton v. Munger*, 9 Tex. 292; *Able v. Chandler*, 12 Tex. 92; 62 Am. Dec. 518. No action can be sustained against an executor or administrator, as such, on a penal statute; nor when the cause of action is founded upon any malfeasance or misfeasance is a tort, or arises *ex delictu*, such as trespass, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, etc., when the complaint imputes a tort done to person or goods of another by the testator or intestate: 2 *Williams on Executors*, pp. 1470, 1471; *Wheatley v. Lane*, 1 Sand. 216, note 1; *People v. Gibbs*, 9 Wend. 29": *Eustace v. Jahns*, 38 Cal. 3, 22.

An executor or administrator may unlawfully interfere with, or take possession of, land respecting which the decedent has made some conveyance or lease, or has otherwise covenanted that the owner shall have the undisturbed enjoyment thereof, and the question must then arise whether the estate is answerable. Thus an executor or administrator may be guilty of an eviction of a tenant of the decedent, or at least, of doing acts which, if done by the decedent in his lifetime, the tenant might have elected to treat as an eviction. There are some very early cases tending to show that for such eviction the estate of the decedent may be answerable. *Ratcliffe v. ———*, 1 Bl. & G. 80; *Forte v. Vine*, 2 Rolle. Abr. 21. They are not defensible upon principle. It is well settled that a covenant for quiet enjoyment is not broken by the tortious acts of third persons: *Rawle on Covenants*, sec. 127, p. 96; *King v. Reynolds*, 67 Ala. 229; 42 Am. Rep. 107; *Playter v. Cunningham*, 21 Cal. 229; *Moore v. Weber*, 71 Pa. St. 429; 10 Am. Rep. 708; *Webb v. Alexander*, 7 Wend. 281; but it may be broken by the tortious act of the covenantor or by acts of third per-

wons in the assertion of a right or title paramount to that of such covenantor. If, after the death of one bound by a covenant for quiet enjoyment, a breach is committed by a third person, for which the covenantor would have been answerable had it occurred in his lifetime, his executor or administrator is answerable in his official capacity, and if his lessor is guilty of eviction or taking possession of property devised to his tenant, and such property comes into the possession of the executor or administrator, who continues the possession, claiming the right to do so in his official capacity, an action may be sustained against him officially to recover the damages suffered from such eviction after, as well as before, the death of the lessor: *Wells v. Tydell*, 10 East, 315; *Williams v. Burrell*, 1 Com. B. 402; *Hovey v. Newton*, 11 Pick. 421. But an executor or administrator has no more right by virtue of his office to evict a tenant or eject a grantee of his decedent, or to in anywise interfere unlawfully with the possession of either, than he has to do a like wrong against a person who never had any dealings with the decedent. In the one case, as well as in the other, his act is a mere tort, no more within the duties or powers of his office than would be the publication of a libel or the commission of an assault and battery by the personal representative upon the person entitled to the benefit of the covenant made by decedent. Outside of what he may lawfully do by virtue of his office, the personal representative of the decedent should be regarded as a third person having no relation to him, against whose conduct he has not stipulated, and therefore his estate should not be held answerable for any unlawful interference by such representative with the property subject to the decedent's covenant. The general principle controlling the subject of liability for tortious acts has thus been stated by a well known writer: "An executor or administrator cannot be sued in his representative character for his own wrongful act, committed so as to inflict injury upon another while administering the estate. For, if liable at all, the act is outside his official authority, and he must be sued and held responsible as an individual": *Schouler on Executors and Administrators*, sec. 385. This rule and the reasons underlying it seem as applicable to torts consisting of the eviction or ejectment by an executor or administrator of a tenant or grantee of the decedent as to any other claim or tortious acts.

Summary.—The general rule deducible from all the authorities upon the subject is, that, strictly speaking, an estate is not answerable for contracts or wrongs of its executor or administrator, and that no action at law can be sustained against him as such on account of any contract made or act done by him after the death of the testator or intestate, but that if he, in the discharge of the duties of his office and within the scope of his authority, procures services to be rendered, materials to be furnished, or moneys to be expended for the benefit of the estate for which he is entitled to charge it, the person to whom he is liable may, in some instances, when otherwise without adequate remedy, be subrogated to the rights of the personal representative, and proceed to compel payment directly from the estate; and, perhaps, even in the case of the commission of torts,

such as the conversion of property and the like, the estate may, in some jurisdictions, be held answerable to the extent to which it retains the fruits of such torts. Whenever an action is sustainable at all, it is in the nature of a quantum meruit for something received and held by the estate, and the liability of the estate, in whatever form it may be asserted, cannot extend beyond the value of that which it has received and retained, and the complainant will, under no circumstances, be granted relief which is inequitable as against the estate and the persons beneficially interested therein. There may, indeed, be instances in which an estate may be answerable, though it does not retain the benefits of something which the executor or administrator has rightfully received in his official capacity, as where he, being authorized to make a sale of real or personal property receives a bid therefor, accompanied with a part or the whole of the purchase price, and the sale is subsequently disapproved by the court, or the property is awarded to another and higher bidder, in which event the first bidder is entitled to the return of the moneys so paid by him. We have not seen any decision determining whether in such a case the executor or administrator in his official capacity, or otherwise the estate, may not be held answerable for such moneys. If it should be embezzled or otherwise misappropriated by the executor or administrator, and he should also be insolvent, the question will be presented whether the loss should fall upon the estate or upon the person who thus dealt with the personal representative within the limits of his authority. Under such circumstances, we should conclude that when the moneys were so received by the executor or administrator in his official capacity, they became the property of the estate, and that for any embezzlement or misappropriation thereof the estate must be the loser, unless it can secure indemnity by some proceeding against its representative or the sureties upon his official bond, and that if a loss must be suffered, it should be borne by the estate rather than by the person who had thus bid for its property and made payment on account thereof.

VISALIA & TULARE RAILROAD CO. v. HYDE.

[110 CALIFORNIA, 632.]

CORPORATIONS—ASSESSMENT—LIABILITY OF PURCHASER OR STOCK.—One purchasing stock in a corporation and causing a transfer thereof to be made to himself, and entered upon its books, becomes substituted to his vendor, and therefore holds such stock on the same conditions and subject to the same obligations as such vendor held it upon prior to the transfer.

CORPORATIONS.—A STOCKHOLDER TRANSFERRING HIS STOCK in a corporation after the levying of an assessment thereon, without the transfer being entered on the books of the corporation, remains liable for the amount of such assessment.

CORPORATIONS.—IF STOCK HAS BEEN ISSUED WITHOUT THE SUBSCRIPTION THEREFOR BEING PAID in full, and is afterward transferred, the purchaser becomes personally liable for the amount of such subscription remaining unpaid.

CORPORATIONS.—AN ACTION TO RECOVER AN ASSESSMENT UPON THE BALANCE REMAINING UNPAID FOR STOCK issued by a corporation cannot be resisted on the ground that the defendant did not own the stock when the liability was incurred to meet which the assessment was made, nor on the ground that the corporation has assets sufficient to meet all its liabilities. The obligation of the defendant rests upon the contract of subscription. The propriety of making the assessment or otherwise compelling the payment of the subscription has been placed in the discretion of the board of trustees.

Lamberson & Middlecoff, for the appellant.

Hannah & Miller, for the respondent.

634 HARRISON, J. The plaintiff is a corporation under the laws of this state, for the purpose of constructing and operating a railroad between the city of Visalia ⁶³⁵ and the town of Tulare, and was incorporated November 1, 1887, with a capital stock of one hundred thousand dollars, divided into one thousand shares of one hundred dollars each, all of which was subscribed for, and upon each share of which stock there had been paid into the corporation the sum of fifty dollars. On March 28, 1894, the directors of the corporation levied an assessment of ten dollars upon each share of the capital stock, and in the order levying the assessment fixed a day on which the stock would be delinquent, and also a day for the sale of the delinquent stock. After the day specified for declaring the stock delinquent, and before the sale, the board of directors, by an order in that behalf, elected to waive and abandon further proceedings for the collection of the assessment by a sale of the stock, and to proceed by action to recover the amount that should be delinquent. November 29, 1890, the defendant became the owner of one hundred shares of the capital

stock which had been originally subscribed for by Thomas Creighton, and on that day a certificate for said one hundred shares of stock was issued to and received by him, and he was then registered on the books of the plaintiff as the owner thereof, and has since remained registered as such stockholder. The present action is brought to recover from him the amount of the assessment, by virtue of the provisions of section 349 of the Civil Code. The answer to the complaint does not question the regularity of the steps taken in levying the assessment, or in the election of the plaintiff to proceed by action to collect the same, or that the plaintiff was indebted in an amount greater than the amount of the assessment; but sets up as special defenses that, at the time the plaintiff incurred the liability for which he alleges the assessment was levied, he was not a stockholder; that prior to the commencement of the action he had sold, indorsed, and delivered the shares of stock to another person; and that at the time of levying the assessment the plaintiff had sufficient property with which to meet all of its obligations, ⁶³⁶ without levying an assessment therefor. The plaintiff had judgment and the defendant has appealed.

1. By purchasing the stock from Creighton, and causing a transfer thereof to himself to be entered upon the books of the plaintiff, the defendant was substituted for Creighton as a stockholder of the corporation, and thereafter held the shares on the same conditions, and subject to the same obligations, as did Creighton prior to the transfer: *Morawetz on Corporations*, sec. 159; *Cook on Stock and Stockholders*, sec. 256; *Hall v. United States Ins. Co.*, 5 Gill, 484; *Hartford etc. R. R. Co. v. Boorman*, 12 Conn. 530; *Upton v. Hansbrough*, 3 Biss. 417; *Merrimac Min. Co. v. Bagley*, 14 Mich. 501. In the case last cited, the court say: "The very essence of a corporation consists in its corporate succession, which, in stock companies, is kept up by the substitution of one owner for another in the proprietorship of shares. If the original stockholders stand under different relations to the company from their assigns, the corporation itself loses some of its attributes by the substitution, or else becomes introduced into more complicated relations. It seems to be an unavoidable conclusion that every liability which attaches to a stockholder, as such, is inseparable from the ownership of the stock." And in *Hartford etc. R. R. Co. v. Boorman*, 12 Conn. 530, it is said: "The reasons for subjecting the original subscribers to personal liability apply with

equal force to those who become stockholders by purchase. The relation of stockholder and company exists. A privity between them is created."

The defendant did not divest himself of this liability by an assignment of the certificate to another subsequent to the levy of the assessment, especially as his assignee did not procure a transfer to himself upon the books of the corporation. For the purpose of ascertaining those who are liable to it for the amount of the assessment, the corporation can look only to the list of stockholders as their names are registered upon its books.

⁴³⁷ 2. The liability of the defendant to the creditors of the corporation for his proportion of their claims against the corporation, and his liability to the corporation for the unpaid portion of his subscription, are entirely distinct, and rest upon different principles. The stockholder is liable to a creditor upon only such liabilities as were incurred during the time he has been a stockholder, but he is liable to the corporation for the unpaid portion of his subscription, whenever the corporation may choose to call it in; and, while the creditor may enforce his claim against the corporation, and seek its entire satisfaction out of the corporate property, he can recover from the stockholder only his proportionate part of the claim. The corporation is authorized to levy an assessment for the express purpose of providing a fund with which to meet its outstanding obligations, and it is no defense to the assessment that the defendant was not a stockholder at the time the obligation was contracted or the liability incurred. Nor is it any defense that the corporation has sufficient property with which to meet its obligations. The liability of the defendant rests upon his contract of subscription, and the propriety or necessity of requiring him to pay it for the purpose of meeting the corporate liabilities, rather than to resort to property in the hands of the corporation with which to meet such liabilities, has been placed in the discretion of the board of directors.

The judgment and order are affirmed.

Garoutte, J., and Van Fleet, J., concurred.

CORPORATIONS—LIABILITY OF TRANSFEREES OF STOCK.
A purchaser from the original subscriber to stock is substituted to his obligations, as well as his rights, and being accepted by the corporation as a stockholder a privity is established between them: *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227; 93 Am. Dec. 697; *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532, and note. The assignee of certificates of stock takes them subject to all equities existing against

the assignor: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752, and note. See, further, the extended notes to *West Nashville Planing Mill Co. v. Nashville Sav. Bank*, 6 Am. St. Rep. 838, and *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 830, 860.

KAUFMAN v. SHAIN.

[111 CALIFORNIA, 16.]

AMENDMENT AND CORRECTION OF RECORDS.—Every court of record has the inherent right to cause its acts and proceedings to be correctly set forth in its records; and whenever it is properly brought to the knowledge of the court that a record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the court has authority to correct its record in accordance with the facts, but it cannot, under the form of an amendment of its record, correct a judicial error, or make of record an order or judgment that was never in fact given.

AMENDMENT OF RECORD—CONCLUSIVENESS OF ACTION OF COURT.—A motion to amend a minute entry must be addressed to the court in which the entry is made, and the amount and kind of evidence requisite to satisfy that court as to what was its real order must rest with that court, its determination upon any conflict of evidence concerning the order actually made being conclusive.

AMENDMENT OF RECORD AFTER TERM.—The common-law rule that a court record can be amended after the term, only when there is something in the record to amend by, does not extend to minute entries, or orders of court not forming a part of the judgment-roll.

AMENDMENT OF RECORDS—TIME.—The power of a court to amend its records to make them correspond with the facts, may be exercised at any time.

AMENDMENT OF RECORD—ORDER OF DISMISSAL.—If an order dismissing an action is entered by the clerk in the minute-book in connection with an order sustaining a demurrer without argument, in the absence of plaintiff and of one of the codefendants, the court may at any time, or as late as three years afterward, upon satisfactory proof that there has been no order, in fact, made directing a dismissal of the action, correct the entry, and it may also set aside the judgment of dismissal at any time within six months after its entry. It is immaterial that the judgment was in favor of the moving party, or entered at his request.

AMENDMENT OF JUDGMENT.—It is not necessary that the minute entry on the record of the court should have been actually amended in accordance with an order therefor before it is available upon motion to amend the judgment resting on such erroneous entry. The direction for amendment is, for the purposes of such motion, equivalent to actual amendment.

Garber, Boalt & Bishop, for the appellants.

F. Shay, for the respondent.

¹⁸ HARRISON, J. An amended complaint was filed in this action May 16, 1890, to which a demurrer was filed by the de-

defendants Herrlich and Hanlon, May 23d, and by the defendant Davis, June 4th. October 10, 1890, the demurrer of Herrlich and Hanlon came on for argument, and was sustained by the court, and thereupon the clerk made the following entry in his minutes under the title of the cause: "In this case the demurrer of the defendants, Julie Herrlich and John F. Hanlon, to the second amended complaint coming on regularly this day to be heard, it is by the court ordered, on motion of counsel for said defendants, that said demurrer be and the same is hereby sustained. It is further ordered by the court that this cause be and the same is hereby dismissed." Thereafter, on the 14th of March, 1894, a judgment was entered by the clerk in accordance with said ¹⁹ entry, dismissing the action, and in favor of the defendants for their costs. May 4, 1894, the defendant Davis, in accordance with a previous notice to the plaintiff therefor, moved the court for an order amending the above minute entry, by striking therefrom the clause, "It is further ordered by the court that this cause be and the same is hereby dismissed," upon the ground that said entry upon the minutes was not the order made by the court, and was not authorized or directed to be entered by the court; and also that the judgment be amended by limiting its effect to the defendants Herrlich and Hanlon; and, in support of his motions, presented the affidavit of the shorthand reporter of the court, setting forth what had transpired in court on the day the order sustaining the demurrer was made. After hearing the motions and the evidence offered in support thereof, the court made an order August 20, 1894, directing that the minutes be amended by striking out the words, "It is further ordered by the court that this cause be and the same is hereby dismissed," and that the judgment entered on the 14th of March be set aside. From this order the plaintiff has appealed.

Every court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions; and, whenever it is properly brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted: *Matter of Wright*, 134 U. S. 136; *Balch v. Shaw*, 7 Cush. 282; *Fay v. Wenzell*, 8 Cush. 315; *Frink v. Frink*, 43 N.

H. 508; 80 Am. Dec. 189; *Crim v. Kessing*, 89 Cal. 486; 23 Am. St. Rep. 491. In the exercise of this power, the court is not, however, authorized to do more than to make its records correspond to the actual facts, and cannot, under ²⁰ the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given: *Egan v. Egan*, 90 Cal. 15. The power to change its judgment, as well as the time within which such change may be made, depend upon different principles, and it was held in this state, until a different rule was prescribed by statute, that this power could not be exercised after the adjournment of the term in which the judgment had been entered: *Baldwin v. Kramer*, 2 Cal. 582; *Morrison v. Dapman*, 3 Cal. 255; *Carpentier v. Hart*, 5 Cal. 406; *Lattimer v. Ryan*, 20 Cal. 628; *Willson v. McEvoy*, 25 Cal. 169; *Casement v. Ringgold*, 28 Cal. 335. The history and development of the procedure in this state upon this subject is set forth in *Brackett v. Banegas*, 99 Cal. 623. In *Branger v. Chevalier*, 9 Cal. 172, the same rule was applied to an order revoking the settlement of a statement on the ground that by being filed the statement had become a part of the record. In *De Castro v. Richardson*, 25 Cal. 49, the rule was applied to an order amending a previous order granting time within which to prepare a statement on motion for a new trial, but in *Spanagel v. Dellinger*, 34 Cal. 476, the court held that it had erred in making such application; that, notwithstanding the adjournment of the term after judgment had been entered, the court had jurisdiction to correct or amend orders made in proceedings for a new trial, for the reason that such orders did not form a part of the "record" which had become final by the adjournment; and in *Willson v. Cleaveland*, 30 Cal. 192, it was held that the adjournment for the term did not affect the jurisdiction of the court over its orders made during that term, unless final judgment in the case had been entered. The same question was argued by counsel in *Hegeler v. Henckell*, 27 Cal. 491, but, as it did not appear from the record that any order amending the minutes had been made, the point was not passed upon by the court.

Whether the clerk has correctly recorded an order made by the court, or whether an amendment of the ²¹ entry shall be made so that the minutes shall correctly express what was done or directed, is to be determined by the court in which the motion is made; and the evidence that may be offered in support of the motion must be satisfactory to the judge of that court. The motion to correct a minute entry is eminently addressed to the

court in which the entry is made, and its determination upon any conflict of evidence concerning the order that it had made is not open to review. "The amount and kind of evidence requisite to satisfy that court as to what was the real order of the court, and what was the proper entry on the docket or extended record, must rest with that court": *Fay v. Wenzell*, 8 Cush. 315. In acting upon the motion, the judge is in the exercise of one of the functions of his judicial office, and will not direct the amendment unless the evidence is such as will clearly satisfy him that the entry does not correctly express the order which was made. If the motion is made upon the day succeeding the entry, his own memory of what he had directed might be sufficient, whereas, if there had been a great lapse of time between the making of the entry and the motion for its amendment, he would naturally require more explicit evidence that the entry was incorrect: See *Porter v. Vaughan*, 22 Vt. 269.

The court is not precluded from correcting the entry merely because the "record" does not show that it is itself incorrect. The rule at common law, that the record can be amended only when there is something in the record to amend by, was applied when it was sought to amend a judgment at a term of the court subsequent to that in which it had been signed and enrolled, but it has no application to the amendment of matters that do not form a part of the judgment-roll or "record." Until the entry of the judgment the record was in the breast of the court. Afterward it was in the roll. It was only the "record" thus made up which imported absolute verity. "The making up of the judgment-roll is the equivalent, under our practice, of the entry of record ²² at common law": *De Castro v. Richardson*, 25 Cal. 49. So long as the matters remained "in paper," that is, before the record had been enrolled on parchment, it was not a matter of record, but was subject to amendment upon mere suggestion: 1 *Tidd's Practice*, 697, 711. Mere entries in the minutes of the court are not, properly speaking, matters of record: *Weed v. Weed*, 25 Conn. 344. They become so only by being incorporated into bills of exception, and thus made a part of the judgment-roll. In *Spanagel v. Dellinger*, 34 Cal. 476, the original entry in the minutes of the court gave the appellant time within which to prepare a "statement on appeal," and after the adjournment of the term the court directed an amendment of the entry by causing it to read a "statement on motion for a new trial." There was no record or minute entry that such an order had been made, and the amendment was allowed upon a showing

by the affidavit of the attorney that such was the order that had been made. In *Crim v. Kessing*, 89 Cal. 486, 23 Am. St. Rep. 491, an order, of which there was no entry in the minutes, was made and entered nunc pro tunc upon "proofs to the satisfaction of the court." In *Rousset v. Boyle*, 45 Cal. 64, after the judgment had been affirmed by the supreme court, it was amended in matter of substance, upon a showing of matters outside of the record that it did not conform to the judgment which had been in fact rendered. In *Weed v. Weed*, 25 Conn. 344, it is said: "It is often the case that the court announces in open court the decision which it has made, without furnishing the clerk with any writing upon the subject. Were the latter to make a mistake in entering up the judgment, the injured party would be remediless, unless the mistake could be corrected upon the testimony of the judge who made the decision, and the counsel and others who were present and heard it announced." In *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, the court said: "We think it clear upon the authorities that the court may make such amendments upon any competent legal evidence, that they are the proper judges as to the ²³ amount and kind of evidence requisite in each case to satisfy them what was the real order of the court or actual proceeding before it; what was the proper entry to be made upon the docket, and how the record should be extended": See, also, *Gillett v. Booth*, 95 Ill. 183; *Bank v. Seymour*, 14 Johns. 219; *Hunt v. Wallis*, 6 Paige, 375.

This power of a court to amend its records so that they may correspond with the fact, and correctly express what was done by the court, may be exercised at any time: *Crim v. Kessing*, 89 Cal. 486; 23 Am. St. Rep. 491; *Egan v. Egan*, 90 Cal. 15; *Frink v. Frink*, 43 N. H. 508; 80 Am. Dec. 189; *Balch v. Shaw*, 7 Cush. 282; *Fay v. Wenzell*, 8 Cush. 315; *Hart v. Reynolds*, 3 Cow. 42, note. "No lapse of time will divest the court of its power or absolve it from its duty to supply deficiencies in the records of its own proceedings where justice and the truth of the case require it": *Lewis v. Ross*, 37 Me. 230; 59 Am. Dec. 49. In *Cradock v. Radford*, 4 Mod. 371, the court ordered the roll to be brought in and amended twenty years after the judgment had been signed. In *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, the amendment was allowed after a lapse of twelve years, and in *Balch v. Shaw*, 7 Cush. 282, a still longer time had intervened between the entry and the amendment. In *Crim v. Kessing*, 89 Cal. 486, 23 Am. St. Rep. 491, the court in January ordered a nunc pro tunc order to be made, as of the previous

March, prior to the trial of the cause. In *Rousset v. Boyle*, 45 Cal. 64, the court permitted the amendment several years after the entry of the judgment, and after it had been affirmed in the supreme court.

In view of the foregoing principles, the order of the superior court must be affirmed. From the affidavit of the shorthand reporter, it appeared that when the demurrer was called for argument there was no appearance on behalf of the plaintiff, and that the demurrer was sustained on the motion of the attorney for the demurring party without argument, and that when, upon the direction of the court that the demurrer be sustained, the attorney asked for judgment, the court replied: "The demurrer is sustained. I haven't allowed any ²⁴ amendment. If you desire it, let judgment be entered dismissing the action. I say that must follow as a matter of course; but I simply sustain the demurrer here."

It may be conceded that the remarks of the court are not entirely free from ambiguity, but, for the purpose of resolving this ambiguity and determining what order was then made, the court was justified in holding that the final statement, "I simply sustain the demurrer here," was to be taken as qualifying the prior announcement to the attorney that judgment would be entered dismissing the action, if he desired it, and as declaring to him that before such order would be entered some additional motion must be made by him. In addition to this affidavit, there was before the judge at the hearing of the present motion the calendar and note-book kept by him, upon which was the following entry written by him: "*Kaufman v. Shain et al.* Demurrer of J. F. Hanlon and Julie Herrlich to second amended complaint. Demurrer sustained. Action dismissed, if counsel are present." Through the words "if counsel are present," a pencil mark had been drawn, but it did not appear when or by whom it was drawn. There was another demurrer to the complaint in behalf of other defendants pending before the court, and none of the counsel for either the plaintiff or any other party to the action was present. This showing on behalf of the respondent was sufficient to sustain a finding by the judge that there had been no order made by him directing a dismissal of the action, and to authorize the minutes to be corrected accordingly. The plaintiff presented no evidence contravening the above showing, and introduced only the minute entry itself and the judgment-roll containing the judgment subsequently entered thereon.

That portion of the order setting aside the judgment must

also be affirmed. Such an order necessarily followed the order amending the minute entry. The objection upon the ground of lapse of time has no application, for the reason that the motion to amend, as ²⁵ well as the order amending the judgment, were made within less than six months after the judgment was entered. It was not necessary that the minute entry should have been actually amended in accordance with the order therefor before it was available upon the motion to amend the judgment. The direction for its amendment was, for the purpose of that motion, equivalent to its actual amendment. Upon the amendment of the minute entry, the premises upon which the judgment rested, and which were recited therein, fell, and as it appeared to the court that a judgment had been entered by the clerk without any direction therefor, the court was authorized to set it aside at any time within six months after its entry, even upon its own motion, and without any request therefor. Whether the judgment had been entered at the request of the respondent or not was immaterial. If the clerk had no authority to enter it, it could not be binding upon him, even though it purported to be a judgment in his favor; and he was not precluded from seeking to have it set aside even if it had been entered at his request.

The order is affirmed.

Van Fleet, J., and Garoutte, J., concurred.

Hearing in Bank denied.

COURTS—AMENDMENT OF RECORDS.—There can be no doubt of the general power of a court to amend its records or its process so as to make them conform to the truth: *Dewey v. Peeler*, 161 Mass. 185; 42 Am. St. Rep. 399, and note.

COURTS—AMENDMENT OF RECORDS AFTER TERM.—The court may amend its record so as to make it conform to the truth, even after the term has expired: *Crew v. McCafferty*, 124 Pa. St. 200; 10 Am. St. Rep. 573, and note; *Gibson v. Chouteau*, 45 Mo. 171; 100 Am. Dec. 366, and note; *Hogue v. Corbit*, 156 Ill. 540; 47 Am. St. Rep. 232, and note.

AM. ST. REP., VOL. LII.—19

LEWIS v. TERRY.

[111 CALIFORNIA, 89.]

SALES—WARRANTY—LIABILITY TO THIRD PERSON.—If a tradesman sells, or furnishes for use, an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries, resulting from its defective or unsafe condition, to a person who is neither a party to the contract with him nor one for whose benefit the contract was made.

SALES—WARRANTY—KNOWN DEFECT—LIABILITY TO THIRD PERSON.—If a tradesman sells or furnishes an article, representing it to be safe for the uses it is designed to serve, when he knows it to be dangerous because of concealed defects, he commits a wrong, independent of his contract, and renders himself liable to another person, without notice of such defects, for any injury which may be reasonably contemplated as likely to result, and which does in fact result, therefrom to that person, or to any other without notice and who is not himself in fault.

SALES—WARRANTY—KNOWN DEFECTS.—Although a folding bed is not ordinarily a dangerous instrumentality, this fact does not relieve the vendor from liability for injury to a third person, if such vendor, in making the sale, represents the bed to be safe, knowing it to be really unsafe for the purposes for which it is intended to be used.

SALES—WARRANTY—KNOWN DEFECT—NEGLIGENCE—PROXIMATE CAUSE.—To render the purchaser of an unsafe and defective article, represented by the seller to be safe, the culpable intervening cause relieving the vendor from liability for injury to a third person, the purchaser must actually know of the defect in the article purchased.

H. A. Clement and Clement, Cannon, Kline & Stradley, for the appellant.

G. E. Lawrence, for the respondent.

48 **BRITT, C.** It is alleged in the complaint in this case, among other things, that defendants were engaged as copartners in the business of selling household furniture, and that among the wares dealt in by them were certain folding beds, which were represented and warranted by defendants to their customers and the public to be safe for use; that defendants, in the course of said business, sold and delivered one of said beds to a Mr. Apperson and his wife, and expressly represented and warranted to them that such bed was so constructed that it would stand upright against the wall, and when wanted for use its front could, with little effort, be lowered to a horizontal position by means of hinges at the bottom; that a solid piece of iron, inclosed in the framework at the back of the bed, acted as a balance to the front part while being lowered, and rendered it easy to raise or lower the same with perfect safety; that as soon as the front part was lowered the legs of the same would automatically descend and se-

curely lock themselves, so that the outer end of the bed would be firmly supported in its horizontal position upon its said legs. It is further alleged that there was an inherent and latent defect in said bed so that the said legs would sometimes fail to adjust and secure themselves, with the result that if any weight should be placed on the bed the heavy upright frame would be precipitated with such force upon the lowered portion of the bed as to crush, wound, and even kill anyone reclining thereon, and that such defect rendered the bed dangerous to all who might use it. That defendants, with full knowledge of such defect and of such danger, sold the bed to the Appersons without warning them thereof, and assured them that it was perfectly safe. That plaintiff rented a room from the Appersons, and on the day the bed was purchased from defendants by them it was placed in such room for plaintiff to sleep on. That a few days ⁴⁴ later the plaintiff, being about to retire for the night, opened and let down the bed, and, the legs thereof being apparently secure, she, in the course of her preparations for retiring, leaned with her left arm upon the side of the bed; and while she was in this attitude the heavy upright framework of the bed fell forward and downward upon the horizontal part and upon the plaintiff, breaking her arm and otherwise injuring her, to her damage, etc. A demurrer to this complaint, on the ground that it fails to state facts sufficient to constitute a cause of action, was sustained, and judgment passed for defendants.

The complaint is faulty in not stating directly that the fall of the bed was caused by the latent defect described, but as the argument of the parties has proceeded on the theory that such was the fact we may join in that assumption: *Schubert v. J. R. Clark Co.*, 49 Minn. 335; 32 Am. St. Rep. 559. We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made: *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; 15 Am. Rep. 387; *Heizer v. Kingsland Mfg. Co.*, 110 Mo. 605; 33 Am. St. Rep. 482; *Winterbottom v. Wright*, 10 Mees. & W. 109, the leading case; *Shearman and Redfield on Negligence*, sec. 116; 1 *Beven on Negligence*, 60, et seq. But when the seller, as in the case made by the complaint before us, represents the article to

be safe for the uses it was designed to serve, when he knows it to be dangerous because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts. "It is well settled that a man who delivers an article, which he knows to be dangerous⁴⁵ or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may be reasonably contemplated as likely to result, and which does in fact result therefrom, to that person or any other who is not himself in fault": *Wellington v. Downer etc. Oil Co.*, 104 Mass. 64, per Gray, J; *Schubert v. J. R. Clark Co.*, 49 Minn. 335; 32 Am. St. Rep. 559; *Elkins v. McKean*, 79 Pa. St. 493; *Shearman and Redfield on Negligence*, sec. 117; see *Civ. Code*, secs. 43, 1708. The liability of the willful wrongdoer in like instances is recognized in several cases cited in support of the judgment: *Longmeid v. Holliday*, 6 Ex. 765; *Heizer v. Kingsland Mfg. Co.*, 110 Mo. 605; 33 Am. St. Rep. 482.

The fact insisted upon by respondent that a bed is not ordinarily a dangerous instrumentality is of no moment in this case; if mere nonfeasance or perhaps misfeasance were the extent of the wrong charged against defendants that consideration would be important: *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455; but the fact that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe for use when known to be really unsafe, for the danger is thus rendered more insidious.

Nor is the further point that the chain of causation implicating defendants in the injury was broken by the intervention of the Appersons as the persons who furnished the bed immediately to the plaintiff, available to defendants on this appeal. To have that effect it must appear that the Appersons knew of the defect in the structure of the bed, and so were a culpable intervening cause, and this does not appear on the face of the complaint: *Pastene v. Adams*, 49 Cal. 87; 1 Beven on Negligence, 76. The judgment should be reversed, with instructions to the court below to overrule the demurrer.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion, the⁴⁶ judgment is reversed, with instructions to the court below to overrule the demurrer. Harrison, J., Garoutte, J., Van Fleet, J.

Hearing in Bank denied.

NEGLIGENCE—LIABILITY OF VENDEE OF DEFECTIVE ARTICLE TO THIRD PERSONS.—One who makes and sells a piece of machinery is not liable to persons other than the vendee for injuries caused by its breakage, unless such machinery is of an inherently dangerous character, and he has failed to make known its true nature, or unless he sold it knowing it to be defective without informing the vendee of the defect: *Helzer v. Kingsland etc. Mfg. Co.*, 110 Mo. 605; 83 Am. St. Rep. 482, and note. See, also, the extended note to *Devlin v. Smith*, 42 Am. Rep. 815.

MCGOWAN v. McDONALD.

[111 CALIFORNIA, 57.]

CORPORATIONS—CONSTITUTIONAL LAW—LIABILITY OF STOCKHOLDERS.—If a constitutional provision, and legislation necessary to carry it into effect, make each stockholder in a corporation individually and personally liable for his proportion of all its debts and liabilities, a subsequent statute, in so far as it attempts to exempt corporations formed under it from such liability, is obnoxious to the constitution and of no effect.

CONSTITUTIONAL LAW—STATUTES VOID IN PART.—An independent unconstitutional section of a statute exempting the stockholders in a corporation from personal liability, not entering into the general object and purpose of the act under which the corporation is formed, and which may be stricken out without prejudice to the other portions of the statute, does not defeat such other portions, or affect the validity of corporations organized and formed under such act.

CONSTITUTIONAL LAW—CORPORATIONS—OBLIGATION OF CONTRACTS.—Under a constitutional provision that all general and special laws for the formation of corporations may be altered or repealed, the legislature has power to change the law relating to the liability of stockholders without impairing the obligation of contracts, although in so doing obligations are imposed upon stockholders for which they were not liable when they became such.

CORPORATIONS—LIABILITY OF STOCKHOLDERS.—The provisions of section 287 of the Civil Code of California, stipulating that no corporation formed or existing before such "code" took effect should be affected by such provisions, unless the corporation should elect to continue its existence thereunder, relates to the formation and existence of the corporation and not to the liability of its stockholders. They remain personally liable in any case, under constitutional provisions imposing such liability.

CORPORATIONS—SAVINGS BANKS—LIABILITY OF STOCKHOLDERS.—If constitutional provisions impose personal liability upon stockholders in all corporations for corporate debts, the legislature cannot exempt stockholders in savings banks from such liability.

CORPORATIONS—EVIDENCE—REFRESHING MEMORY FROM PASS-BOOK.—Under a statute providing that "a witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred," a witness may refresh his memory from a bank-book in which entries of his deposits and drafts were made or verified in his presence.

CORPORATIONS—EVIDENCE—PASS-BOOKS OF DEPOSITORS in a bank are admissible in evidence in an action against its

stockholders to enforce their personal liability for the balance due as shown by such books.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—EVIDENCE.—The liability of a stockholder in a corporation for its debts is primary; and any evidence competent and sufficient to show the liability of the corporation is competent to show that of the stockholder.

CORPORATIONS—SUSPENSION OF BANK—INTEREST ON DEPOSITS DETAINED.—If a pass-book is balanced and the bank then suspends business, refusing to pay its depositors, it thereafter detains money received to their use and is liable for interest thereon.

CORPORATIONS — STOCKHOLDERS — ADMISSION BY PLEADINGS.—If an allegation in a complaint alleges that defendant is the owner of certain shares of stock in a corporation, his failure to deny such allegation constitutes an admission that he is such stockholder.

Dunn & McPike, Rosenbaum & Sheline, and Sawyer & Burnett, for the appellants.

R. Johnson, for the respondent.

⁶¹ BELCHER, C. This action was brought to recover from the defendants, as stockholders of the Pacific Bank, their respective proportions of certain debts and liabilities of the bank, alleged to have been due and owing to depositors therein, and to have been assigned to the plaintiff.

The court below gave judgment for the plaintiff as prayed for, from which and from an order denying a new trial the defendants appeal.

It appears from the record that the Pacific Bank was incorporated in February, 1863, by the name of the "Pacific Accumulation Loan Company," and with a capital stock of five million dollars, divided into fifty thousand shares of the par value of one hundred dollars each, under the provisions of an act of the legislature of this state, entitled "An act to provide for the formation of corporations for the accumulation and ⁶² investment of funds and savings," passed April 11, 1862: Stats. 1862, p. 199. By this act corporations organized under it were authorized "to loan and invest the funds of the corporation, to receive deposits of money, and to loan and invest the same."

In March, 1866, an act was passed by the legislature, entitled "An act to authorize the Pacific Accumulation Loan Company to change its name" (Stats. 1865-66, p. 620), and thereafter, in April of that year, and in accordance with the provisions of the said act, the corporation changed its name to that of Pacific Bank.

In February, 1872, an act was passed by the legislature amend-

ing the act of April 11, 1862 (Stats. 1871-72, p. 132), and under and in pursuance of its provisions such proceedings were taken by the stockholders of the said corporation that the capital stock thereof was reduced to the sum of one million dollars, and its shares to the number of ten thousand, which said capital stock had theretofore been subscribed and paid up, and thereafter remained as the capital stock of the said corporation.

The Pacific Bank never elected to continue its existence under the provisions of the Civil Code, which took effect January 1, 1873, but continued to do business as a bank under the act of April 11, 1862, and subsequent acts amendatory thereof and supplementary thereto, until June 23, 1893, when, being insolvent, it closed its doors and suspended all business.

1. At common law, no individual liability was imposed upon the members of a corporation, but article IV of the constitution of 1849 contained the following provisions:

"Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."

"Sec. 36. Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities."

On the 22d of April, 1850, "An act concerning corporations" was passed by the legislature, which provided ⁶³ in section 32: "Each stockholder of any corporation shall be individually and personally liable for a portion of all its debts and liabilities, proportioned to the amount of stock owned by him"; Stats. 1850, p. 344.

In 1853 an act "to provide for the formation of corporations for certain purposes" was passed, which provided in section 16: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be instituted and prosecuted."

In *French v. Teschemacher*, 24 Cal. 518, it was held that section 36 of the constitution, above quoted, was not self-executing, and that legislation was necessary to give it effect. It was also held that neither of the statutory provisions above quoted was sufficient of itself to impose a liability, "yet, although neither by itself affords a perfect rule, the two combined contain what is omitted in the thirty-sixth section of the constitution, and is needed to give it a practical operation."

Section 322 of the Civil Code contains very full and complete provisions as to the liability of the stockholders of all corporations formed or doing business in this state for debts incurred while they were such stockholders, and as to the method of enforcing such liability.

And section 3 of article XII of the constitution of 1879 provides: "Each stockholder of a corporation, or joint stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association."

Appellants contend that they are not liable to the plaintiff in this case for any portion of the debts of the corporation, for the reason: 1. That by terms of the statute, under which the Pacific Accumulation Loan Company was organized, the stockholders of the corporation ⁶⁴ were expressly exempted from such liability; and 2. That as the Pacific Bank never elected to continue its existence under the provisions of the Civil Code, the corporation was not affected by the provisions of the code in regard to corporations, and hence no liability was thereby imposed upon appellants.

The provision of the act of April 11, 1862, relied upon in support of the first point, is as follows:

"Sec. 27. Corporations formed under this act, and the members and stockholders thereof, shall not be subject to the conditions and liabilities contained in, and shall be exempt from, the operation of an act concerning corporations, passed April 22, A. D. 1850."

But if by this section it was intended to declare that the stockholders of a corporation, formed under the provisions of the act, should not be individually and personally liable for any portion of its debts and liabilities, then the section was in plain conflict with section 36, article IV, of the constitution of 1849, and must be held to have had no validity or effect. For, as said in *French v. Teschemacher*, 24 Cal. 518: "The individual liability of the stockholder is a constituent element in the artificial life of a corporation, made so by the author of its creation, and that life can no more exist under the constitution without the element than a natural person can exist when deprived of an element made indispensable to his existence by the laws of nature. Hence an act of the legislature, authorizing the formation of corporations, without attaching to the corporators an individual liability,

would be as obnoxious to the constitution as would be the creation of a corporation by special act."

If, however, this be so, it is claimed that the whole act was rendered unconstitutional, and hence that the bank never had any corporate existence. But this does not follow. In *People v. Hill*, 7 Cal. 103, it was said: "That if some of the provisions of the bill are unconstitutional, this will not vitiate the whole act, unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such ^{as} obnoxious provisions." And in *Robinson v. Bidwell*, 22 Cal. 379, it was held that where a provision of a statute is of such a nature and has such a connection with the other parts as to be essential to the law, its unconstitutionality vitiates the whole enactment. But if an independent provision, not in its nature and connections essential to the law, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid: See also, *French v. Teschemacher*, 24 Cal. 518, and *Ex parte Frazer*, 54 Cal. 94, where the same doctrine is announced.

It is quite evident that the section of the act in question was an independent provision which did not enter into the general object and purpose of the act, and which might be stricken out without prejudice to the other portions thereof. It therefore did not vitiate the other portions of the act or affect the validity of corporations formed under its provisions.

The provision of the Civil Code relied upon in support of the second point is as follows:

"Sec. 288. No corporation formed or existing before 12 o'clock noon of the day upon which this code takes effect, is affected by the provisions of part 4 of division 1 of this code, unless such corporation elects to continue its existence under it, as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed subject to the provisions of this section."

By the constitution of 1849 each stockholder of a corporation was made personally liable for his proportion of all of its debts and liabilities, but to enforce such liability legislation was necessary. It was not, however, necessary that every act providing for the formation of corporations should also provide for the liability of their stockholders. A general law making such provisions would have subserved all the purposes required. And while the liability of the stockholder was a constituent element in the life of the corporation, and necessary to its existence, it was still only a burden imposed ^{as} on the stockholder, and had

otherwise nothing to do with the formation or existence of the corporation.

In *Market Street Ry. Co. v. Hellman*, 109 Cal. 571, it was held that the provisions of the Civil Code relating to corporations which do not affect, and were not applicable to, such corporations as were formed before the code took effect and had not elected to continue their existence under it, were such only as related to the formation and existence of the corporations. Under this rule, we think it must be held that section 322 of that code applies to the stockholders of corporations formed or doing business in this state before or after the adoption of the codes. Besides, our present constitution imposes the same liability, for, as said in *Bidwell v. Babcock*, 87 Cal. 32, section 322 of the Civil Code and section 3 of article 12 of the constitution have "substantially the same meaning and effect."

It is objected, however, that if the provisions of the code and constitution are applicable they impose obligations upon appellants for which they were not liable when they became stockholders, and are in conflict with that provision of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts, and are therefore as to them unconstitutional and of no effect.

The answer to this objection is that the constitution of 1849 provided: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed: Const., art 4, sec. 31.

Under the authority thus conferred, both the legislature and the people had power to change the law in regard to the liability of stockholders, without violating any provision of the constitution of the United States.

In *In the Matter of Empire City Bank*, 18 N. Y. 199, a similar question arose. That was a proceeding to enforce a personal liability of stockholders for the debts of the bank under an act passed after the bank was incorporated. The court, by Denio, J., said: "The statute under which the proceedings were had was challenged as being a violation of the constitution of the United States and of this state. By the federal constitution no state can rightfully enact a law impairing the obligation of contracts. It is argued that, by the general banking law, the associations which it authorizes are alone responsible for its contracts, the shareholders being wholly exempt from liability, and it is

insisted that this is in the nature of a contract between the state and the shareholders, and that the constitutional guaranty of the integrity of contracts, in the national constitution, would be illusory if the state could, by changing its constitution, subvert all existing engagements; and hence that the guaranty applies as well to state constitutions as to other state laws. Without denying or affirming the soundness of these positions, it is enough to say that the general banking law expressly reserves to the legislature the power to alter or repeal it, so that any changes, which it or the people think proper to make, are fully authorized by the provisions of the supposed contract itself." See, also, the following cases, which are to the same effect: In the Matter of Lee etc. Bank, 21 N. Y. 9; In the Matter of Reciprocity Bank, 22 N. Y. 9; Sleeper v. Goodwin, 67 Wis. 577; Tomlinson v. Jessup, 15 Wall. 454; Meadow Dam Co. v. Gray, 30 Me. 551.

It is also objected that the Pacific Bank was originally organized for the purpose of doing business as a savings bank, and that the stockholders of such a bank cannot be held liable for its debts. But the provisions of the constitution of 1849 applied to the stockholders of all corporations, without regard to the character of the business to be transacted, and the same is true of the constitution of 1879. It is not, therefore, within the power of the legislature or the courts to declare any such exemption as that here claimed: And see Mitchell v. Beckman, 64 Cal. 117, and Kennedy v. Savings Bank, ⁶⁸ 101 Cal. 495, 40 Am. St. Rep. 69, where liability for deposits in savings banks was enforced. If, however, the law were as it is interpreted by appellants, the objection could not be sustained, for the reason that it is alleged in the complaint, and not denied by the answer, that at all the times mentioned therein (within two years prior to the commencement of the action) "said bank was receiving deposits and doing a general banking business." And it was proved that since 1886 the bank had been advertising itself as a commercial bank by a printed statement on the front page of its by-laws, that it is "the oldest chartered commercial bank in California."

2. Appellants contend that the court committed several errors of law in its rulings upon the admission of evidence offered to establish the indebtedness of the Pacific Bank to the assignors of the plaintiff.

There are three such assignors, and each had a bank-book. The left-hand page of these books showed the date and amount of each deposit, and the right-hand page showed the amount of each check paid by the bank, the number of checks returned,

and the balance remaining due and unpaid to the depositor on each occasion when the balances were struck. The last balances were entered on the twenty-second day of June, 1893, and the amounts shown thereby to be then due to the depositors were the same as those alleged in the complaint. It was proved that all the entries on the left-hand page were made by the teller of the bank when the moneys were deposited and in the presence of the depositor, and were correct, and that all the entries on the right-hand page were made by a clerk of the bank when the books were handed in by the depositors from time to time to be balanced. It was also proved by each of the three depositors that when he received back his book he verified the entries made by comparing them with his own accounts, and in every instance found them correct; and each one, therefore, testified that he knew of his own knowledge that ^{as} the balance shown by the book was the correct amount due him. Neither of the witnesses could, however, state the amount of his deposits or of his drafts, or the balance due, without refreshing his memory by looking at his bank-book, and this, against the objection of defendants, he was permitted to do. The books were also offered, and, against the objection of defendants, admitted in evidence to prove the same facts.

Section 2047 of the Code of Civil Procedure provides: "A witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing."

It is claimed that this section did not authorize the witnesses to refresh their memories by looking at the books, but we think it did. The entries of his deposits were admittedly made in the presence of the witness and under his direction, and he knew at the time that they were correct. There can be no question, therefore, that as to them he could refresh his memory from the book. And the entries of the amounts drawn out were clearly made under the direction of the witness, for he handed in his book to have such entries made and the balance struck; and when the book was returned to him he checked it up from his own books and knew that the balance stated was correct. This was at a time when the matter was fresh in his memory and when he knew that the same was correctly stated. In our opinion, therefore, the case comes fairly within the rule declared by the code, and there was no error in the ruling complained of.

It is also claimed that the pass-books were not admissible in evidence against the defendants, and in support of this position *Neilson v. Crawford*, 52 Cal. 248, is cited.

It is well settled by numerous decisions of this court that by the constitution and statutes of this state the ⁷⁰ stockholders of a corporation organized therein are made personally liable for their respective proportions of all its debts and liabilities contracted while they are such stockholders. Such liability arises when the debt is incurred, and is primary and not secondary. In a suit against a stockholder to enforce his liability, the first fact to be established is the indebtedness of the corporation, and, when that is established, the liability of the stockholder results as a necessary sequence. It would seem, therefore, that any evidence which is competent and sufficient to show the liability of the corporation must be competent and sufficient to show the liability of the stockholder.

In *Borland v. Haven*, 37 Fed. Rep. 394, a case decided by the United States circuit court for California, Sawyer, judge, the question arose as to the admissibility and effect of evidence in a case like this, and on page 414 it was said, "that any evidence that is competent to establish the liability, as against the corporation, must be competent to establish the liability of the stockholders, for the liability of the corporation being established, the liability of the stockholder for his share follows as an inevitable legal consequence by the express terms of the constitution and statute."

The case of *Neilson v. Crawford*, 52 Cal. 248, relied on by appellants, was an action to enforce the liability of the defendants for their portion of the indebtedness of a corporation of which they were stockholders. At the trial, to prove such indebtedness, the plaintiff offered in evidence the books of the corporation—its ledger, journal, book of resolutions and transfers. It was held on appeal that while in an action against the corporation for the recovery of a debt its books of account, showing the existence of the indebtedness alleged, would be admissible, because they are the admissions of the corporation entered by its servants, still they were inadmissible in an action against the stockholders. And the court said: "If an admission of indebtedness, made by a corporation, be evidence of indebtedness in an action ⁷¹ against a stockholder, it is not perceived why a similar admission made by a stockholder should not be evidence in an action brought against the corporation, nor why an estoppel against the corporation—for instance, a judgment rendered—should not equally

estop a stockholder to deny the fact of indebtedness in an action brought against him to enforce his proportionate liability."

That case is not in point here, for the reason that in this case the books of the bank were not offered, and the objection urged is only to the admissibility of the pass-books of depositors. But the pass-books were the books of the depositors and not of the bank. They showed the indebtedness of the bank as certificates of deposit would have shown it. Now suppose the assignors of plaintiff had held certificates of deposit, instead of pass-books, can there be any doubt that they would have been admissible? We think not.

Besides in *Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, it was held that the legal effect of the condition prescribed by section 3 of article 12 of the constitution of this state, regulating the individual liability of stockholders for debts contracted and liabilities incurred by the corporation, is that a corporation when created becomes the agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and its articles of incorporation, and the contracts which it thus makes bind the stockholders to the extent named. If this be so, then the rule that the admissions of an agent, which are made while in the performance of his duty and are a part of the *res gestae*, may be proved against the principal, must be applicable here. And see *Mitchell v. Beckman*, 64 Cal. 117, where it was held that there was no error in admitting in evidence a judgment against the corporation for the purpose of establishing its indebtedness and the liability therefor of its stockholders.

We conclude, therefore, that the court below did not err in admitting the pass-books in evidence.

72 3. Some of the appellants object to the allowance of interest against them from the time of the suspension of the bank. But, as before stated, the pass-books were balanced and the accounts stated on the day before the suspension. Section 1917 of the Civil Code provides that interest is payable on all moneys "due on any settlement of accounts, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him." Ordinarily, of course, interest is not payable on the amount found due when a pass-book is balanced. But when a bank suspends business and refuses to pay its depositors, it thereafter clearly detains moneys which it received to their use, and, under the provisions of the code, must be held liable for interest thereon.

4. The point is made that the evidence does not show that appellant Wood was a stockholder when the deposits were made. But the complaint alleges that Wood was the owner of two hundred and twelve shares of stock of the bank at all the times mentioned therein, and this allegation is not denied in his answer. His ownership of the stock was therefore admitted, and no evidence as to it was required.

The other points discussed by counsel do not require special notice.

The judgment and order appealed from should be affirmed.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

CORPORATIONS—ALTERING LIABILITY OF STOCKHOLDERS.—Stockholders of corporations are personally liable to corporation creditors only by virtue of express provision of the statute, there being no privity of contract between them; and the repeal of such a statute does not impair the obligation of any contract: *Coffin v. Rich*, 45 Me. 507; 71 Am. Dec. 559.

CORPORATIONS—NATURE OF STOCKHOLDER'S LIABILITY TO CREDITORS.—In very many cases it has been held that the liability of a stockholder for the debts of a corporation is primary and original, and not that of a guarantor or surety, under statutes or charters making the stockholder liable "at all times" for "all debts due" by the corporation: Extended note to *Freeland v. McCullough*, 43 Am. Dec. 700. See especially on this subject the extensive note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 848.

STATUTES VOID IN PART.—A statute may be partly unconstitutional without being wholly void: *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193; 50 Am. St. Rep. 801, and note.

WITNESSES—REFRESHING MEMORY OF.—A witness may use a memorandum to refresh his memory: *Holladay v. Marsh*, 3 Wend. 142; 20 Am. Dec. 678. A witness testifying as to facts whereof he had made a memorandum at the time of their occurrence may refer thereto for the purpose of refreshing his memory: *Riordon v. Davis*, 9 La. 239; 29 Am. Dec. 442; *Henderson v. Ilsey*, 11 Smedes & M. 9; 49 Am. Dec. 41. See, also, the extended notes to *State v. Bacon*, 96 Am. Dec. 619-623, and *Ackler v. Hickman*, 35 Am. Rep. 56, 57.

DE LANY v. KNAPP.

[111 CALIFORNIA, 165.]

HOMESTEADS ON PUBLIC LANDS—EXEMPTIONS.—Land claimed as a homestead is not subject to execution for any debt contracted by the claimant prior to issuance of patent for the land, so long as the title remains vested in the patentee.

HOMESTEADS—DIVESTITURE OF EXEMPTIONS—RECONVEYANCE.—The character and exemptions which attach to a homestead in public lands do not revive on a subsequent repurchase by the original holder by whom it has been sold. After such repurchase it is liable for his debts contracted before he made the original sale.

HOMESTEADS—DIVESTITURE OF EXEMPTION—RECONVEYANCE—EXECUTION CREDITOR AS BONA FIDE PURCHASER.—An execution creditor who purchases land bona fide and for value at execution sale against a homestead claimant upon a levy made after the latter has conveyed the land, and its reconveyance to him, is protected against every secret trust arising from such conveyance by the homestead claimant without consideration to protect his title against his creditors. In such case the execution creditor is protected against latent equities of which he has no notice, although he is in position to defeat the transfer made by the homestead claimant.

HOMESTEADS—DIVESTITURE OF EXEMPTIONS.—SUBSEQUENT PURCHASERS of land from a homestead claimant, after the rights of a bona fide purchaser at execution sale against him have attached, cannot defeat the title of the execution purchaser by proof of a latent equity in favor of the homestead claimant, of which such purchaser had no notice.

E. W. Hendrick and J. W. Murphy, for the appellant.

Daney & Wright, for the respondents.

¹⁶⁷ **HENSHAW, J.** Appeals from the judgment and from the order denying a new trial. The action was to quiet title to one hundred and sixty acres of land. The facts of the case are as follows:

One Neil, from whom both plaintiff and defendants deraign title, entered the land in controversy under the United States homestead laws, and thereafter, pursuant to the statute, commuted and paid for the land, receiving a patent therefor, which, by way of preamble and recital, declared that, "Whereas, George Neil, of San Diego county, California, has deposited in the general land-office of the United States a certificate of the register of the land-office at Los Angeles, California, whereby it appears that full payment has been made by the said George Neil, according to the provisions of the act of ¹⁶⁸ Congress of the 24th of April, 1820, entitled 'An act making further provisions for the sale of the public lands,' and the acts supplemental thereto, for" the land (describing it), "which said tract has been purchased by the said George Neil," etc.

Upon March 18, 1893, Neil, by deed of grant duly recorded, conveyed the land to Mrs. A. L. Treanor. Upon the fifth day of May following, Mrs. Treanor, by like deed of grant, also duly recorded, reconveyed the same property to Neil. Upon May 10th, five days after, a deficiency judgment was docketed against Neil, and in favor of this plaintiff. The land in controversy was then subjected to levy, and, on the fifteenth day of June, 1893, was sold at public auction, and purchased by this plaintiff. Thereafter, upon the twenty-third day of November, 1893, Neil executed his deed of grant to the same land to one Pauly, to whose title these defendants afterward succeeded.

For the reasons hereafter given, we consider it unnecessary to pass upon the question whether, by his commutation, the character of the title Neil received from the government was that inuring under a homestead, or that attaching to a pre-emption patent. For the purposes of this consideration, it will be assumed (though not decided) that Neil took the land as a government homestead.

So taking, the land was not liable for any debt of Neil contracted prior to the issuance of the patent: Rev. Stats. 1878, sec. 2296. The deficiency judgment of plaintiff against Neil was for such a pre-existing debt.

Neil's deed to Mrs. Treanor was, upon the face of the recorded instrument, a conveyance of all his interest in the property, and, when he subsequently acquired title from her by deed of grant, he took the land divested of its homestead exemptions. The patentee sells his land. It is protected in the hands of the purchaser from any debt of the grantor which could not have been enforced against it while the title remained in him; and this is ¹⁰⁰ all that the case of *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 390, decided upon the matter. But, as with a state homestead, so with a federal; its character and exemptions do not revive on a subsequent repurchase by the original holder by whom it has been sold: *Hebert v. Mayer*, 42 La. Ann. 839.

But to overcome the effect of the deeds from Neil to Treanor, and from Treanor to Neil, defendants were permitted, over objections and exceptions, to call Mrs. Treanor, who testified that Neil, who was sick, sent for her, and said to her: "My creditors are pushing me pretty hard. Would you object to having my property put in your name, so that it will be beyond the reach of my creditors?" Mrs. Treanor consented, the deed was made under these circumstances without consideration, and the property thereafter in like manner reconveyed by her to him.

Plaintiff's claim was for a debt due prior to the issuance of the patent. The land was, therefore, not liable for it, and plaintiff was not one of Neil's creditors who could have been injuriously affected by the transfer.

Upon the other hand, these transactions originated and were executed in fraud. Plaintiff had no knowledge of the secret trust. She bought at the execution sale in good faith and for value, upon the security of the title which stood in Neil, and which, by the record, was freed from homestead exemptions. Under these circumstances, is she protected against the effect of this private agreement?

I think she should be and is. It is true she was not one of those creditors who could complain of the original fraud and cause the conveyance to Mrs. Treanor to be set aside. Nevertheless, she was a bona fide purchaser for value and without notice at the execution sale, and her rights are the same as those which would have attached to an innocent third person buying under like circumstances. She is protected against latent equities of which she had no notice: *Riley v. Martinelli*, 97 Cal. 575; 33 Am. St. Rep. 209.

¹⁷⁰ The defendants, deriving their title from Neil after the rights of plaintiff as purchaser had accrued, occupy no better position than would he. Where he would be estopped, so are they; and what binds him concludes them.

The fact that plaintiff was not one of those whose injury was intended by the original fraud would not be a reason for permitting Neil to prove it against her, if in fact she had innocently suffered by reason of it, and if Neil could not prove it neither could those claiming under him.

If the transfers had been made with the understanding that they were designed merely to effect an apparent destruction of the homestead character of the land, no one would assert that Neil could prove this fact against one who had changed his situation under a belief in the bona fides of the matter. Yet this is the precise result which, if not intended, necessarily followed the fraud of Neil and Mrs. Treanor. Neil held out to the world that he had purchased the land under circumstances which, by operation of law, freed it from its homestead exemptions. An innocent third person dealing with this property relied upon these circumstances, and bought the property after a levy and sale which were legal except for this secret and fraudulent transaction. Neil cannot, nor can those claiming under him, defeat the title thus obtained by proof of any such "latent equity."

The admission of the evidence of Mrs. Treanor was thus error for which the order denying a new trial must be reversed and the cause remanded. So ordered.

McFarland, J., and Temple, J., concurred.

PUBLIC LANDS—HOMESTEAD ENTRY—WHEN SUBJECT TO EXECUTION.—Lands entered under the United States homestead laws are liable to the satisfaction of debts contracted by the homestead claimant between the date of the final certificate of entry and the date of the patent: *Struby-Estabrook Mercantile Co. v. Davis*, 18 Col. 93; 36 Am. St. Rep. 266. In *Faull v. Cooke*, 19 Or. 455, 20 Am. St. Rep. 836, it was held that a homestead in public lands, claimed and perfected under the United States statute, is exempt from liability for debts contracted prior to the issuing of the patent therefor.

COOPER v. WILDER.

[111 CALIFORNIA, 191.]

PUBLIC LANDS—TIMBER CLAIMS, DEVISABILITY OF.—An owner of a timber claim upon public land has no devisable interest therein before a patent issues, and upon his death before he has complied with all the conditions necessary to obtain a patent, his heirs may comply with the remaining conditions, and upon obtaining a patent, they take the land in equal shares as direct grantees of the government, and not by inheritance, regardless of the proportions in which they would have taken under the law of succession of the state.

W. H. C. Ecker, and Hayes & Ward, for the appellant.

J. E. Wadham, and F. W. Stearns, for the respondent.

¹⁹² **TEMPLE, J.** Action to quiet title to forty acres of land in San Diego county. The land was entered as a timber culture claim in November, 1879, by David ¹⁹³ Cooper, plaintiff's father. David Cooper died testate in July, 1881, leaving his widow sole beneficiary of his will and expressly excluding plaintiff from any share of his estate. The property was duly distributed to the widow. In 1892 a patent was issued by the United States conveying the land in terms to the heirs of David Cooper, deceased. In 1891, before the issuance of the patent, the widow, who was the sole devisee of David Cooper and the sole distributee of the estate, mortgaged the land to the defendant, who subsequently foreclosed and purchased the property at the foreclosure sale, and in due time received a deed therefor. Defendant at the trial proved his deraignment of title from the widow of David Cooper, deceased.

The question is, In whom did the title vest? Appellant claims

it as heir. The defendant that it passed by the will and the decree of distribution to the widow of David Cooper. Or, if it did not vest under the will and decree, then the widow and son of David Cooper took equally.

The applicant for the government bounty is required to subscribe an oath to the effect that he makes the filing for the purpose of cultivating timber for his own exclusive benefit, and not for the purpose of speculation, and that he intends to hold and cultivate the land. He is required to break or plow five acres the first year, five acres the second year, and to cultivate the five acres broken or plowed the first year; the third year to cultivate the five acres plowed the second year, and to plant in timber, seeds, or cuttings the five acres first plowed, and to cultivate the remaining five acres; and the fourth year to plant in timber, seeds, or cuttings the remaining five acres.

To get his certificate he must prove, or if he is dead his heirs or legal representatives must prove, that he or they have planted, and for not less than eight years cultivated, that quantity and character of trees, and that there are then growing at least six hundred and seventy-five thrifty trees per acre.

¹⁹⁴ A failure at any time to perform the conditions works a forfeiture. The property could not be taken in satisfaction of any debt contracted prior to the issuance of the final certificate, which could not be had until full proof of performance, as above stated, was made.

Obviously, the privilege or right acquired by the entry and filing is personal, and cannot be transferred except as authorized in the act. The death of the applicant before performance renders him incapable of performance, and that event would end the claim but for the provisions of the act, which authorize the heirs to prove that he or they has or have performed. Does the heir in such case take by inheritance from the applicant, or is he by appointment in the act itself a substituted beneficiary of the government to whom the title goes by direct grant?

It is admitted, at once, that the condition of the applicant prior to full performance is in no wise analogous to that of a pre-emptor either before or after the pre-emptor has received his certificate of purchase. The applicant has a right to the land of which the government cannot deprive him, but which will be lost if he fails to perform. And death, before performance, renders such failure certain, and ends the estate of the applicant. In view, however, of the hardship of such a result, the law continues its offer to certain persons whom it is presumed the applicant him-

self might have selected. But they take, not by inheritance from the deceased, but as grantees from the government.

No case is cited under the timber culture act, but cases have arisen under other acts of Congress which are in all essential respects similar to the act in question. The Oregon donation act (9 U. S. Stats., 496) granted to qualified settlers on public land, who had occupied and cultivated the same for four years, and performed certain acts in regard to making application for the land, proving up, etc., three hundred and twenty acres of land. The opening words of that act were, "That there shall be, and hereby is, granted," and it ¹⁹⁵ was provided, in case of death before the expiration of four years' possession required, "all the rights of the deceased under this act shall descend to the heirs at law of such settler."

In 1852 one Loring, who had all the qualifications necessary to enable him to take and hold under the act, entered upon three hundred and twenty acres of land in Oregon, with the intent to acquire the title under the act. He died within one year after his entry upon the land, having by his will devised all his estate. Whether the land or his right was devisable arose in *Hall v. Russell*, 101 U. S. 503. Chief Justice Waite, speaking for the court, said the question was whether "the heirs took by descent from the settler or as donees of the United States. If by descent it is conceded the settler had a devisable estate. If as donees he had not."

It was held that, by entering under the act, the settler acquired at once a present right to occupy and maintain possession so as to acquire a complete title to the soil, but got no title until he had completed his four years' continued residence and cultivation. His rights were, however, statutory, and must be ascertained by the language of the act. It is said: "The object of Congress undoubtedly was to allow a settler's heirs to succeed to his possessions, and thus keep his rights alive. But for some such provision all the rights of the settler would have been lost by his death. As the law required full four years' residence by the person who claimed the grant, if no provision had been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence, it was provided that the possessory rights of a deceased settler should go to his heirs, and that they might get the land on making requisite proof without further residence and cultivation of their own. Their title to the land was to

come, not from their deceased ancestors, but from the United States."

¹⁹⁶ Every word of this is as applicable to the timber culture act as to the Oregon donation act, so far as concerns the question under consideration.

Here, as there, a series of acts were to be performed running through a number of years before the applicant was entitled to a patent, and a failure at any point during that time defeated the claim and left the land open to another. In each case the death of the applicant rendered performance impossible, and the right would have entirely lapsed but for a provision giving the heirs of the applicant the privilege of procuring the title which would have gone to the deceased.

Hall v. Russell, 101 U. S. 503, has been followed many times. The cases are reviewed in Hershberger v. Blewett, 55 Fed. Rep. 170.

Respondent contends that the position of a claimant under the timber culture act is like that of a homestead claimant before full performance, and he thinks in such case a homestead claimant has a devisable interest. This is I think a mistake. The homestead act is, if possible, less doubtful than any of the others; for it is expressly provided that the right to complete performance and receive the patent shall go to the widow if there be one; if there be none, to the devisee of the deceased, or to his heirs. Obviously, the right is not devisable in any just sense. If there be a widow the right goes to her, if none the settler may appoint the grantee. It was so held by the secretary of the interior in Dorame v. Towers, 1 Copp's Pub. Land Laws, 438, which is cited by respondent as an authority to the contrary. Towers was in possession of the land before he made his entry, but died within two weeks after the entry. Contest was inaugurated six months afterward by Dorame, who sought to establish an abandonment, as the heirs did not reside on the land. The secretary said: "The death of the party casts whatever of title or estate the statute has created directly by operation of law upon 1. The widow; 2. The heirs or devisees; and, the substitution being effected, the requirement of proof ¹⁹⁷ of residence or cultivation attaches to the person or persons succeeding to the right, title, or estate." He further says that by the laws of California the executor was entitled to possession during administration, and that the right of the heirs to possession is subject to this administration, and therefore, "the time allowed by the court for the settlement of the estate must either be counted for the heir

or devisee, in making final proof, or excluded in his favor from the period required by the statute, and further time allowed him on the ground that, the land being in the custody of the law, the time does not run against the party who is required to perform the acts of residence or occupation upon it." We must hold, therefore, that the land was not devisable, and is not affected by the decree of distribution in the estate of David Cooper, deceased.

The grant is to the heirs of David Cooper, but they do not take by inheritance. The heirs will, therefore, take equally, regardless of the proportions in which they would have taken under the law of succession of the state. The United States has no general law of succession; the heirs must, therefore, be found by the law of the state or territory in which the land is situated. By the law of this state, the widow is an heir of the husband. The plaintiff and the widow would therefore take equally. It would follow that the one-half interest which vested in the widow was subject to defendant's mortgage. A new trial will be necessary because the findings would not support the judgment as it would be modified by this opinion, and they are against law.

The judgment is reversed and a new trial ordered.

Harrison, J., Garoutte, J., Van Fleet, J., McFarland, J., Henshaw, J., and Beatty, C. J., concurred.

PUBLIC LANDS.—Effect of the issuance of a patent to heirs of a deceased claimant is the subject of the extended note to *Cobb v. Stewart*, 88 Am. Dec. 468.

HAMMOND v. CAILLEAUD.

[111 CALIFORNIA, 206.]

PARTITION SALES — CONCLUSIVENESS UPON PURCHASER.—An order confirming a sale in partition is appealable by the purchaser, and is conclusive upon him upon his failure to appeal as to all objections made to the confirmation of the sale, and he then becomes legally bound to complete his purchase.

PARTITION SALES—RESALE—ACTION FOR DEFICIENCY—EVIDENCE.—A purchaser at partition sale, confirmed without appeal, when sued for a deficiency arising from a resale, cannot prove that the terms of the first sale insured a perfect title to relieve him from liability as a purchaser, but he may show such terms of the first sale and that the second sale was made expressly at the purchaser's risk, as to title, for the purpose of showing that the conditions of the two sales were different, and that the second sale was neither a just nor legal mode of ascertaining his liability for the deficiency. He cannot be held liable for such deficiency if the differ-

ence in price at the two sales was due to the difference in the conditions thereof.

JUDICIAL SALES—MISREPRESENTATIONS—KNOWLEDGE OF PURCHASER—PRESUMPTION.—Purchasers at judicial sales are not held to presumptive knowledge of the limits of the power of the officer making the sale, and if they are misled by his representations as to the state of the title or encumbrances, they are not bound by the rule of *caveat emptor*.

JUDICIAL SALES—MISREPRESENTATIONS.—If the officer making a judicial sale makes any error, irregularity, or misrepresentation, whether intentional or not, whereby the purchaser has been misled to his prejudice to such an extent as to make it unconscionable that his contract of purchase should be enforced against him, the sale will not be confirmed.

JUDICIAL SALES—INADEQUACY OF PRICE—ESTOPPEL.—If the owner of property does not object to the confirmation of a judicial sale thereof on the ground of inadequacy of price, he is estopped from denying the adequacy of price obtained under the conditions of the sale, and the officer who makes the sale cannot avoid the terms and conditions made by him with the purchaser.

PARTITION SALES—RESALE AT PURCHASER'S RISK.—Upon the refusal of a purchaser to complete a partition sale after its confirmation, the court may order the property resold at the risk of such purchaser, and such order is binding on him if he has notice thereof.

A. Ruef, for the appellant.

A. C. Freeman, for the respondent.

§11 HAYNES, C. This action was brought by plaintiff as referee in the partition suit of *Finnerty et al. v. Pennie et al.*, to recover the sum of seventeen hundred and fifty dollars from the defendant. The action of *Finnerty et al. v. Pennie et al.*, was for a partition of a certain lot situated on the corner of Natomas and Mary streets in the city of San Francisco, in which a decree was entered determining the interests of the several parties, the amount and priority of several liens thereon, and adjudging that said lot was incapable of partition, and ordering a sale thereof by Hammond, the plaintiff herein, who was duly appointed sole referee for that purpose, the sale to be subject to confirmation by the court.

The referee offered said property for sale at public auction, and at such sale the defendant herein became the purchaser upon his bid of seven thousand five hundred dollars, and thereupon deposited with the referee seven hundred and fifty dollars, that being ten per cent of the amount bid.

The purchaser opposed the confirmation of the sale upon grounds hereinafter stated, but the court confirmed the sale, and the referee executed and tendered a deed in due form, and

demanding payment of the remainder of the sum bid, but the defendant refused to pay said balance or accept the deed.

These facts were reported to the court, and afterward an order was made for a resale of the premises, and directing the referee, in case such resale should not realize said sum of seven thousand five hundred dollars and the costs and expenses of the resale, to collect from defendant, by some proper proceeding, such deficiency.

To these facts, alleged in the complaint, the defendant answered, and also filed a cross-complaint and counterclaim. The answer, after denying the allegations of the complaint, alleged that said property was ²¹² offered for sale at public auction on the following terms and conditions, namely:

"The property to be sold to the highest bidder, the purchaser to receive a perfect and valid title, free from imperfections, otherwise there to be no sale; the bidder, upon acceptance of his bid, to deposit with plaintiff ten per cent of the sum bid, to secure the bid and sale to him, and the balance of the bid to be paid, if the title should prove perfect and valid, upon conveyance to the bidder of said property with a valid and perfect title thereto, and after examination of said title by the bidder; and if the title should not prove to be perfect and valid and free from imperfections, nor made so within thirty days after notice by the bidder to plaintiff of defects therein, the said deposit of ten per cent to be returned by plaintiff to bidder on demand"; and that he bid for said property said sum of seven thousand five hundred dollars with the express agreement that if the title to said land should prove imperfect, invalid, and not free from all imperfections, there should be no sale, and that said deposit should be returned to him upon demand.

He further alleged that the title to said lot was invalid and not free from imperfections, that he notified plaintiff thereof, that plaintiff refused to make said title perfect, and that he thereupon demanded the return of his deposit. He admitted that said sale was reported to the court for confirmation, but denied that the terms and conditions thereof were reported; that he filed objections thereto, stating the terms under which his purchase was made and specifying certain defects in the title, but that the court decided that he would not be bound by the decision of the court thereon, nor by such confirmation, and refused to hear or consider his objections thereto. He admitted the tender of the deed, but denied that such tender was in pursuance of the terms of the sale, or that it would have conveyed a valid title

and averred his readiness and willingness to comply with the terms of the sale.

²¹³ He further alleged that the terms and conditions under which the property was resold were different from the terms and conditions of the first sale; that at the second sale it was expressly stated that the purchaser should take the title as it stood without any agreement that it was perfect or should be made so upon notice of defects, and that by reason of such change in the terms and conditions of sale the selling value of the property was greatly depreciated.

At the second sale, one Denigan became the purchaser at the sum of five thousand dollars. The cross-complaint and counterclaim were interposed for the purpose of recovering the deposit of seven hundred and fifty dollars.

The cause was tried by the court, and findings and judgment were for the plaintiff for said sum of seventeen hundred and fifty dollars, with interest, and from said judgment and from an order denying his motion for a new trial the defendant appeals.

Appellant's defense to said action is based upon two distinct propositions: 1. That his purchase was conditional upon his obtaining a good title, and that the title was not good; and 2. That he is not liable for the deficiency or loss upon resale, because the terms and conditions of the two sales were materially different.

To these propositions respondent replies, in effect: 1. That the sale to appellant was confirmed by the court, and that order not having been appealed from, appellant is concluded as to all questions involved in the confirmation; and 2. As the referee had no power to give or impose any conditions of sale not contained in the decree or authorized by law, and as the rule of caveat emptor applies to judicial sales, and as he is conclusively presumed to know the law, that he therefore purchased under the conditions imposed by the law, and not under different conditions alleged to have been made by the referee without authority, and if so, the two sales were made under the same conditions.

1. That the order confirming the sale to Cailleaud, the ²¹⁴ first purchaser, was appealable, and became conclusive upon his failure to appeal, I think is clear.

In *Boggs v. Fowler*, 16 Cal. 560, 76 Am. Dec. 561, it was held, in a foreclosure case, that the purchaser, by his act of purchase, submitted himself to the jurisdiction of the court in that suit as to all matters connected with the sale, and was entitled to

apply for such relief as the facts of the case might justify, and that upon his application the sale could be set aside and the satisfaction canceled.

In *Hickson v. Rucker*, 77 Va. 135, it was said: "By buying at such sale the purchaser selects his forum, comes into the case, and submits himself to the court as to all questions concerning the sale and his purchase."

That in sales under a decree in equity the purchaser becomes a quasi party to the suit, see note to *Mount v. Brown*, 69 Am. Dec. 368, and cases there cited, and *Jones on Mortgages*, sec. 1642.

The confirmation of a sale often involves rights of vast importance. A purchaser at a judicial sale may thereby be deprived of a purchase of great advantage to him, or have improperly imposed upon him a burden he should not bear. But it is urged by appellant that there is no provision of the statute under which he could have appealed from that order; that the decree in partition was interlocutory, that he was not a party and could not appeal therefrom. But the decree in this case was not interlocutory, but final. It not only determined the several interests of the cotenants and the amounts and priorities of the several liens, but also adjudged the property incapable of partition, and decreed that it be sold, and directed the distribution of the proceeds, which distribution is to be made by the referee when the decree so directs (Code Civ. Proc., sec. 773), so that the sale and confirmation were simply steps to be taken in the execution of the decree, and the order of confirmation was an order made after final judgment. The appeal from an interlocutory judgment in partition provided for in section 963, subdivision 2, of the Code of ²¹⁵ Civil Procedure, is only "from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made."

But if the decree did not become final until the sale was confirmed, it then became final, and the purchaser, being then a party to that which made the decree final, had the right to appeal from that part of the decree as to which he was a "party aggrieved."

The defendant was therefore concluded, by the order of confirmation, as to all objections made to the confirmation of the sale, and became legally bound to complete the purchase.

There are three modes of proceeding in a court of equity when a purchaser, after confirmation, fails or refuses to complete his purchase: 1. Set aside the sale, release the purchaser, and order

a resale; or 2. Decree a specific performance of the contract; or 3. Order a resale, holding the purchaser responsible for any deficiency: See Jones on Mortgages, sec. 1642, and cases there cited.

The third of the above modes of procedure is the one pursued in this case. Upon the trial, the defendant, in order to prove that he never became liable as a purchaser, offered in evidence the following written terms and conditions of said sale (omitting the description):

"San Francisco, December 14, 1891.

"We have this day sold to H. Cailleaud, at the price of \$7,500 in gold coin, the following described property: . . .

"Seven hundred and fifty dollars, cash in hand paid, the receipt of which is hereby acknowledged; \$6,750, payable ten days after date, or upon completion of the examination of title and the other papers connected therewith, as hereinafter specified; ten days (from date hereof) are allowed for the examination of the title. If the title is not found valid, nor made so in thirty days after notice to us of defect therein, the deposit, for which this is a receipt, is to be returned on demand. If the ²¹⁶ title is found or made valid, within the time herein specified, and the sale is not closed in accordance with the above terms, the sum of \$750, for which this is a receipt, is to be forfeited. The owner hereof binds himself, upon receipt of the purchase money, to deliver to H. Cailleaud a valid title to said property, unencumbered, unless it is specified above that certain liens are assumed. Time is of the essence of this contract. Subject to confirmation by the superior court of the city and county of San Francisco.

"RICHARD P. HAMMOND, JR., Referee."

"I hereby agree to buy the property above described upon the terms and conditions hereinabove expressed.

"HENRY CAILLEAUD."

An objection to its introduction in evidence for that purpose was properly sustained, the validity of defendant's purchase having been conclusively adjudicated by the order confirming the sale.

The defendant afterward offered to prove that at the second sale it was expressly stated that the purchaser would take the title as it was, that one sale had been confirmed and the purchaser had refused to take it; and, in that connection, for the purpose of proving that the terms of the two sales were different, also again offered the writing above quoted.

We have held that the order confirming the first sale was appealable, and that, having failed to appeal, the purchaser was bound by the order of confirmation, and could not relitigate the questions arising upon the motion to confirm. But conceding for the moment that his objections to the title were groundless, and that therefore the terms and conditions of his purchase were fully complied with, and that without cause or excuse he refused to take the property, and deliberately intended to suffer all the legal consequences of such refusal, the resale could not be either a just or legal mode of ascertaining his liability, unless made upon the same terms and conditions as those under which he purchased: ²¹⁷ *Riggs v. Pursell*, 74 N. Y. 370; *Shinn v. Roberts*, 20 N. J. L. 435; 43 Am. Dec. 636. The court refused to permit the defendant to prove what the terms of the second sale were, as announced by the auctioneer, the court holding that the terms of the second sale were definitely fixed by the order of sale and the published notice, and that the defendant would not be allowed to contradict these; and also refused to permit proof of the terms and conditions of the first sale for the purpose of showing that the conditions of the two sales were different.

Conceding that the rule of caveat emptor applies to judicial sales generally, and that the order of sale was silent as to any conditions relating to the validity or invalidity of the title to be acquired by the purchaser thereunder; and further conceding, for the purposes of this opinion, that the referee derived no power from the statute or the order of sale to stipulate with the purchaser that the title should be good and free from imperfections, or the sale be void, it does not follow that the purchaser was bound to accept an imperfect title, if it be true that the referee sold the property under the conditions alleged and offered to be proved by the defendant.

If it be true that purchasers are conclusively bound to know the limits of the powers of the officer making the sale, it must follow that, as matter of law, they are not affected or influenced by any representation made by the officer, or by any terms or conditions given or imposed by him, and therefore the sale must, for the purposes of confirmation, as well as for all other purposes, be deemed to have been regular and valid; and not only so, upon that theory it would be impossible that two sales, made by the same officer, of the same property, under the same order of sale, could be made on different terms; and if so, there could be no foundation for the established rule, that in order to hold the first purchaser liable for the loss upon a resale, the terms and

conditions of the two sales must not be different. ²¹⁸ But that courts do not hold purchasers to such presumptive knowledge, in confirming sales, is well settled.

In *Woodward v. Bullock*, 27 N. J. Eq. 507, bidders were misled as to the amount of the encumbrances to which the sale was made subject, both by the sheriff and the successful bidder. The sale was set aside.

In *Hayes v. Stiger*, 29 N. J. Eq. 196, the court said: "Where surprise or misapprehension is occasioned by the conduct of the purchaser or the officer making the sale, to the injury of a person interested, the court will interfere."

In *Black v. Walton*, 32 Ark. 321, the syllabus is as follows: "A sale by a guardian of his ward's land under an order of the probate court, is a judicial sale, and the rule caveat emptor applies; but if the land is purchased upon the representation of the guardian that the purchaser would acquire a good title, which turns out to be untrue, the purchaser will not be held at law or in equity, although the guardian may not have known the falsity of his representations."

In *Veeder v. Fonda*, 3 Paige, 94, the chancellor said: "As property to a vast extent is sold under the orders and decrees of this court, much of which belongs to infants and others who are not able to protect their own rights, it has always been an important object with the court to encourage a fair competition at master's sales. For this purpose, it is necessary that purchasers at such sales should understand that no deception whatever will be permitted to be practiced upon them; that in a contract between them and the court they will not be compelled to carry the contract into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of the contract against the purchaser, if the sale had been made by such an individual or his agent. It is, therefore, a principle of the court that the master who sells the property shall not, in the description of the same, add any particular which may unduly enhance the value of the property or mislead the purchaser."

²¹⁹ These authorities clearly show that for any error, irregularity, or misrepresentation of the officer, whether intentional or otherwise, whereby the purchaser has been misled to his prejudice to such extent as to make it unconscionable that his contract of purchase should be enforced against him, the sale will not be confirmed. But in this case, as here presented, it is not necessary to go further than to hold that if, by the alleged terms

and conditions of the sale to appellant, he was led to bid more for the property—to any material extent, at least—than he would if he had been informed, as the purchaser was at the second sale, that he must take the title as it was, whether defective or not, it is obvious that the resale did not furnish any just measure of damages. No fact or circumstance is disclosed by the record other than the different conditions under which these sales were made, which tends, in any degree, to account for the difference between the final bids at these two sales; and, under such circumstances, we must conclude that all above the amount of the second sale which was bid at the first was induced by the condition that the purchaser took no risk as to the title. The owners are estopped from saying that the price obtained upon the second sale was inadequate, since they are not shown to have opposed confirmation upon that ground, and, therefore, the presumption is strengthened that the higher price obtained at the first sale was secured by the more favorable conditions given to appellant.

If the referee had entirely omitted to publish notice of the sale, and had made a private contract for the sale of the property, and the owners (creditors not being affected) had been satisfied with the terms of sale and the price obtained, and with knowledge of the facts had obtained its confirmation, the sale so confirmed would have been valid, and they could not thereafter have objected that they were not bound by the acts of the referee, though made without authority. Here the owners were informed before confirmation of the terms ²²⁰ of the written contract, and should be held to have ratified that contract as to all its terms and provisions.

But whether that be true or not, this action is brought by the referee, who alone is authorized to maintain the action, unless by assignment he confers that right upon another: *Mayer v. Wicks*, 15 Ohio St. 548. In *Galpin v. Lamb*, 29 Ohio St. 529, 534, it was said: "The contract of purchase is made with the officer as representing all the interests involved in the suit in which the judgment or decree of sale is rendered. He and the purchaser are the only parties to the contract of purchase; and he alone can maintain an action against the purchaser to recover the purchase money"; and in commenting upon the case of *Mayer v. Wicks*, 15 Ohio St. 548, it was said: "In that case, the sale had been confirmed, and the officer had thus become responsible for the purchase money. He had tendered the deed to the purchaser, and assigned his right of action to the plaintiff in the decree under which the property was sold, and the latter was

allowed to maintain the action for the purchase money": See, also, *Michener v. Lloyd*, 16 N. J. Eq. 38.

If, therefore, the right of the referee to prosecute this action is based upon the contract he made with the purchaser, it would appear to be clear that he should not be permitted to say, "I am not bound by the written contract I made with you, because I had no power to make it, and therefore it did not constitute any part of the terms and conditions of the sale, and you cannot use it for the purpose of showing that the terms of the second sale were different."

If without a resale the referee had brought suit against the defendant to recover the unpaid purchase money, the action could properly have been sustained, because the order confirming the sale, not having been appealed from, absolutely fixed the defendant's liability as a purchaser; but he was not concluded by his failure to appeal from showing the terms of his purchase to have been different from those of the second sale.

²²¹ As to the order of resale at appellant's risk, made April 7th, I think appellant is bound thereby. It recites that the purchaser had notice, and was represented by counsel. If that were untrue, he should have moved to vacate or modify the order, and upon a denial of his motion have taken an appeal.

No other questions require notice.

The judgment and order appealed from should be reversed and the cause remanded.

Searls, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded.

Harrison, J., Van Fleet, J., Garoutte, J.

Hearing in Bank denied.

The principal case is a very important one in two respects: The first of these is, that it affirms the liability of purchasers at a partition sale, though there is no statute expressly conferring the remedy, to be pursued in an action at law for the amount of their bid; and the second is, that it permitted such a purchaser to escape from the payment of his bid upon the ground that the terms of the sale and resale were different from what they were in effect adjudged to be by the court wherein such sale and resale were made, and which confessedly had jurisdiction thereof, and of the purchasers thereat, for the purpose of determining the amount and character of their bid.

The general question of remedies existing against purchasers at judicial sales was treated in the monographic note to *Mount v.*

Brown, 69 Am. Dec. 365-375. The effect of orders confirming judicial sales was considered in *Watson v. Tromble*, 29 Am. St. Rep. 495-499.

In the opinion of the court in the principal case, the statement was made that the order of confirmation is conclusive upon all grounds presented to the court. We do not know whether this is intended as an assertion that it is not conclusive as to questions not presented. If so, it is erroneous, for every adjudication is conclusive not only of the grounds presented, but also of those which ought to have been presented. In other words, neither the purchaser nor the parties to the action can, after a confirmation, raise questions which might have been, but were not, raised before. "The rule is, that an order of confirmation is conclusive as to all matters upon which the court might have been called to pass, had the parties chosen to have brought them forward as objections to the confirmation": *Speck v. Pullman Palace Car Co.*, 121 Ill. 56. It is true that orders of confirmation have been relied upon more frequently as curing irregularities in the proceedings than for any other purpose, but their effect is not limited to this purpose. They are, in fact, the consummated contract between the court as vendor and the purchaser of the property, and conclusive of the terms, as well as of the fact, of the contract, and we do not know of any other instance in which any collateral attack has been permitted to add to or vary the terms of the sale, nor do we know of but one other instance in which a purchaser has been allowed to escape from the sale, unless upon application to the court and in the cause in which the order of confirmation was entered.

There are, however, cases in which the confirmation has been relied upon with success to establish the terms of the sale. Thus, where the purchaser insisted that with the parcels described in the order of confirmation there was in fact included at the sale another parcel, he was held to be bound by the confirmation, and estopped from asserting that there was sold to him a lot in addition to those described in the order of confirmation: *Barron v. Mullin*, 21 Minn. 376. Though the terms upon which the sale was ordered gave the purchaser the right to have the tract surveyed, and his bid was in the report, and confirmation designated as a specified sum, it was held that he was not thereafter entitled to insist that he was liable only for the number of acres actually contained in the tract: *Sackett v. Twining*, 18 Pa. St. 199; 57 Am. Dec. 599. A purchaser, therefore, after confirmation, cannot obtain relief on the ground that the title was imperfect or encumbered: *Threlkelds v. Campbell*, 2 Gratt. 198; 44 Am. Dec. 384; *Young v. McClung*, 9 Gratt. 358; *The Monte Allegre*, 9 Wheat. 644; nor that the lands were not situate in the township in which they were described to be in the levy and notice of sale: *Cooper v. Borrall*, 10 Pa. St. 491; nor that in bidding he acted for another person: *Gray v. Case*, 51 Mo. 463; nor that by the contract of sale he was entitled to certain valuable water privileges which he failed to get: *Long v. Weller*, 29 Gratt. 352; nor that the lots were advertised as dry land, and purchased in the belief that they were such, when in fact they were under water: *Mechanics' S. B. & L. A. v. O'Connor*, 29 Ohio St. 655; nor that there was a deficiency in the quantity of the land sold:

Dresbach v. Stein, 41 Ohio St. 70. Further, the case of *Brummagim v. Ambrose*, 48 Cal. 386, ought to be sufficient upon this subject. The defendant there offered to show that at the time of the sale the administrator represented that the title to the land was valid, and that one Reay, who claimed to be in possession and to own the property, had no interest in it, and that the bid by the purchaser was made in reliance on these statements; that after the sale, finding these statements to be untrue, the purchaser applied to the administrator, who thereupon returned to him the amount of his deposit, and released him from the payment of his bid. A resale was subsequently made, and a deficiency resulted. To an action to recover the amount of this deficiency, the defense above indicated was interposed. The court, speaking of the defendant, said: "He has had his day in court, and if he had appeared and proved to the satisfaction of that court the facts which he offered to prove on the trial in this action, he would doubtless have escaped the subsequent litigation." This was a case exactly like the principal case in this, that there was a claim that the first sale had been made with representations that the title was perfect, when it was not such in fact, and the second sale had been made when presumably there was no such representation of title. The court did not there, as in the principal case, exclude the evidence for one purpose, and admit it for another, nor hold that the order of confirmation was final, but that the defendant might, nevertheless, show that the first sale was on a warranty, and the second not. In other words, it did not

"Keep the word of promise to our ear
And break it to our hope."

In support of the opinion in the principal case, and to show that the defense of misrepresentation as to title may be urged even after confirmation, cases are cited from the chancery courts of New York and New Jersey, and one from the supreme court of Arkansas. As to the cases cited from these chancery courts, they are not in point at all, for the reason that it has always been the practice of these courts, on application to them in the same cause in which a sale has been ordered, to release the purchaser upon various equitable considerations—even after he has paid his bid and received a conveyance. We do not deny that if the appellant had applied in the original partition suit to be released from his bid, that the court had power to grant such release, and that, upon its failure to grant it, relief might have been had upon appeal. This is exactly what the purchaser did not do. He left the orders in force and treated them as void. In the case of *Veeder v. Fonda*, 3 Paige, 94, it does not appear that an order of confirmation had been made. The master was probably proceeding with a view to obtain such an order when the purchaser resisted him on the ground of misrepresentations as to the quantity of land sold, and the court, acting in the original cause, in effect refused the confirmation, and released the purchaser from his bid. Had the court refused to release him, and directed a resale at his risk, as in the principal case, an entirely different question would have arisen. In the case of *Woodward v. Bullock*, 27 N. J. Eq. 507,

an application was made in the original cause to set aside a sale for misrepresentations, and it was accordingly set aside. In the case of *Hayes v. Stiger*, 29 N. J. Eq. 198, an application was made in the original cause to set aside a sale. The application was refused, but the court did not doubt that it had jurisdiction to act. We admit that it was the practice of chancery courts at any time, whether the sale was confirmed or not, and whether the purchaser had accepted a conveyance of the property or not, to entertain a petition to set aside the sale: *Freeman on Executions*, sec. 304, l. They treated their orders and decrees as always within their control, and, therefore, as subject to further action at any time. This is not so under the practice now generally prevailing in the different states. They have statutory provisions allowing a fixed time within which to appeal from orders, after which they are final.

The case of *Black v. Walton*, 32 Ark. 321, does in its result sustain the opinion pronounced in the principal case. It did result in a judgment for the defendant on the ground of misrepresentation in the officer making the sale. But the attention of the court does not appear to have been called to the effect of the order of confirmation, nor did the plaintiff place any reliance upon it whatever. It is not considered in the opinion of the court, and its effect was manifestly overlooked, unless Arkansas is to be classed among those states which treat orders of confirmation as inconclusive upon the purchaser on the ground that he has no notice thereof, and is not in law a party thereto. A decision thus inadvertently given upon a point not argued nor considered should not be allowed to destroy the rule announced in many well-considered cases, that an order of confirmation is a final and conclusive adjudication precluding the purchaser from being released upon any ground which he might have urged before such confirmation.

JUDICIAL SALES—RESALE—DEFICIENCY.—A resale of land upon failure of the purchaser to comply with the terms of the first sale must be made upon the same conditions as the first as near as may be, in order to render the first purchaser liable for the difference between the sales: *Shinn v. Roberts*, 1 Spenc. 435; 43 Am. Dec. 636. This subject is fully discussed in the extended note to *Mount v. Brown*, 69 Am. Dec. 366.

JUDICIAL SALES—CAVEAT EMTOR—WHEN RULE OF DOES NOT APPLY.—The maxim of caveat emptor does not apply to a judicial sale, where the defect in the title of the purchaser is occasioned by some irregularity in the proceedings depriving them of the power to divest the title held by the defendant: *Bond v. Montgomery*, 56 Ark. 563; 35 Am. St. Rep. 119, and note. The maxim caveat emptor applies strictly to judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts, fraud, or misrepresentations: *Redd v. Dyer*, 83 Va. 831; 5 Am. St. Rep. 272; but see *Norton v. Nebraska Loan etc. Co.*, 35 Neb. 466; 37 Am. St. Rep. 441. See, also, the notes to *Neal v. Gillaspie*, 26 Am. Rep. 39, and *McGhee v. Ellis*, 14 Am. Dec. 181.

JUDICIAL SALES—CONCLUSIVENESS OF ORDERS CONFIRMING.—An order or decree confirming a judicial sale is a final and conclusive judgment determining the rights of the parties, pos-

sessing the same force and effect as any other adjudication by a court of competent jurisdiction: *Extended note to Watson v. Tromble*, 29 Am. St. Rep. 495.

HUNTER v. HUNTER.

[111 CALIFORNIA, 261.]

MARRIAGE AND DIVORCE—ANNULMENT OF SECOND MARRIAGE—DIVORCE FROM FIRST HUSBAND—CONCLUSIVENESS OF.—A decree of divorce obtained by a woman from her first husband and based upon service by publication of summons after living twenty-two years with her second husband, is conclusive in an action by him to annul his marriage, of the fact that his wife is no longer the wife of the first husband, but is not conclusive of the fact that the first husband was alive at the time that the decree was rendered, or, that the woman was his wife at the time that she married the second husband.

MARRIAGE AND DIVORCE—ANNULMENT OF SECOND MARRIAGE—DIVORCE FROM FIRST HUSBAND—EVIDENCE—ESTOPPEL.—If a woman in an action to obtain a divorce from her first husband, after marrying another man, makes affidavits to secure publication of summons, based upon rumor, in which she states that her first husband was living at the time of her second marriage and that she was not divorced from him, such affidavits, though strong evidence against her in an action to annul the second marriage, do not create an estoppel against her to deny the facts stated therein.

MARRIAGE AND DIVORCE—ANNULMENT OF MARRIAGE—PRESUMPTIONS in favor of the legality of a marriage regularly solemnized prevail in an action to annul that marriage over the presumption of the continuance of the life of a former husband who has been absent and unheard of for less than seven years.

MARRIAGE AND DIVORCE—ANNULMENT OF MARRIAGE—PRESUMPTIONS.—Rather than hold a second marriage regularly solemnized, invalid, and that the parties have committed a crime or been guilty of immorality, the presumption of death of the former and absent husband or wife, in less than seven years before the second marriage, is indulged, or if the absent party is shown to be living at that time, it is to be presumed that he or she has procured a divorce, and the burden of proof is on the party asserting guilt or immorality, to prove that the first marriage had not ended before the second marriage.

MARRIAGE AND DIVORCE—ANNULMENT OF MARRIAGE—APPEAL FROM JUDGMENT—ALIMONY.—An appeal from a judgment refusing to annul a marriage, if taken too late, must be dismissed, and objection to the allowance of alimony cannot be considered.

Knight, Simpson & Harpham, for the appellants.

S. A. W. Carver, for the respondents.

263 TEMPLE, J. The action was brought to annul a marriage between the parties entered into on the third day of July,

1862, upon the ground that defendant had another husband, to wit, Joseph Milam.

²⁰⁴ It is now conceded that defendant was married to Joseph Milam in February, 1858, when defendant was but fifteen years of age; that she lived with Milam as his wife for ten days, when she was taken away by her parents and went to Salt Lake. It does not appear how long she was absent from San Bernardino, but it could not have been a very long time, for she testified that she lived at San Bernardino after her marriage to Milam about four and one-half years, when she married plaintiff. Only about that period elapsed between her first and second marriage. She testified that Milam left a few days after her marriage to him, and she had heard nothing of him since. Plaintiff and defendant lived together as husband and wife at Los Angeles for about twenty-two years, when, as defendant testified, she was told by her nephew, who lived in Arizona, that he had met a brother of Joseph Milam who said Joseph Milam was living at Walla Walla. This is all she has ever heard in regard to Milam since he left San Bernardino. She then commenced an action against Joseph Milam to secure a divorce. In her verified complaint, filed December 21, 1883, she describes herself as Jane Elizabeth Milam, and states that plaintiff and defendant were married in February, 1858, and ever since have been and now are husband and wife, and that defendant resides out of the state of California.

On the same day she made and presented to the court her affidavit, to procure the publication of summons, in which she stated that defendant resides out of the state, that his last residence within the state was in Pajaro, in Santa Cruz county, that through knowledge derived from his brother she believes he resides at Walla Walla in Washington territory.

Such proceedings were had in the action that on the twenty-ninth day of March, 1894, a decree was entered dissolving the marriage between Joseph Milam and the defendant, plaintiff in that action.

Certain findings were also filed, and purport to constitute part of the judgment-roll; but, as there were no ²⁰⁵ issues to try and judgment was entered on default, express findings were unauthorized and add nothing to the necessary adjudication.

Subsequently, defendant commenced an action against the plaintiff to have her marriage with him declared void on the same ground on which plaintiff now seeks relief, to wit: That at the time of her marriage with him her first husband, Joseph Milam, was living and she had not been divorced from him. The com-

plaint in that suit was also verified. The action was finally dismissed by her before it came to judgment.

Two of plaintiff's brothers testified that, at the time the parties to this action were married, they heard travelers say the man defendant married was still living there (San Bernardino). It is, however, pretty certain that he was not then living at San Bernardino. This is all the evidence contained in the record upon this subject.

It is contended: 1. That the judgment in the divorce suit is conclusive upon defendant that she was divorced from Milam. That is, that Milam was then alive, and that until the decree was entered she was his wife.

But this adjudication as such did not bind Milam. He was not served with summons and was without the state, and the action was therefore strictly in rem. "No sovereignty," says Story on Conflict of Laws, section 539, "can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions." The res before the court was the status of the plaintiff in the divorce suit. No service of summons being had, it was not an action inter partes, but a proceeding affecting only the status of the wife. "It did not establish but recognized and presupposed the relation of husband and wife as previously existing": *Burlen v. Shannon*, 3 Gray, 387. It was conclusive against all the world that the plaintiff in that suit was no longer the wife of Joseph Milam, and it was an adjudication of nothing else. No one would claim that Milam would be estopped by the decree to deny that he had ever been ²⁶⁶ married to defendant, or, had he remarried and had children, that the decree would be evidence of their bastardy. Milam may have been previously divorced, and in such case there would be two valid decrees, which, on the theory that they constituted an adjudication of marriage at the time of the divorce, conclusive against the world, would contradict each other and yet both be binding on all the world: See on this point *Gill v. Read*, 5 R. I. 343; 73 Am. Dec. 73; *Gourand v. Gourand*, 3 Redf. 262; *Freeman on Judgments*, 154.

But since the court had jurisdiction to declare the status of Mrs. Milam as affected by an assumed marriage with Joseph Milam, and did adjudge that she was no longer the wife of Joseph Milam, it would follow that he could no longer be her husband. He was thus affected by the judgment as he would have been by the death of his wife, and this resulted simply from the fact that the status of his wife was changed. So far and no farther, the judgment bound him and all the world.

That being so, it must follow that as an adjudication it bound her no further. Had she borne children to Hunter the judgment would have estopped neither such children nor her to deny that she was the wife of Milam when she married Hunter.

It is further contended that her affidavits are conclusive evidence against her. Three times she stated under oath that she was the wife of Milam when she was married to Hunter. This is very strong testimony against her, but it is only strong evidence. It is not an estoppel. She went upon the stand as a witness for herself, and explained that she made those affidavits upon the strength of a rumor she heard. This was all she had heard. The court found in her favor, and must have believed her statement. The statements made by plaintiff's brother do not show that Milam had been heard from, and, if defendant's testimony was true, such statements must have been unfounded. The court could well find that there was no authentic information to the effect that Milam was alive.

²⁶⁷ But it is said the marriage of the parties to this suit took place only about four and one-half years after the marriage to Milam, and it will be presumed that Milam was alive, in the absence of proof to the contrary. There was no proof tending to show that Milam was dead, or that his chance for life was below the average; therefore it is contended the court should have found that he was alive.

This presumption of the continuation of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong: Code Civ. Proc., sec. 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage. A few cases will best illustrate the rule. In *Rex v. Twyning*, 2 Barn. & Ald. 386, was a question as to a settlement, which depended upon the validity of a second marriage of Mary Burns. She was a pauper and married about twelve months after her husband had enlisted as a soldier in foreign service. The second marriage was held good. The court said: "The law presumes the

continuation of life, but it also presumes against the commission of crimes, and that even in civil cases, until the contrary is proved." This was the question in *Rex v. Harborne*, 2 Ad. & E. 540. It was said that there was no absolute presumption, but that it was a question for the jury to determine under the circumstances of the case, and a verdict convicting a defendant of bigamy was upheld on proof that the husband was alive twenty-five days before the second marriage: See, ²⁶⁸ also, *Rex v. Lumley*, L. R. 1 C. C. 196. *Murray v. Murray*, 6 Or. 1, involved the legitimacy of the children of a second marriage. It was held that the presumption of innocence should be preferred, but that presumption was not absolute and the question would depend upon the special circumstances of the case. In *Lockhart v. White*, 18 Tex. 102, Mrs. Waggoner had been separated from her husband about five years. One witness had heard of him since the separation. The court said: "There is no evidence that Waggoner had been heard of within twelve months (though that exact time is not necessary to raise a favorable presumption) prior to the marriage with Allsbrooks, and, under the rule established in the above case, the continuance of the life of Waggoner will not be presumed. The second marriage was consequently lawful and valid." It was also said that the presumption of the continuance of life was weaker and must yield to the presumption of innocence. *Sharp v. Johnson*, 22 Ark. 79, was a case involving a question of heirship depending upon legitimacy. This depended upon the validity of a marriage. The court refused an instruction to the effect that the former wife, if alive within five years before the last marriage, was presumed to be still alive. The ruling was affirmed, and the court quoted from Mathews on Presumptive Evidence: "A charge of an act of immorality, or of disobedience of a positive law, will not be received unless supported by direct evidence. Circumstances showing probability merely are not enough; the fact averred must be conclusively proved."

Klein v. Laudman, 29 Mo. 259, was an action of slander, and a similar ruling was made. *Spears v. Burton*, 31 Miss. 547, involved the question of legitimacy, and it was held that the presumption of continuancy of life would not establish a crime, even in a civil case.

To the same effect is *Greensborough v. Underhill*, 12 Vt. 604. The question in that case was as to settlement. *Schmisseeur v. Beatrice*, 147 Ill. 210, was a case involving the question of legitimacy. It was proven that an absent ²⁶⁹ husband was alive at

the time of the marriage, and the court held that in favor of this second marriage it would presume that the absent party had obtained a divorce, and that the burden of proving that such divorce had not been obtained was on the party alleging the invalidity of the second.

It is said that a contrary doctrine is established in *People v. Stokes*, 71 Cal. 263. This precise point was not there discussed, although it was raised. The court contented itself with asserting the general proposition, which no one disputes, that the presumption of life continues for seven years. The fact that there were conflicting presumptions must have escaped the attention of the court, otherwise the case is in conflict with all the cases upon the subject and with all the text-books. We cannot hold that this long line of decisions, in which there is no break, has been overruled by a case in which the point was not discussed.

The court found for the defendant upon all points notwithstanding the fact that owing to her former statements under oath her testimony was justly subject to grave suspicion. If her explanation of the former affidavits was true I think it sufficient. We cannot reverse the judgment for insufficiency of the evidence.

As the appeal from the judgment was taken too late, we cannot consider the objections to the allowance of alimony. A new trial is a re-examination of an issue of fact in the same court after a trial. The allowance of alimony is an incident to an action for a divorce, and, although the determination as to its allowance may involve a controversy as to facts, such determination is not the trial of an issue in the case. It may be before or after trial.

The appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

McFarland, J., Van Fleet, J., Harrison, J., Garoutte, J., and Henshaw, J., concurred.

MARRIAGE AND DIVORCE—SECOND^o MARRIAGE—PRESUMPTION.—Where a woman, deserted by her husband, married another, more than six but less than seven years after the first had been last heard from, the presumption in favor of the validity of the second marriage outweighs the presumption of the continuance of the first husband's life: *Johnson v. Johnson*, 114 Ill. 611; 55 Am. Rep. 888.

MARRIAGE—ESTOPPEL BY DIVORCE.—J. married R. in 1860 and soon after permanently deserted her. In 1864 J. married the plaintiff, and in 1868 they separated. In 1870, while living near J., the plaintiff publicly married W. Subsequently, the plaintiff got a divorce from J. for desertion. It was held that in this action for

dower in the estate of W: 1. That the presumption was against the validity of the marriage of 1864; 2. That the plaintiff was not estopped from showing that that marriage was void: *Williams v. Williams*, 63 Wis. 58; 53 Am. Rep. 253.

PEOPLE v. BENDIT.

[111 CALIFORNIA, 274.]

FORGERY.—TO CONSTITUTE FORGERY, there must be the making of a writing which falsely purports to be the writing of another. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. To make it such there must be a design to pass as the genuine writing of another person, that which is not his writing.

FORGERY BY AGENT.—If one fraudulently executes and issues an instrument purporting on its face to be executed by him, as the agent of a principal therein named, he is not guilty of forgery, though he has in fact no authority from such principal to execute the writing.

FORGERY AT COMMON LAW AND UNDER STATUTE.—As to what constitutes forgery of instruments which are subjects of forgery the common law and the statute—California Penal Code, section 470—do not differ. Under both, forgery consists in the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. The common law and the statute differ only as to the kinds of instruments which are the subject of forgery.

W. S. Hinkle and H. H. Davis, for the appellant.

W. F. Fitzgerald, attorney general, and C. H. Jackson, deputy attorney general, for the respondent.

²⁷⁵ **McFARLAND, J.** The defendant was convicted of forgery, and appeals from the judgment and from an order denying a new trial.

The information charges that appellant on July 30, 1894, did unlawfully, feloniously, falsely, etc., and with intent to defraud, "make and forge a certain instrument in writing, in words and figures following, to wit:

"San Francisco, July 30, 1894.

"G. W. Hume & Co.—William Cluff Company, wholesale grocers and provision dealers, 18 to 22 Front St., corner Pine. Telephone 1819.

"To balance\$

"July 23. To bill rendered 15 50

"Discount 30

—————
\$15 20

"WM. CLUFF & CO.

"A. B."

It further charges (in brief) that on said July 30th he willfully, fraudulently, etc., passed the said instrument "as true and genuine," to one J. Deming, with intent to defraud G. W. Hume and J. Deming, doing business under the firm name of G. W. Hume & Co. The instrument is admitted by appellant to be a receipt for ²⁷⁶ money, although there is nothing on its face which acknowledges such receipt.

We do not deem it necessary to consider the points made by appellant that the information is insufficient, and that material errors were committed by the court in rulings upon the admissibility of evidence, for in our opinion there was no evidence sufficient to establish the crime of forgery. There was a conflict of evidence as to whether appellant was the person who did the acts testified to by the witnesses for the prosecution; but assuming that plaintiff was identified as the person who did those acts, the acts themselves do not constitute the crime charged. The facts testified to were (in brief) these: The writing alleged to have been forged was sent by Wm. Cluff & Co. to Hume & Co. the day before July 30, 1894, so that the latter might examine it, and be ready to pay when the collector of the former should call for payment. It was then simply an unreceipted account with no name signed to it. On July 30th, according to the people's testimony, appellant went to the business place of Hume & Co., and asked J. Deming, one of the partners, for the payment of this account. Deming asked him the amount, and as he did not give the correct amount Deming refused to pay. Appellant said there must be some mistake, and that he would see about it, and went out. Deming testified: "I naturally thought he was a collector for them." Deming afterward went out himself, leaving Fannie A. Berry as acting cashier. Afterward appellant returned, and Miss Berry paid him the amount of the account, and appellant receipted it, by writing in the presence of Miss Berry, "Wm. Cluff & Co., A. B." She testified: "I saw him sign Wm. Cluff & Co., per A. B. I understood him to be the collector in the employ of the William Cluff Company, who came there to collect, and was authorized to collect the bill."

It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making ²⁷⁷ of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a

person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not. And there was nothing of the kind in the case at bar. There was no pretense that "Wm. Cluff & Co." was the genuine signature of that firm. It was written by appellant himself in the presence of the party who paid the money; he added the initials A. B. to it; and he was understood to be acting as the agent of the firm, and to have written the name Cluff & Co. by himself as such agent. By these acts he may have committed some other crime, but he did not commit forgery.

We have been referred to no authorities to the point that the signing of another's name as his agent is forgery; while there is a multitude of authorities to the contrary in text-books and adjudicated cases. "If a man accept or indorse a bill of exchange in the name of another, without his authority, it is a forgery. But if he sign it with his own name, per procuration of the party whom he intends to represent, it is no forgery; it is no false making of the instrument, but merely a false assumption of authority": 2 Archbold's Criminal Practice, 819. The doctrine is fully discussed, and the views hereinbefore stated declared, in *Regina v. White*, 2 Carr. 404. In that case the defendant brought a bill to a banker as from Tomlinson. The bill was not indorsed, but the defendant said he would indorse it. The banker wrote "per procuration Tomlinson," beneath which the defendant signed his own name. It was held that this false assumption of authority was not forgery, as there was no false making. It has frequently been held that "the false instrument should carry on ²⁷⁸ the face of it the semblance of that for which it is counterfeited," although it is not necessary that the semblance should be exact: 2 Archbold's Criminal Practice, 866. This rule illustrates the nature of forgery. How in the case at bar could there be any question about "semblance"?

The American authorities are as pronounced on the subject as the English. In the matter of *Heilbonn*, 1 Park. C. C. 434, the court, after having referred to other cases, say: "It might not be necessary to refer to these authorities, for it is the essence of forgery that one signs the name of another to pass it off as the signature or counterfeit of that other. This cannot be when the party openly, and on the face of the paper, declares that he signs for that other; there he does not counterfeit the name of the other, nor attempt to pass the signature as the sig-

nature of that other. The offense belongs to an entirely different class of crimes." In *Mann v. People*, 15 Hun, 155, the court, in an elaborate opinion in which the authorities and the arguments for an opposite view are fully reviewed and discussed, holds that "where one executes and issues an instrument purporting on its face to be executed by him as the agent of a principal therein named, he is not guilty of forgery, either at common law, or under the statutes of this state, even though he has in fact no authority from such principal to execute the same." (We quote from the syllabus, which is a correct condensation of the opinion.) In *Commonwealth v. Baldwin*, 11 Gray, 199, 71 Am. Dec. 703, the supreme judicial court of Massachusetts say: "It is not, says Sergeant Hawkins, the bare writing of an instrument in another's name without the privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. If the defendant had written upon the note 'William Schouler, by his agent Henry W. Baldwin,' the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon the signature. He is not deceived ²⁷⁹ by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature." In *Commonwealth v. Foster*, 114 Mass. 311, 19 Am. Rep. 353, the court say: "The falsity of the instrument consists of its purporting to be the note of some party other than the one actually making the signature. The falsity of the act consists in the intent that it shall pass as the note of some other party." In *State v. Young*, 46 N. H. 270, 88 Am. Dec. 212, the supreme court of that state say: "To forge or counterfeit is to falsely make; and an alteration of a writing must be falsely made to make it forgery at common law or by our statute. The term falsely, as applied to making or altering a writing in order to make it forgery, has reference not to the contents or tenor of the writing, or to the fact stated in the writing, because a writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains—a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not." In *State v. Willson*, 28 Minn. 52,

the court referring approvingly to *Mann v. People*, 15 Hun, 155, say: "The court decided that this did not constitute forgery, and held, in substance, that when one executes and issues an instrument purporting on its face to be executed by him as agent of a principal therein named, he is not guilty of forgery, although he has in fact no authority from such principal to execute or issue the same. In fact we found no authority to the contrary, and the text-writers uniformly lay down or approve of the same rule." There are numerous other authorities to the same point, but further citation is unnecessary. Of course the averment in the information that the appellant uttered ²⁸⁰ and passed the said instrument "as true and genuine" is also, under the above views, unsupported by the evidence.

It is contended that the definition of forgery in section 470 of the Penal Code makes the crime different from forgery at common law; but with respect to the question here under discussion there is no such difference. At common law there were frequent embarrassing questions as to what kinds of writings were the subjects of forgery; while our code, to avoid those questions, enumerates a very large number of writings as subjects of forgery. But as to what constitutes forgery of instruments which are subjects of forgery, the definitions at common law and by our code are the same. "Forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability": 2 Bishop's Criminal Law, 8th ed., sec. 523. In the notes to the section of Bishop just quoted many other definitions are given, and it will be noticed that the leading descriptive words are "false making" (or altering). In our code the words are "every person who, with intent to defraud another, falsely makes, alters," etc., any of the written instruments enumerated. The definition is therefore essentially the same in both instances; and it is the same in the statutes of all the other states to which our attention has been called, but the meaning of the words "false making" when applied to forgery is that hereinbefore stated.

The broad and well established distinction above set forth cannot be ignored by courts or jurors—even when in their opinion a more severe punishment should be imposed on a defendant than the one which the law prescribes for the offense of which he is guilty. As was said in *Mann v. People*, 15 Hun, 155, "whatever his misdeeds, he must not suffer for a crime which he has not committed."

Forgery is a grave and exceedingly dangerous crime. ²⁸¹ A very large part of the business of civilized countries is done by means of negotiable instruments. These are rarely presented by the makers, but are paid to others on the faith that the signatures, and the bodies of the instruments, are genuine. The business of a bank would come to a standstill if the paying teller would not pay any check until he could communicate with the drawer. Hence, if there were many successful forgeries there would be the utmost confusion in business circles. Consequently forgery, no matter how small the amount involved, is made a felony. But obtaining money or other property by false pretenses, where the party defrauded gives credit, not to the genuineness of a writing, but to the person who deceives him, is made a misdemeanor, or felony, according to the amount of money obtained by the false representation.

For the foregoing reasons the judgment must be reversed; and, of course, another trial upon the theory on which the first trial was conducted would be useless.

The judgment and order appealed from are reversed.

Temple, J., and Henshaw, J., concurred.

FORGERY—WHAT CONSTITUTES.—The chief essential elements of forgery are: 1. A writing in such form as to be apparently of some legal efficacy; 2. An evil intent; and 3. The false making of such writing: *State v. Gryder*, 44 La. Ann. 962; 32 Am. St. Rep. 358, and note. Forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability: *State v. Sherwood*, 90 Iowa, 550; 48 Am. St. Rep. 461, and note. Forgery consists of making or altering a writing so as to make the alteration purport to be the act of another person: *State v. Taylor*, 46 La. Ann. 1832; 49 Am. St. Rep. 351, and note.

FORGERY—AGENCY.—An instrument showing on its face that the person who executed it signed as agent for the maker cannot be the subject of forgery, although such agent acted without authority: *State v. Taylor*, 46 La. Ann. 1832; 49 Am. St. Rep. 351, and note. See, also, the extended note to *Arnold v. Cost*, 22 Am. Dec. 307.

SINSHEIMER v. WHITELEY.

[111 CALIFORNIA, 378.]

WAREHOUSEMEN—RECEIPTS OF—WEIGHING TAGS—DELIVERY—ATTACHMENT.—To constitute a writing a warehouse receipt there must be something on its face to indicate that a contract of storage has been entered into. Weighing tags, given by a company charging no storage and only showing the weight and quantity of the property weighed for a person named therein are not warehouse receipts; and their transfer to a pledgee does not transfer possession of the property so as to exempt it from attachment by a creditor of the pledgor.

WAREHOUSEMEN—POWER TO ISSUE WAREHOUSE RECEIPTS.—It is only persons who pursue the calling of warehousemen by receiving and storing goods in a warehouse as a business for profit, that have power to issue technical warehouse receipts, the transfer of which is a good delivery of the goods represented by them.

ATTACHMENT OF GOODS IN WAREHOUSE—SUFFICIENCY OF LEVY.—Goods stored in a warehouse are sufficiently levied upon under a writ of attachment, by taking actual possession of and placing them in charge of a keeper.

F. A. Dorn and W. Shipsey, for the appellants.

J. M. Wilcoxon and Wilcoxon & Bouldin, for the respondent.

³⁷⁸ **BRITT, C.** Replevin for two hundred and seventeen sacks of beans. Defendant Whitely is constable of a certain township in San Luis Obispo county, and as such levied on the beans as the property of one Costa in virtue of a writ of attachment to him issued out of the justice's court of said township at the suit of one Lial against said Costa. At the time of the levy, the ³⁷⁹ beans were stored in a warehouse at Pismo, in said county, owned by the Jordan Bituminous Rock and Paving Company, a corporation, which is joined with the constable as a defendant in this action. In November, 1893, said Costa, who was then the owner of the beans, caused them to be weighed at said warehouse and deposited therein, receiving from said paving company at that time five certain instruments, which plaintiffs style "warehouse receipts," and which defendants call "weighing tags"; these were in the following form, varying as to the number of sacks specified: "Jordan Bit. Rock and Pav. Co's scales, Pismo, Cal., 11-2, 1893. Weighed for F. J. Silva. Gross, 5,080. Tare, 1,570. 40 sks. beans. Net wt. 3,510. Marked F. J. S. A. Klatt, weigher." They were issued at Costa's request in the name of one F. J. Silva, with consent of the latter, but were delivered to Costa; Silva never had possession

of them and had no interest in the beans. A Mr. Stevens, agent of said company, and who had charge of the warehouse, testified at the trial: "The tags in evidence were issued by our company at Pismo, and are the only kind issued by our company, the only receipts given. They are given by the weigher; the tags, or whatever you call them, were given by the weigher at the scales when the beans were weighed and were placed in the warehouse"; also, that the company took the beans as a warehouseman, but had no charge against them; that it does not charge storage.

On December 6, 1893, Costa delivered said instruments, though without indorsement, to plaintiffs as security for a debt then owed by him to them. He also gave them a written order for the beans addressed to "Agent Pismo Wharf and Warehouse." December 11th, following, the constable seized the beans pursuant to said writ in Lial's suit against Costa; Lial obtained judgment in that action, and an execution issued thereon, under which the constable was about to sell the beans, when plaintiffs for the first time notified him and also the paving company of their claim to the property in ³⁸⁰ virtue of the transfer to them of said alleged warehouse receipts; their demand for release of the property being refused, they brought this action.

A warehouse receipt has been defined to be a written contract between the owner of the goods and the warehouseman, the latter to store the goods and the former to pay for that service: *Hale v. Milwaukee Dock Co.*, 29 Wis. 488; 9 Am. Rep. 603. Perhaps some of the terms of this contract may be implied (see forms of such receipts construed in *Lowrie v. Salz*, 75 Cal. 349, and *Bishop v. Fulkerth*, 68 Cal. 607); but surely there ought to be something on the face of the instrument to indicate that a contract of storage has been entered into; our statute on the subject requires that much (Stats. 1877-78, sec. 5, p. 949); the language in the papers here, "Weighed for F. J. Silva forty sacks beans," no more signifies that the paving company received or held the beans as a warehouseman than that it bought or sold the same, or shipped them to a distant port; on their face they plainly are not warehouse receipts: *Cathcart v. Snow*, 64 Iowa, 584; *Robson v. Swart*, 14 Minn. 371; 100 Am. Dec. 238. But it is said that the tickets were the only vouchers issued by the defendant company, and hence must be treated as warehouse receipts. Rather, it seems to us, that circumstance tends to show that said company was not a warehouseman at all in the sense which the law attributes to that term—an inference corroborated by the fact that it makes no charge for storage. It

is only persons who pursue the calling of warehousemen—that is, receive and store goods in a warehouse as a business for profit—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it: *Shepardson v. Cary*, 29 Wis. 42; *Bucher v. Commonwealth*, 103 Pa. St. 534; *Edwards on Bailments*, sec. 332. Since there was nothing equivalent to delivery of the beans in the transaction between Costa and plaintiffs, the rights of the attaching officer are not affected by the attempted transfer.

³⁸¹ The court found that the constable made no valid levy of the writ; and some effort is made here to justify the finding; it seems to us a mere conclusion of law; but, admitting it to be a finding of ultimate fact, it is not sustained by the evidence. It appears from the constable's return and certain parol evidence (which was admissible in aid of the return (*Brusie v. Gates*, 80 Cal. 462), that he took actual possession of the beans in the warehouse and placed said Stevens in charge thereof as keeper; there were some further proceedings by him to charge both Silva and the paving company as garnishees, but the sufficiency of these need not be looked to; his possession by his keeper was a compliance with the statute: *Code Civ. Proc.*, sec. 542, subd. 3.

The judgment and order denying defendants' motion for new trial should be reversed.

Belcher, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order denying defendants' motion for a new trial are reversed.

Harrison, J., Garoutte, J., Van Fleet, J.

Hearing in Bank denied.

WAREHOUSEMEN—WHO LIABLE AS.—It may be stated as a general principle that one who for hire receives goods for storage, and whose duty is that of custody, rather than carriage, is liable for such goods as a warehouseman, whatever may be his designation: *Extended note to Schmidt v. Blood*, 24 Am. Dec. 145.

WAREHOUSE RECEIPTS—WHAT ARE.—A warehouseman's receipt is said to be a quasi negotiable instrument, though in some states they have been made negotiable by statute. A mere weigher's ticket, with the word "stored" on its face, is not a warehouseman's receipt: *Extended note to Rice v. Cutler*, 84 Am. Dec. 753.

· **CHARNOCK v. HIGUERRA.**

[111 CALIFORNIA, 472.]

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—USE OF PUMPS FOR IRRIGATION.—A riparian proprietor has the right to raise a reasonable quantity of the waters of a stream by means of pumps for the purpose of irrigation.

WATERS AND WATERCOURSES—IRRIGATION—MODE OF DIVERSION.—The method of obtaining the water of a stream with which to irrigate land has nothing to do with the process of irrigation or the meaning of the word, nor with the reasonableness or lawfulness of any given diversion of water.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—ALTITUDE OF LAND.—The right to use water for the purpose of irrigation results from the need of water upon the land, and assuming this need in any given case to exist equally as to all riparian land, the respective rights of the proprietors to divert water for this purpose must be in proportion to their respective ownerships upon the stream, irrespective of the altitude of their land.

WATERS AND WATERCOURSES—IRRIGATION—ALTITUDE OF LAND—MODE OF DIVERSION.—In no case can one riparian proprietor be deprived of his just and equal proportion of the waters of a stream for the purpose of irrigation, merely because his land, by reason of its level or altitude above the stream, cannot be irrigated by the same method employed on some other land along the stream.

WATERS AND WATERCOURSES—IRRIGATION—DETERMINATION OF RIGHTS—PARTIES.—A final and satisfactory adjustment between riparian owners of irrigation rights cannot be had without the presence of every person having any right in the stream, and all the facts which can possibly bear on the question should be laid before the court.

F. A. Howard, for the appellants.

R. Dunnigan, for the respondents.

474 VAN FLEET, J. This is an action brought by several riparian proprietors against certain persons above them on the stream, to restrain them from diverting any of the waters of the stream.

475 The complaint alleges that the plaintiffs are riparian proprietors, and as such entitled to all the waters of the stream; that the defendants are not entitled to use any of the water for any purpose; and that they, by means of certain machinery, artificially and wrongfully raise and divert from the stream a large amount of the waters thereof, for the purpose of irrigating certain lands not of right irrigable from the stream, and which do not so lie as to be irrigated by the waters of said stream "diverted therefrom by any natural means" on said lands.

The facts found by the court are in substance: That both plaintiffs and defendants are riparian proprietors on the stream,

the lands of defendants being above those of plaintiffs; and that neither plaintiffs nor defendants have any right to the waters of the stream, except as such riparian owners. That all of the lands of the plaintiffs, and thirty acres of the lands of the defendants, are so situated that the water of the stream can be diverted and conducted thereon solely by natural gravity from dams in the stream, situated within the limits of said lands, respectively, without backing the water upon the lands of the owners next above them; and that no other part of the lands of the defendants can be irrigated in that manner. That the defendants have erected pumping machinery and pumps on their land, and by means thereof pump water from the stream onto land belonging to them, bordering on the stream and within its watershed, but which lie too high to be irrigated solely by natural gravity from dams situated within the limits of their lands without backing the water upon the lands of others above them. That all of the lands of both parties are dry and of little value without irrigation, but are of great value and very productive when irrigated. That defendants have not used, and do not threaten or propose to use, more than their just proportion of the water of the stream.

On these findings, judgment was entered in favor of ⁴⁷⁶ defendants, with leave to any of the parties at any time to "maintain another action to determine the exact proportion of the water of said creek which the respective owners may use."

A portion of these findings is attacked as unsupported by the evidence; but we think that the evidence fully justifies them in the particular in which they are so attacked. The only question, then, is whether the findings support the judgment.

1. It is contended by appellants that a riparian proprietor has not, for the purpose of irrigation, the right to raise water by means of pumps. No authorities are cited in support of this contention, and counsel states his inability to find any. So far as we can understand, this argument is based on the meaning of the word "irrigate," which counsel contends is "to convey water by ditches," and on the alleged universal custom in the past to employ only such means in irrigation.

As to the meaning of the word "irrigation," counsel cites some doubtful passages from civil law writers; but it is evident that this court, in holding, as it has repeatedly held, that riparian proprietors have the right to use a reasonable proportion of the water of the stream to irrigate their lands, used the term in no such restricted sense. The Latin word from which it is derived

means, primarily, to convey water to or upon anything, and, more generally, to wet or moisten anything; and the ordinary definition in our language is to water lands, whether by channels, by flooding, or simply by sprinkling. The mere method of obtaining the water with which to irrigate has nothing to do with the process of irrigation or the meaning of the word.

There was no proof in this case of any such custom as is claimed by appellants; and, if we can take judicial notice of such a matter at all, we are unable to say that pumping has never been used for such purpose. It may be that, owing to the comparatively greater expense of that method, it has been little used in the past; but, if improvements in machinery have made, or shall make, ⁴⁷⁷ that method practicable, we see no reason why riparian proprietors may not like others take advantage of such improvements. In fact, it has always been considered that the reasonableness or lawfulness of any given diversion of water is in nowise affected by the mere mode of diversion. Thus in *Elliott v. Fitchburg Ry. Co.*, 10 Cush. 191, 57 Am. Dec. 85 (cited with approval in *Lux v. Haggin*, 69 Cal. 402, 404), Chief Justice Shaw said: "One man may take water from a perennial stream of moderate size, by means of buckets or a pump—for the mode is not material—to water his garden." And in such a case, he says, "the water would be for irrigation," and such "might be regarded as a reasonable use."

So this court has repeatedly held that a prior appropriator of water may change, at pleasure, the place or mode of his diversion, so long as others are not injured by such change.

And in *Earl of Norbury v. Kitchin*, 7 L. T., N. S., 685, it was held that a riparian proprietor, so long as he took no more than his reasonable share of the water, might take water from the stream by pumping machinery, elevate it into a reservoir, and thence convey it by pipes to other land, not riparian, and there use it; the court holding that neither the mode of diversion nor the use to which the water was actually applied was material—the only question being whether or not the defendant had taken more than his reasonable share.

2. But appellants claim, as we understand them, that whether the particular mode is material or not, the mode by which the land of a riparian proprietor can possibly be irrigated is a material factor in ascertaining what portion of the water he may divert for irrigation. They contend that a riparian proprietor cannot be allowed to use any portion of the water of the stream to irrigate land which, though bordering on the stream, lies so

far above it that water cannot be conducted thereon solely by natural gravitation from the stream, without the use of any appliances other than ditches originally on such land and dams situated thereon, and ⁴⁷⁸ which will not back the water on the lands of other persons. In other words, the reasonable proportion of water which any riparian proprietor may withdraw for irrigation is made to depend, primarily, upon the area of his land which can be irrigated in that particular manner.

In the first place, that question does not properly arise in this case. The complaint was framed on the theory that the defendants were not riparian proprietors at all, and had no right to divert any water. No issue was tendered as to what amount or proportion of the water of the stream could lawfully be used by the defendants, if they had the right to use any portion. It was denied that they had any rights to the stream; and the complaint furnished no data from which any rights of the parties, as tenants in common of the water, could be determined. Nevertheless, as the question seems to have been treated as an issue, evidence being introduced on the subject, apparently without objection, and as the court below did to a certain extent consider it, it calls for consideration at our hands.

No authorities whatever are cited by appellants in support of this contention, nor can we find that any such doctrine has ever been even suggested by any court or writer. Appellants do cite some cases to the point that riparian diversion must be "on the bank of the proprietor," but the judgments in those cases do not sustain that doctrine, and we are not prepared to say that any such rule exists. It is, however, not necessary to decide that question, for its determination would shed no light on the subject now under consideration. The only question now is, whether the mere altitude of this land can deprive the riparian owner of the right to irrigate it.

No rules have ever been laid down by this court for determining the relative and proportional rights of riparian proprietors to the use of water for irrigation, nor has any case come before us, in which we could properly determine what are the rules on that subject. ⁴⁷⁹ But whatever difficulties may arise in matters of detail, that problem must find its solution in an application of the principles upon which the right to use water for that purpose at all is based. That right, as recognized in the decisions of this court, is founded upon the proposition that in an arid country the use of water for irrigation is of such vital consequence, that of necessity it must be considered as embraced with-

in the spirit of the category of rights accorded by the common law to riparian proprietors. The common-law rule, as interpreted in this country, is that the right to the waters of the stream, with certain exceptions not material here, belongs to the riparian proprietors in common and equally, and may be exercised by each as the necessities of the situation may require only so as not to infringe upon the equal rights of the others. As irrigation is here a necessity of the situation, resulting from climatic conditions, the right to use a just and equal portion of the water for that purpose has been held to be an essential part of the riparian ownership.

Such being the foundation of the right, it is evident that the restriction contended for by appellants is inconsistent with the rule itself. The right to use the water for this purpose results from the need of water upon the land. Assuming this need in any given case to exist equally as to all the riparian land, the respective rights of the proprietors to divert water for this purpose must be in proportion to their respective ownerships upon the stream. No other method would conform to the rule of equity. If every riparian proprietor on a given stream owned the same quantity of land, with the same frontage on the stream and the same susceptibility to and need of irrigation, each would be entitled to precisely the same quantity of water for that purpose. We do not now decide how far a variation in any one of those factors would affect the question, nor whether all of them are necessarily to be considered in any case. But it must necessarily be true, from the very nature of the right, that in no case can one proprietor ⁴⁸⁰ be deprived of this just and equal proportion merely because his land, by reason of its level or altitude above the stream, cannot be irrigated by the same method employed on some other land.

That the rule contended for by appellants would be utterly inconsistent with the very foundations of the riparian doctrine in this country will readily be seen by observing its results in particular instances. According to appellants' theory, none of the waters of the Colorado river, in the greater part of its course, can ever be used by the riparian owners for irrigation, for none of them can erect a dam high enough to divert any water by gravity on his own land without backing the water upon his neighbor. The same is true of many important streams in the mountainous districts of this state, now extensively used for irrigation. Yet nowhere is irrigation more needed than in such localities. Coming next to the level plains, we find streams with

so little fall that diversion by a dam on the very tract of land to be irrigated is only possible on tracts having very considerable frontage on the stream. Suppose six adjoining proprietors on such a stream, neither of whom can divert the water on his own land in the manner required by appellants. According to appellants' contention, they could not, even by agreement among themselves, divert the water on the land of one and carry it to the land of another of their number, or pump it onto the land of any of them. They must permit all the water to flow down to the more fortunate proprietor below, whose acres are thousands to their hundreds. And yet, if one of the six should buy the lands of the others, he would then be entitled to divert the water.

Such are some of the consequences, suggesting themselves to the mind, of the rule we are asked to declare; and they show clearly that the mode of diversion of the water is a false quantity in the discussion. Whatever be the just proportion of water to which any riparian proprietor is entitled, that proportion cannot be diminished by the fact that, in order to utilize it, he must ⁴⁸¹ raise it from the bed of the stream by pumps, or other similar appliances. Every diversion of water from a stream is artificial—a disturbance of the natural order of things. A dam or a ditch is as much an artificial mechanism as a pump; it may indeed be much more so; and the one alters the natural conditions in the same sense that the other does. The right to take the water at all is a right to change the ordinary course of nature; and the methods employed, so long as their use does not infringe the like and equal rights of others, are immaterial.

We do not wish to be understood as now deciding how, in any given case, the respective proportions of the different owners upon a stream are to be determined. Whether they are to be ascertained according to the extent of ownership or frontage along the stream, or according to the area of land bordering on the stream, or the amount of land needing or susceptible of irrigation, or the character of the soil, or according to several or all of these circumstances or other circumstances that may exist, has never been decided, nor has there been, so far as we know, any opportunity for deciding it. We merely hold that the mere mode of diverting the water from the stream, so long as that mode does not deprive others of their equal rights, is not a factor to be considered. We will add, in view of any further effort that the parties may make to obtain a judicial determination of their respective rights in this stream, that a final and satisfactory adjustment can never be had without the pres-

ence of every person having any right in the stream, and that all the facts which can possibly bear on the questions should be laid before the court.

In the present case, as we have suggested, no sufficient data are furnished by the pleadings or evidence for a determination of that question; and the learned judge of the court below would have been justified in no other disposition of the case as presented than the one made.

⁴⁸² The judgment and order are, therefore, affirmed.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

WATERS—RIPARIAN RIGHTS—MEANS OF DIVERSION.—There must be an actual diversion of water from its natural channel by means of a ditch or other structure to effect a valid appropriation of it: *Simmons v. Winters*, 21 Or. 35; 28 Am. St. Rep. 727. See the extended note to *Davis v. Getchell*, 79 Am. Dec. 639.

GOULD v. EATON.

[111 CALIFORNIA, 639.]

WATERS AND WATERCOURSES—TITLE TO PERCOLATING WATERS—DIVERSION.—Principles of law which govern the right to waters flowing upon the surface of the earth are inapplicable to waters which are beneath its surface and percolate through the soil and the water which is held by the soil, whether sand or sandstone, in a state of percolation is a portion of the soil itself and belongs absolutely to the owner of the land. He may appropriate and divert such water at his pleasure.

WATERS AND WATERCOURSES—TITLE TO PERCOLATING WATER—RIGHT TO DIVERT FROM ADJACENT LAND.—The right of the owner of land to percolating water therein and to appropriate and divert it, is not affected by the fact that an impervious strata of clay beneath and on which the porous strata containing the water rests, diverts the course of percolation in a definite direction towards and over adjacent lands and into a natural stream.

WATERS AND WATERCOURSES—PERCOLATING WATERS—DIVERSION.—Although the course of percolating water is in some definite direction, the owner of the land in which it is found has the exclusive dominion over it, and does not violate the rights of another by appropriating it to his own use, though the effect is to divert its course from adjacent lands, or to destroy the advantages therefrom previously enjoyed by the adjacent proprietor.

R. B. Canfield, for the appellants.

Wright & Day and R. Y. Hayne, for the respondent.

⁶⁴¹ HARRISON, J. The Cold Spring branch of Montecito creek has its rise in the Santa Inez Mountains, and flows in a

southerly direction through a canyon on the southerly slope of said mountains. These mountains in the neighborhood of said stream are composed chiefly of parallel strata of sandstone, extending across the canyon, and separated by seams parallel with the strata, filled with clay, which is impervious to water. This sandstone is porous and fissured with seams and cracks, both parallel with the strata and transversely thereto. The trend of the strata is nearly east and west, and nearly at right angles with the general course of the canyon and of the stream, and the dip of the strata is toward the north, and at an angle of about eighty degrees. The stream has a fall of about four hundred feet to the mile, and its natural supply is the rain which falls upon the adjacent mountains and descends into the sandstone, percolating through it and passing ⁶⁴² along the seams and cracks thereof in a direction with the trend of the strata. The plaintiff is the owner of a tract of land through which the stream flows, and from which his land derives a benefit. In October, 1892, the owner of a tract of land extending on both sides of the stream above that of the plaintiff granted to the defendants the right to enter thereon and excavate a tunnel for developing water, and, in pursuance thereof, the defendants commenced the construction of a tunnel at a point about thirty feet west of the stream, and at an elevation of about four feet above its level, and continued the construction of said tunnel in a northerly direction for about six hundred feet. The tunnel was constructed so as to be throughout the greater part of its length below the level of the stream, and so that this depth increased gradually toward the head or northern end, where it was about fifty feet below the level of the stream. At a point about three hundred feet from the mouth of the tunnel, there is a bold outcropping of one of the strata of said sandstone, and for a space of thirty yards along the canyon, extending from near the foot of the western slope of the mountains to the margin of the stream, a distance of about one hundred feet, the water, prior to the construction of the tunnel, percolating through this stratum, moistened the ground and sustained thereon a growth of ferns. Within this growth of ferns there were, prior to the construction of the tunnel, certain small springs, the waters of which came to the surface in such quantities as to be visible, and percolating through said ferns seeped into the stream along the western bank thereof, but did not form a defined channel or current. The line of the tunnel was a short distance west of this growth of ferns and the locality of these springs, and also about forty feet below the

level of the same, and the effect of its construction has been to intercept and divert into and through the tunnel the waters that had previously supplied the springs, and to cause the same, and the seepage therefrom into the stream, to wholly disappear. The porous character ⁶⁴³ of the sandstone formation which crosses the canyon permits water from the ground neighboring to and overlying the tunnel, and water from the channel of the stream, to drain into the tunnel. The court finds that the intention of the defendants in running the tunnel was to intercept and divert into said tunnel the subterranean waters stored in and percolating through said sandstone, and passing along the seams and cracks thereof, and particularly to intersect the aforesaid stratum of sandstone, and to intercept and divert into the tunnel the water percolating and passing through and along said stratum and the seams and cracks thereof, but that they did not intend to divert from their natural course any waters flowing from said springs, or to divert from said stream any water naturally flowing in the channel thereof, and that the said small springs and the waters percolating or seeping therefrom are the only tributaries of said stream affected in any way by the construction of said tunnel.

The plaintiff brought the present action to restrain the defendants from diverting the waters of the stream by means of said tunnel, and from preventing the water which would issue from the mouth of the tunnel from flowing back into the channel of the stream. The court found that at the time of the trial of the action there was a flow of water from the tunnel at its mouth of three and ninety-two hundredths inches, measured under a four-inch pressure, and that of this amount one and forty-three hundredths inches was, and under the conditions then existing would be, obstructed and diverted, by reason of the tunnel, from the natural course of the waters flowing in said stream; that, except as to said one and forty-three hundredths inches, the whole of the flow of water from said tunnel had been developed and gathered from the subterranean waters percolating in the sandstone of the adjacent mountains, and passing along the seams and cracks thereof, and did not come from the channel of said stream. Judgment was thereupon rendered, giving to the plaintiff the ⁶⁴⁴ relief asked by him, to the extent of one and forty-three hundredths inches. From this judgment, in so far as by its terms the defendants are permitted to appropriate and divert the waters flowing from the tunnel in excess of one and forty-three hundredths inches, the plaintiff has appealed.

The appeal is presented here upon the judgment-roll alone, without any bill of exceptions.

The rule is well established that the principles of law which govern the right to waters flowing upon the surface of the earth are inapplicable to waters which are beneath its surface and percolate through the soil. The water which is held by the soil is a portion of the soil itself, and belongs to the owner of the land as fully as any other ingredient of the land: *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Southern Pac. R. R. Co. v. Du-four*, 95 Cal. 615. This rule is not changed by the character of the material through which the water percolates, whether it be loose sand, or a more compact sandstone. So long as the water is in a condition of filtration or percolation, it is a part of the soil and subject to the sole dominion of the proprietor of the land in which it is found. The appellant does not dispute this proposition of law, but contends that it is inapplicable to the present case, inasmuch as it appears, from the findings of fact herein, that by reason of the seam of clay which separated the strata of sandstone, and which is impervious to water, the waters, which had up to that point been in a state of percolation through the sandstone, ceased to be in percolation, and thereafter passed along the seam in the direction of the creek; that this constituted a defined stream of water beneath the surface, and is to be governed by the same laws as govern streams upon the surface of the earth. This conclusion, however, necessitates the inference of a fact from the findings which has not been made by the court, and which will have the effect to defeat the judgment which the court has rendered. The inference of one fact from others, unless such fact is a necessary conclusion from those others, must be made by the trial court, and, if the facts that ⁶⁴⁵ it has found are such as might authorize different inferences therefrom, it will be assumed that the inference made by the trial court was one that will uphold, rather than defeat, its judgment: *Breeze v. Brooks*, 97 Cal. 72. The court has not found that there is any flow or stream of water at the seam of the stratum, nor do the findings which it has made authorize such a conclusion. As it must be assumed that the stratum of sandstone is uniformly porous, and extends close to the seam which limits it, it must follow that the water within that stratum is in a state of percolation until it is arrested by the seam, and is thereafter, by reason of gravitation, diverted toward the channel of the creek. The mere diversion of its direction does not, however, change its character from percolating water to a flowing

stream. So long as it is within the sandstone, although the lower part of the stratum may be more highly charged with the water than the upper part, it merely percolates through the sandstone until it is freed at the outcropping of the stratum where it borders upon the stream. It is frequently the case that the course of percolating waters is in some definite direction, but the owner of the land in which they are found has the exclusive dominion over them, and does not violate the rights of another by appropriating them to his own use, even though the effect be to divert their course from adjacent lands, or to destroy the advantages therefrom previously enjoyed by an adjacent proprietor.

The judgment is affirmed.

Van Fleet, J., and Garoutte, J., concurred.

Hearing in Bank denied.

WATERS—TITLE TO PERCOLATING WATERS.—Waters percolating in the soil belong to the owner of the freehold, and he may use them as he chooses free from any usufructuary rights in others: *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352, and note. Percolating waters, unless flowing in natural channels and between defined banks, may be lawfully intercepted by him through whose land they flow: *Bloodgood v. Ayers*, 108 N. Y. 400; 2 Am. St. Rep. 443, and note; *Lybe's Appeal*, 106 Pa. St. 626; 51 Am. Rep. 542, and note. See the notes to *People's Gas Co. v. Tyner*, 81 Am. St. Rep. 438, and *Collins v. Chartiers Valley Gas Co.*, 17 Am. St. Rep. 796; also the extended note to *Wheatley v. Baugh*, 64 Am. Dec. 727, where the subject is fully treated.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

GERMAN INSURANCE COMPANY v. HAYDEN.

[21 COLORADO, 127.]

INSURANCE—FORCE AND CONSTRUCTION OF CONTRACT.—The rights of both insurer and insured are governed by the contract of insurance. If it is susceptible of two constructions, that one will be adopted which is more favorable to the assured; but if its language is clear and unambiguous, its effect cannot be destroyed by construction.

PUBLIC LANDS—LAND OFFICERS—JURISDICTION—ENTRIES.—The land department of the government has the right to make necessary and reasonable rules governing the manner in which the character of the land entered shall be made to appear, both *prima facie* and ultimately; and if these rules are not complied with, or if it appears that the land is not such as can be entered under the particular claim advanced to it, as, for instance, where agricultural lands are applied for under the mining laws, it is not only the province, but the duty, of the land department to deny the entry.

PUBLIC LANDS—LAND OFFICERS—CONCLUSIVENESS OF DECISIONS.—In the absence of fraud, the decisions of the officers of the land department of the government as to matters within their jurisdiction is final and conclusive; hence, their decision that land in dispute is agricultural, and not mineral, determines the character of the land.

INSURANCE—PUBLIC LANDS—FAILURE OF TITLE—NOTICE—LIABILITY FOR LOSS.—If one enters land as a placer mining claim, which entry is approved by the local land officers, and a policy of insurance issues to the claimant, who has a building on the land, upon an application for insurance, in which it is stated that the title of the insured is "good," but the policy contains a stipulation that it shall be void if the building stands on land to which the insured has not a perfect title, the insurance company is not liable for a loss by fire, occurring nearly eighteen months after such entry was canceled by the secretary of the interior, for the reason that the land was agricultural, and not subject to entry as mineral land; and where no notice of a failure of title had been given to the company,

such cancellation avoided the claimant's title ab initio, and presented the very condition which the parties had agreed should forfeit the policy.

INSURANCE—LOSS PAYABLE TO MORTGAGEE—DEFENSES.—The fact that a loss is payable to the mortgagee of insured premises does not increase, lessen, or otherwise change, the burden assumed by the insurance company. The same defenses may be made against the mortgagee, who brings an action on the policy, as could have been made against the insured.

INSURANCE—PRIOR INSURANCE.—A policy of insurance is not void by reason of prior insurance which had lapsed before the issuance of the policy sued on.

INSURANCE—FALSE ANSWERS WRITTEN BY AGENT—ESTOPPEL.—An insurance company is estopped to take advantage of the falsity of an answer, in an application for insurance, respecting the amount of encumbrance on the property, where the agent of the company, being correctly informed, at the time, as to the amount of the encumbrance, fills out the false answer without the knowledge of the insured, and where such error in the application occurs through no fault of the insured, but is the result of the agent's negligence.

Action upon a fire insurance policy, issued upon two certain frame buildings owned by Mrs. Clara Leonhardy. On or about July 14, 1885, she executed to the plaintiffs, Hayden & Dickinson, a partnership, her promissory note for the sum of five thousand dollars, and executed to Job A. Cooper, trustee, for the use of plaintiffs, a deed of trust to the land upon which the insured buildings stood for the purpose of securing the payment of the note. The policy provided that the loss, if any, should be payable to Cooper, as his interest should appear; and plaintiffs alleged that this provision of the policy was made for their sole use and benefit. The replication denied that the amount of the encumbrance was ever stated by the applicant as being eight hundred dollars; and alleged that the amount was given at five thousand dollars, the latter sum being the correct amount. It admitted the provision of the policy with reference to forfeiture, as alleged. The case was tried by the court. There were findings and judgment for the plaintiffs, and the defendant appealed.

Stuart, Murray & Andrews and G. W. Barnett, for the appellant.

John H. Denison, for the appellees.

¹²³ HAYT, C. J. It is admitted by the pleadings that in the application the insured in answer to the question, "What is your title?" answered, "Good." And it is likewise admitted that the policy contained the following stipulation:

"That if the interest of the insured in the said property, or any part thereof, now is or shall become any other or less than a perfect legal and equitable title and ownership free ¹³⁴ from all liens whatever, except as stated in writing thereon, if the property be encumbered by a mortgage or otherwise, or if the buildings or either of them stand on land of which the assured has not a perfect title, then this policy shall be void."

The facts in reference to the title to the real estate upon which the insured buildings stood are as follows: Upon the twenty-eighth day of January, 1880, and prior thereto, the title was in the United States. Upon the date mentioned, Leonhardy located the same as the Leonhardy placer claim, and on the 19th of April, 1880, filed his application for patent for this claim, covering one hundred and forty-nine and forty-one hundredths acres. Advertisement of said application was duly made. It does not definitely appear at what time this advertisement expired, but it is certain that no adverse claim was filed during the time within which the law permits the same to be filed, or in fact at any other time.

On the 7th of February, 1882, one David N. Cook filed a protest against the issuance of a patent to nineteen and three-tenths acres of the ground claimed by Leonhardy as a placer claim, alleging that he had filed upon the same as agricultural land; that it was agricultural and not mineral land. A hearing before the local officers upon this protest resulted in an order overruling it. The insured buildings were not situate upon any part of the nineteen and three-tenths acres involved in the Cook protest. Seven days thereafter, to wit, on February 14, 1882, the receiver issued his final receipt to Olara P. M. Leonhardy for the surface area embraced in the Leonhardy placer claim of one hundred and forty-nine and forty-four hundredths acres. From the order overruling the protest filed by Cook an appeal was taken to the commissioner of the general land-office. In the general land-office it was discovered that the report of the deputy surveyor upon the character of the Leonhardy placer claim was not in compliance with the rules of the department, and, it not appearing to the satisfaction of the commissioner that the lands were mineral lands, the entry was suspended and the matter referred to the register and receiver of the local land-office for ¹³⁵ a hearing, to determine the character of the entire tract and its adaptability for placer mining.

The testimony taken upon this hearing before the register and receiver is very voluminous. An opinion was filed on the 4th of

May, 1883, in which it was held that the preponderance of the testimony was in favor of the proposition that the ground in dispute was more valuable for mineral than for agricultural purposes. From this decision Cook appealed. When the case again reached the commissioner, he held that the evidence did not establish the mineral character of the land, reversed the decision of the register and receiver, and canceled the Leonhardy entry. From this order an appeal was taken to the secretary of the interior, who in turn affirmed the decision of the commissioner. Upon a motion for review of this latter decision before the honorable secretary, a written opinion was filed reviewing the entire transaction from its inception, affirming the previous decision under which the Leonhardy placer claim was canceled.

The final order was made by the secretary of the interior on the 9th of January, 1889. Of this order Mrs. Leonhardy had notice, but it does not appear from the evidence that the insurance company was ever notified of the cancellation of the entry, or that the company had notice of the invalidity of the Leonhardy title at any time prior to the destruction of the insured buildings by fire, and demand for payment under the policy, although the buildings were destroyed by fire some time during the month of June, 1890, nearly eighteen months after the cancellation of the Leonhardy entry.

When a clause in a contract of insurance is susceptible of two constructions, that one will be adopted which is more favorable to the assured; but when the language of the contract is clear and unambiguous, its effect cannot be destroyed by construction. The rights of both insurer and insured must be governed by the contract solemnly executed.

In this case the covenant in regard to title is clear and unambiguous. If the title fails, "then the policy shall be void." This would seem to be a wise provision, necessary ¹³⁶ to the protection of both insured and insurer. Certainly, as a general proposition, it is to their mutual interest that the inducement to incendiarism shall be reduced to the minimum. The title of the realty is an important consideration in determining the value of buildings. A building may be worth thousands of dollars to the owner of the realty, while to others it would be of but little value. Consequently, the inducement to incendiarism would be greatly increased if contracts of insurance executed upon a valuation based upon the assumption that the title to the realty and to the buildings is in one and the same person could be enforced, if, in fact, the title was not thus united.

In the present instance, the title failed by reason of an inherent infirmity—the land not being mineral land, and consequently not open to entry under the mining laws of the United States. The character of this land was a question of fact, the determination of which is specially committed to the appropriate officers of the land department of the government, and their decision in all cases within their jurisdiction is final and conclusive, in the absence of fraud: *Lindsey v. Hawes*, 2 Black, 554; *Lee v. Johnson*, 116 U. S. 48; *Vance v. Burbank*, 101 U. S. 514.

It is claimed, however, in this case, that the land officers were acting without jurisdiction. This claim is based upon the assumption that a protestant has no right of appeal, and upon the further claim that by the protest filed only a small portion of the placer claim was involved, the buildings not being upon such portion.

The answer to this claim will be found in the statutes. By section 2329 of the Revised Statutes of the United States it is provided that a placer claim is "subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims." In section 2325, provision is made with reference to lode claims as follows: "If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration ¹³⁷ of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." The standing of the protestant seems to be regulated by the exception in the paragraph last quoted. The statement that he is not a party, and therefore not entitled to appeal, is immaterial to the real question at issue. The law does not knowingly permit a claimant to obtain patent under the mineral laws to agricultural lands, and, when a patent is applied for, it is quite unimportant as to how the attention of the land department may be called to the character of the land sought to be patented. That department certainly has the right to make necessary and reasonable rules governing the manner in which the character of the land shall be made to appear, both *prima facie* and ultimately, and if these rules are not complied with, or if it appears that the land is not such as can be entered under the particular claim advanced

to it, as, for instance, where agricultural lands are applied for under the mining laws, it is not only the province, but the duty, of the land department to deny the entry. It should be unnecessary to cite authorities in support of the foregoing, but as the contrary has been seriously urged in this case, we cite the following cases: *Lindsey v. Hawes*, 2 Black, 554; *Pierce v. Frace*, 2 Wash. 81; *Harkness v. Underhill*, 1 Black, 316; *McCarthy v. Mann*, 19 Wall. 20.

The law does not make the local land officers the tribunal of last resort upon these questions, although upon their decision the price of the land may be accepted and a receiver's receipt issued. The commissioner of the general land-office has a right, and it is made his duty, to examine the application and proofs in support thereof, before the issuance of a patent. In this case, upon such an examination, it was found that the proof failed to show that the lands embraced in the Leonhardy placer claim were mineral lands, and a hearing ^{was} upon this question was ordered. Upon a subsequent review, it was found that the lands were more valuable for agricultural than for mineral purposes, and the receiver's receipt theretofore issued was accordingly ordered canceled. Upon appeal by Leonhardy to the secretary of the interior, this decision was affirmed. The land department not only had jurisdiction, but the proceedings appear to have been regular and proper. We find nothing in the case of *Godding v. Decker*, 3 Col. App. 198, to militate against this conclusion. That court was then considering the position of a protestant with reference to an appeal in pre-emption conflicts, and the right was denied; but that the land-office should, in a proper case, cancel an entry upon its own motion, although certificate had been issued, is expressly recognized. And the same is true of *Wilson v. Fine*, 40 Fed. Rep. 52, where it was held that "an entry and certificate, issued to a settler under the homestead act for land subject to entry thereunder, cannot be set aside or canceled by the land department, on its own motion, for fraud or mistake committed or occurring in obtaining or issuing it."

Without expressing any opinion upon the doctrine announced, we need only call attention to the fact that it is expressly predicated upon the assumption that the land was subject to entry under the homestead act. Here the reverse is true. The land is not subject to entry under the mining laws.

The title of Mrs. Leonhardy under her placer claim having been denied for the reason that the land was agricultural, and for this reason not subject to entry as mineral lands, avoided her

title *ab initio*, and the very condition was presented which the parties had agreed should forfeit the policy of insurance.

The buildings were not destroyed by fire until nearly eighteen months had expired after due notice had been given Mrs. Leonhardy of the failure of her title. It was certainly her duty to have promptly notified the company of this failure, ¹³⁹ and, not having done so, she cannot recover in this action, as it is conceded that the same defenses can be made against these plaintiffs as could be made against the assured, Mrs. Leonhardy. The company assumes no greater or different burden by reason of the loss being payable to the mortgagee.

No effort was made in the court below to show that the company had any notice whatever of the failure of title to the realty. Had such notice been received, and no action taken by the company, perhaps it would be estopped from denying that the policy was in force, but such estoppel would depend upon facts and circumstances not now before the court.

In view of the possibility of a new trial, we shall notice two other assignments of error which have been urged upon this appeal. It is claimed that there was a prior insurance on the property which avoided the policy, but the evidence shows that such prior insurance as there had been upon the property had lapsed at the time of the issuance of the policy sued on. Before application was made for this policy, the mortgagees, acting for and on behalf of Mrs. Leonhardy, made inquiry at the office of the company which issued the prior insurance, and were informed that such insurance had been canceled, and that that company at the time had no insurance upon the property. Under these circumstances, we agree with the district court that the policy sued upon was not forfeited by reason of other insurance.

So, also, with reference to the answer as to the amount of encumbrance upon the property, viz., that it was eight hundred dollars, instead of five thousand dollars, it is clear that this part of the application was filled out by an agent of the defendant company, and that he was at the time correctly informed as to the amount of the encumbrance upon the property, and that the error in the application occurred as the result of his negligence and through no fault of the assured. It appearing that the agent of the company wrote down this answer in the printed form in the application, without the knowledge of the assured, ¹⁴⁰ and the true facts having been communicated to the agent at the time, the company is estopped to take advantage of the

falsity of the answers: *State Ins. Co. v. Taylor*, 14 Col. 499; 20 Am. St. Rep. 281.

For the reasons stated the judgment must be reversed.

INSURANCE.—Policies of insurance are construed like other contracts. If not ambiguous, the language controls; but all ambiguities, if any, are resolved in favor of the insured, and against the insurer: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809. A provision in a policy against double insurance is not violated by a prior policy canceled before or contemporaneously with the delivery of the second policy: *Note to Thomas v. Builders' Mutual Fire Ins. Co.*, 20 Am. Rep. 320. If answers are written in an application for insurance by an agent of the insurer without the knowledge or consent of the applicant, the company is estopped from making any defense based upon the falsity of such answers: *Notes to Mailhoit v. Metropolitan Life Ins. Co.*, 47 Am. St. Rep. 344; especially where the agent has been correctly informed of the real facts by the applicant: *Notes to Creed v. Sun Fire Office*, 46 Am. St. Rep. 137; *Follette v. Mutual Accident Assn.*, 28 Am. St. Rep. 696. A failure by the insured to set forth the true title with substantial accuracy renders a policy of insurance void, although the owner had no intention to deceive: *Geiss v. Franklin Ins. Co.*, 123 Ind. 172; 18 Am. St. Rep. 324.

PUBLIC LANDS—DECISIONS OF LAND DEPARTMENT.—The decisions of the general land department on questions of fact involved in the cancellation of entries for public lands are binding on the courts, if the parties have been heard, or have had an opportunity to be heard: *Parsons v. Venzke*, 4 N. Dak. 452; 50 Am. St. Rep. 669. The decisions of land officers are final and conclusive, in actions at law, of all matters of fact of which they have jurisdiction: *Note to Parsons v. Venzke*, 50 Am. St. Rep. 684; *Davis v. Webbald*, 189 U. S. 507, 530.

BRANHAM v. STALLINGS.

[21 COLORADO, 211.]

LOTTERIES ARE PROHIBITED, in Colorado, both by the constitution and by statute.

LOTTERIES—SCHEME AS TO TOWN LOTS.—A scheme by which persons associate themselves together into an organization called the "Denver Lot Club," under an agreement that each shall pay two dollars per week; that drawings for town lots shall be had every Monday, at which drawings one of the members is to receive a lot; and that such drawings shall be continued for a period of sixty weeks, is a lottery within the meaning of a statute prohibiting the disposal of lands or real estate by chance of any kind.

LOTTERIES—NO RECOVERY FOR MONEY PAID.—Members of a lottery association, formed for the purpose of disposing of town lots by chance, and who have joined it in direct violation of the statutes of the state, are all in *pari delicto*, and cannot invoke the aid of either a court of equity or a court of law. Those who have paid out money for chances to obtain lots in such an association cannot recover it back. The maxim, *In pari delicto potior est conditio defendentis*, applies in such a case.

Action by Stallings, as plaintiff, suing for himself, and as assignee for others, to recover back certain moneys paid for the purchase of lots in the Denver University addition to the city of Denver. The plaintiff alleged that he was induced to part with his money by reason of the fraudulent conduct of the defendants. The answer denied each and every allegation of the complaint. The defendants further answered that by the terms of the agreement, mentioned in the opinion, one of the members would draw a lot at the first drawing, which would only cost him two dollars; that one of the members would draw a lot at the second meeting, which lot would cost the successful party the sum of four dollars; and that said drawings were to be continued for a period of sixty weeks. The defendant, Branham, was selected by the members of the club as its manager. No replication was filed. The cause was tried by the court without a jury. Two judgments were entered; the first being simply a money judgment; but two days thereafter a second judgment was entered, in the absence of defendants' attorneys and without notice to them, as shown by an affidavit filed in the trial court to set the judgment aside. The second judgment provided that the plaintiff should have execution upon the bodies of the defendants. The defendants sued out a writ of error to reverse these judgments.

Norris & Howard, for the appellants.

Browne, Putnam & Preston, for the appellee.

214 HAYT, C. J. By the answer of the defendants it appears that the parties plaintiff and defendants, with others, associated themselves together, organized and formed a lottery association known as the "Denver Lot Club"; that they entered into an agreement by the terms of which they were each to pay two dollars per week, and that drawings were to be had every Monday, 215 at which drawings one of the members was to receive a lot. It further appears that the plaintiff and his assignors became members of said club and participated in the meetings and the drawings, and that the plaintiff repeatedly acted as one of the judges and presided over said meetings. It also appears that a number of lots were drawn by the assignors of plaintiff in pursuance of such illegal contract, and that deeds were duly made to said parties for such lots.

These uncontradicted allegations show conclusively the illegality of the contract entered into between the plaintiff and his assignors and the defendants. It was a lottery scheme, pure and

simple, and as such prohibited by the constitution of this state and also by statute. It is shown that these parties voluntarily associated themselves together for the purpose of carrying out this illegal scheme. "In pari delicto potior est conditio defendentis," ³ "In equal guilt, the stronger is the situation of the defendant"—is a maxim of the law, or, as it is sometimes expressed, "Where misconduct is mutual the law will not lend its aid to either party." This rule was not adopted for the benefit of defendants, but simply upon the grounds of public policy. Subject to a few well known exceptions, the law is well established that, where such a contract is executory, the law will not aid either party to enforce its execution, and where it has been executed, or money paid in pursuance thereof, the law will not aid the party to recover back the amounts paid. The exceptions cover cases of usurious contracts, marriage brokerage contracts, and the like, where the transactions are prohibited for the sake of protecting one set of men from another, the one from their condition or situation being liable to be imposed upon by the other, as in such cases the parties are not in *pari delicto*, and it is assumed that public policy will best be advanced by granting relief: ² Pomeroy's Equity Jurisprudence, sec. 941, and cases cited in note.

In this case, however, plaintiff and his assignors admittedly joined with a lottery association in direct violation of the statutes of this state, and do not come under the principle ²¹⁶ governing the excepted cases. The statute reads as follows: "No person or persons, corporation, or association, shall, within this state, open, set on foot, carry on, promote, or draw, publicly or privately, any lottery, game, or device of chance of any nature or kind whatsoever, or by whatever name it may be called, for the purpose of exposing, setting to sale, or disposing of any houses, lands, tenements, mines, or real estate, or any money, goods, or things in action. Whatever [whoever] violates this provision shall, for each offense, upon conviction, upon indictment, be fined not less than one hundred dollars, or imprisoned in the county jail not less than sixty days, or both, in the discretion of the court": Mills' Annotated Statutes, sec. 2928.

It is alleged in the answer, and not denied, that these parties associated themselves together under circumstances showing that they were *particeps criminis* in an illegal scheme to dispose of lots by chance. They are in *pari delicto*, and neither courts of equity nor courts of law will aid either; and where money has been paid by either party upon such a contract, it

cannot be recovered back, for the reason that courts will not assist such a transaction in any way: *Broom's Legal Maxima*, 720-728, et seq; *Norris v. Norris*, 9 Dana, 317; 35 Am. Dec. 138; *Nellis v. Clark*, 20 Wend. 24; *Solinger v. Earle*, 82 N. Y. 393; *Setter v. Alvey*, 15 Kan. 157.

In the case of *Norris v. Norris*, 9 Dana, 317, 35 Am. Dec. 138, it is said:

"When the parties to an illegal or fraudulent contract are in *pari delicto*, neither a court of equity nor a court of law will aid either of them in enforcing the execution of that which may be executory, or in revoking or rescinding that which may have been executed. In such a case, the law will not be the instrument of its own subversion, and, to every invocation of its assistance, replies, '*In pari delicto potior est conditio defendentis.*'"

The judgment of the county court must be reversed and the cause remanded.

LOTTERIES—MAXIM, IN PARI DELICTO.—Every scheme for the distribution of prizes by chance is a lottery. Its name is immaterial. If a tract of land is divided into lots of unequal value, and these are sold to purchasers at a uniform price, and are distributed among them by drawings or lot, and a deed given to each purchaser for the lot drawn by him, the scheme is a lottery, and the deed is void and conveys no title: See monographic note to *Yellowstone Kit v. State*, 16 Am. St. Rep. 43, 45, on what is a lottery. Parties to an illegal agreement stand in *pari delicto*, and neither can enforce the agreement against the other: *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330; 35 Am. St. Rep. 713. A court of equity will not aid either party to an illegal contract, but will leave both where it finds them: *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 798, and note; note to *Harper v. Harper*, 7 Am. St. Rep. 587.

JUSTICE MINING COMPANY v. LEE.

[21 COLORADO, 270.]

MINES—LOCATION OF MINERAL LANDS—ALIENS.—The mineral lands of the government are open to location and purchase only by a citizen of the United States, or one who has declared his intention to become such.

MINES—MINERAL LANDS—LAND DEPARTMENT—CONCLUSIVENESS OF FACTS FOUND.—After an application to purchase mineral land of the government has been approved by the officers of the land department, in the exercise of their jurisdiction, and the entry has been allowed, the fact of citizenship, as well as all other questions of fact, is presumed to have been established, and is not open to review by the courts at the instance of third parties.

PUBLIC LANDS—JURISDICTION OF LAND DEPARTMENT—CONCLUSIVENESS OF JUDGMENT.—The land department of the government was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. It must, therefore, consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is unassailable except by direct proceedings for its annulment or limitation.

MINES—MINERAL LAND—CONCLUSIVENESS OF GRANT TO ALIEN.—After a grant of title to mineral land, or the equivalent of such grant, is made to an alien, it cannot be attacked by any third party.

MINES—MINERAL LAND—INTERFERENCE OF COURTS WITH LAND DEPARTMENT.—While proceedings to acquire title to mineral land of the United States are pending in the land-office, that department has exclusive jurisdiction of the matter, and any attempt on the part of the courts to control its action is, ordinarily, an unwarranted assumption of jurisdiction.

Action to obtain the cancellation of certain instruments. The case was brought into the supreme court by appeal from a judgment of the court of appeals. The facts, as shown by the complaint, were as follows: On May 20, 1887, the plaintiff, Lee, made a valid location of the Aftermath lode mining claim. On October 8, 1885, Edwin Doust, being then, and having been ever since, an alien, had located the Justice mining claim. This claim covered and conflicted, to the extent of three hundred feet in width and five hundred feet in length, with the ground included in the Aftermath location. On October 13, 1885, Doust entered into a contract to sell and transfer the Justice mining claim to one Lawson, also an alien, and on that date executed a deed, without any consideration therefor, to John W. Richards, who was a citizen of the United States, and solely for the purpose of having Richards procure a patent from the government. Concurrently with the deed, and in execution of the agreement to transfer the title to Lawson, Richards executed a title bond to Lawson, agreeing for certain considerations therein named, to convey to him the Justice mining claim, with other properties. Richards made application for patent, and on February 20, 1886, commenced his advertisement therefor. This publication was completed on April 23, 1886. On April 30, 1886, the Justice Mining Company was organized and incorporated, with a nominal capital of one hundred thousand dollars; and on that day Richards executed a deed for the Justice mining claim for a nominal consideration to Joseph Ruse, as trustee for such company, which was recorded June 11, 1887. The receiver's certificate was issued to Richards on June 14, 1887. Ruse there-

after conveyed the title held by him to the Justice Mining Company in consideration of fifty-six thousand shares of the capital stock. The plaintiff contended that the title to the ground in controversy, by reason of his location of the Aftermath, had become vested in him prior to the transfer by the trustee to the Justice Mining Company; and that the receiver's receipt was a cloud upon his title. He, therefore, asked that such receipt, with all the deeds mentioned, be canceled and held for naught. A demurrer to the complaint was sustained by the court below, and the action was dismissed at the plaintiff's cost. This judgment was reversed by the court of appeals.

A. W. Rucker, for the appellants.

A. T. Gunnell, for the appellee.

262 GODDARD, J. We think the learned judge who delivered the opinion of the court of appeals was in error in assuming that the record in the case presented a question as to the right of an alien to acquire by location a transferable interest in a mining claim. That question, under the facts presented, could not be raised by the plaintiff. While it is true that the mineral lands of the government are open to location and purchase only by a citizen of the United States, or one who has declared his intention to become such, and the fact of alienage, if raised at the proper time by anyone adversely interested, will defeat the acquirement of title thereto, yet the qualifications of an applicant for a patent, as well as the fact of discovery and the compliance on his part with other requirements made essential by the act of Congress to entitle him to purchase the mineral land of the government, being cognizable by the officers of the land department, when, in the exercise of their jurisdiction, they approve the application and allow an entry, the fact of citizenship, as well as all other questions of fact, is presumed to have been established, and is not open to review by the courts at the instance of third parties.

As was said by Justice Field, speaking for the court in *Steel v. Smelting Co.*, 106 U. S. 447: "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title

from the United States to portions of the public domain is obtained, and to see that the requirements ²⁶³ of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation."

It is now too well settled to admit of discussion, that after the "grant of title, or the equivalent, is made to an alien, it cannot be attacked by any third party": *Billings v. Aspen etc. Co.*, 52 Fed. Rep. 250; *Gouverneur v. Robertson*, 11 Wheat. 332; *Craig v. Leslie*, 3 Wheat. 563.

If the right of a third party to attack the validity of a patent when issued, upon the ground of the alienage of the patentee, was a debatable question, it is clear that the present action was prematurely brought. At the time of its commencement, the proceedings in the land-office were yet pending, and that department had exclusive jurisdiction of the matter, and any attempt on the part of the courts to control its action would be an unwarranted assumption of jurisdiction, under the circumstances. In either view, this action cannot be maintained, and the demurrer should be sustained.

The judgment of the court of appeals must therefore be reversed and the cause remanded, with directions to affirm the judgment of the district court.

MINERAL LANDS—ALIENS—LAND DEPARTMENT.—Under section 2319 of the Revised Statutes of the United States, it is only citizens of the United States, or those who have declared their intention to become such, that can make a valid location of mineral lands of the government: See monographic note to *McClintock v. Bryden*, 63 Am. Dec. 107, on the right to mine. An alien can neither locate, possess, purchase, or acquire title by patent to mineral lands of the United States: *Tibbitts v. Ah Tong*, 4 Mont. 536; *Wulf v. Manuel*, 9 Mont. 286; *Manuel v. Wulf*, 152 U. S. 510. An alien who has not declared his intention to become a citizen is not a qualified locator of mining ground, and cannot hold, either by actual occupation or location, against one who connects himself with the government title by compliance with the mining laws: Note to *Elmondorff v. Carmichael*, 14 Am. Dec. 98. But the decisions of the officers of the land department upon controverted questions of fact are, in the absence of fraud, imposition, or mistake, final and conclusive, except as they may be reversed on appeal in that department: *Parsons v. Venzke*, 4 N. Dak. 452; 50 Am. St. Rep. 669, and note; monographic note to *Boatner v. Ventress*, 20 Am. Dec. 273, on the conclusiveness of the actions of land officers. A grant of public lands cannot be impeached collaterally, unless it is void upon its face:

Saunders v. New York etc. R. R. Co., 144 N. Y. 75; 43 Am. St. Rep. 729, and note. Mining titles cannot be questioned collaterally: Omar v. Soper, 11 Col. 380; 7 Am. St. Rep. 246. Patents of the land department to mineral lands, as well as others, cannot be collaterally attacked in actions at law. They are conclusive, in such actions, of all matters of fact necessary to their issue where the department had jurisdiction to act upon such matters, and to determine them: Davis v. Weibbold, 189 U. S. 507, 530.

JONES v. ASPEN HARDWARE CO.

[21 COLORADO, 263.]

STATUTES—TITLE OF ACT, AND SUBJECT MATTER.—An act entitled, "An act to fix the fees to be collected by the secretary of state for incorporation and certain other privileges," requiring a fee to be charged and collected for filing certificates of incorporation, etc., and prohibiting corporations from having or exercising any corporate powers, or from doing any business in the state until their certificates of incorporation are filed, is not obnoxious to a constitutional provision requiring every law to contain but one subject, which shall be clearly expressed in its title.

CORPORATIONS—PROOF OF CORPORATE CAPACITY.—If a company is plaintiff in a suit, and relies on its corporate capacity, it must, as a general rule, assume the burden of proving it.

CORPORATIONS—TAKING OF TITLE TO PROPERTY—CORPORATE POWERS—STATUTORY PREREQUISITE.—The taking of title to property by a corporation is the exercise of a corporate power; and, if the statute prohibits a corporation from exercising corporate powers until the fee for filing its certificate of incorporation has been paid, it cannot take title to property until the terms of the statute have been complied with.

CORPORATIONS—ESTOPPEL—DENIAL OF CORPORATE EXISTENCE.—One dealing with a corporation is not estopped to deny its existence unless the corporation has, at least, a de facto existence. Hence, though one assists in the organization of a company which is intended to be a corporation, and sells stock in trade to it, neither he nor his attaching creditor is estopped to deny the corporate existence of the company where the statute requires it to file its certificate of incorporation, and this has not been done, because, until that is done, the company has no existence, in fact, as a corporation.

TO CONSTITUTE A DE FACTO CORPORATION there must be either a charter or a law authorizing the creation of such a corporation, with an attempt, in good faith, to comply with its terms, and, also, a user of, or attempt to exercise, corporate powers under it.

A DE FACTO CORPORATION can never be recognized in violation of a positive law.

CORPORATIONS—WHEN NEITHER DE JURE NOR DE FACTO.—A company, intended to be a corporation, but which has failed to comply with the statute requiring it to file its certificate of incorporation with the secretary of state, and to pay a fee therefor, is neither a de jure nor a de facto corporation, but simply a voluntary association of individuals in the nature of a copartnership.

CORPORATIONS—STATUTORY PREREQUISITE—ATTACK UPON CORPORATE EXISTENCE.—There is a broad distinction

between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers, and those acts required of individuals seeking incorporation, but not made prerequisite to the exercise of such powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter.

CORPORATIONS—RECOVERY BY ALLEGED CORPORATION AS A COPARTNERSHIP.—Though a company, as plaintiff, may not be entitled to recover as a corporation, yet it may maintain the action as a copartnership, if the facts alleged show that the company is a copartnership and not a corporation.

Replevin by the Aspen Hardware Company to recover a stock of goods seized by Jones, a United States marshal, under a writ of attachment issued out of a federal court at the suit of Joseph A. Thatcher, plaintiff, against one A. B. Eads. The hardware company, prior to the attachment levy, had not filed its certificate of incorporation with the secretary of state, as required by statute. This statute read as follows: "Every corporation, joint stock company or association, incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this state, having capital stock divided into shares, shall pay to the secretary of state for the use of the state, a fee of ten dollars, in case the capital stock which said corporation, joint stock company or association is authorized to have does not exceed one hundred thousand dollars; but, in case the capital stock thereof is in excess of one hundred thousand dollars, the secretary of state shall collect the further sum of ten (10) cents on each and every thousand dollars of such excess, and a like fee of ten cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association or charter of said company, joint stock company or association, in the office of the secretary of state; and no such corporation, joint stock company or association, shall have or exercise any corporate powers, or be permitted to do any business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint stock company or association, until said fee shall have been paid to him. But this act shall not apply to corporations not for

pecuniary profit, or corporations organized for religious, educational, or benevolent purposes." The company obtained judgment.

A. B. McKinley, Hugh Butler, and Wilson & Salmon, for the appellant.

H. W. Clark and W. W. Cooley, for the appellee.

206 HAYT, C. J. In November, A. D. 1889, Shepard & Bowles, as copartners, were doing a general hardware business in the city of Aspen, and during that month made a sale of their business stock in trade, goodwill, etc., to A. B. Eads, the consideration for this transfer being certain real estate and the assumption of certain indebtedness of the firm of Shepard & Bowles. Eads being unable to comply with the terms of the agreement, a new arrangement was made between the parties, and an organization known as the Aspen Hardware Company was formed by Bowles, Eads, and one Kettler. The articles of incorporation provided that the affairs of the company should be managed by a board of three directors, naming Bowles, Eads, and Kettler as such directors for the first year. It was the evident intention of the parties that the company should be duly and legally incorporated, and to this end they caused to be executed articles of incorporation on the sixteenth day of November, 1889, in due form, and immediately filed the same with the clerk and recorder of Pitkin county. For some reason not explained by the evidence, the articles were not filed in the office of the secretary of state until after the levy of the writ of attachment hereinafter referred to, and not until the day upon which this suit in replevin was instituted, but whether before or after the commencement of this action does not clearly appear from the evidence.

After the articles were filed with the county clerk, the board of directors held a meeting, elected officers, caused capital stock to be issued, etc., Eads being present and participating in this meeting, at which Bowles was elected president, Eads vice-president, and Kettler secretary and treasurer. Thereupon, Eads, for a valuable consideration, sold and transferred the property to the new organization, and Mr. Bowles from that time forward conducted the business for the Aspen Hardware Company, selling goods and purchasing new goods in the corporate name. Eads, soon after the sale, left the town of Aspen and did not return, nor personally take part in the business at that point, but continued as a director and vice-president of the company, and

²⁶⁷ retained a portion of his stock, although he had sold a part of it prior to the levy of the writ of attachment.

The business was thus continued until July 31, 1890, when a suit was commenced by Thatcher, plaintiff, against A. B. Eads, and the property in question levied upon as the property of the defendant in that suit, and this action of replevin was immediately instituted to recover possession of the property, or its value.

The controversy in this case is narrowed to the single question of the capacity of defendant in error to take title to the property in controversy as a corporation at the time of the attempted transfer by Eads, it not having at that time filed its articles of incorporation with the secretary of state, or paid the fee for such filing, as provided by the statute of 1887: Session Laws of 1887, p. 406.

This is the first time the effect of this statute has been before this court for consideration, although in *Edwards v. Denver etc. Ry. Co.*, 13 Col. 59, the constitutionality of a somewhat similar act was under review. That act was attacked upon several grounds, among which was that it was void because the subject was not clearly expressed in the title, the title being "An Act to Provide for the Formation of Corporations," and it was held that this title was sufficient to cover legislation requiring a fee to be paid for filing the certificate of incorporation, under the principle that the same was germane to the general subject expressed in the title, and that legislation fixing the amount of such fee, time of payment, etc., was not obnoxious to the constitutional provision with reference to titles. The act of 1887, now under consideration, is entitled "An Act to Fix the Fees to be Collected by the Secretary of State for Incorporation and Certain Other Privileges." The body of the act, however, relates entirely to the fee to be charged and collected for filing certificates of incorporation, articles of association, charters, or increase of capital stock of joint stock companies, and, in addition thereto, provides that no such corporation, joint stock company or association "shall have or exercise any ²⁶⁸ corporate powers or be permitted to do any business in this state until the said fee shall have been paid." This provision is so closely allied to the general subject, which is the fixing of fees for filing certificates of incorporation, etc., that, under the uniform rule of decisions in this state, it must be held to be a proper matter for legislation under the title selected: *Golden Canal Co. v. Bright*, 8 Col. 144; *People v. Goddard*, 8 Col. 432;

People v. Scott, 9 Col. 422; Dallas v. Redman, 10 Col. 297; Edwards v. Denver etc. Ry. Co., 13 Col. 59; In re Pratt, 19 Col. 138.

In this case the Aspen Hardware Company claims title to the property in dispute in its corporate capacity, and not as a co-partnership. It is admitted that the fee for filing the certificate of incorporation with the secretary of state was not paid prior to the levy of the writ of attachment, and that the certificate was not filed in the office of the secretary of state until about the time of the bringing of the present action, the evidence leaving the exact time uncertain.

It is to be remembered that in this case the corporation is the party plaintiff, and it may be stated, as a general rule, that, when a company relies on its corporate capacity, it assumes the burden of establishing such capacity.

The language of the act is plain and unambiguous. It reads, "no such corporation . . . shall have or exercise any corporate powers." The taking of title to property was certainly the exercise of a corporate power, and as such prohibited by the express terms of the statute. This is not controverted by counsel for appellee, but it is contended that Eads, having assisted in the organization of the corporation, and having sold to it the hardware stock, is estopped from denying the corporate existence of the company, and that the attaching creditor took the property subject to the same estoppel.

The doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a *de facto* existence. The rule is stated as follows by Morawetz on Private Corporations, section 750, it having been first announced ²⁰⁰ in the case of Brouwer v. Appleby, 1 Sand. 158: "A defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization as affecting its capacity to contract or sue, but that all such objections, if valid, are only available on behalf of the sovereign power of the state."

It is also well settled that, to constitute a *de facto* corporation, there must be either a charter or a law authorizing the creation of such a corporation, with an attempt in good faith to comply with its terms, and also a user or attempt to exercise corporate powers under it: Duggan v. Colorado etc. Co., 11 Col. 113; Bates v. Wilson, 14 Col. 140.

A *de facto* corporation can never be recognized in violation of a positive law. This principle, which seems to be supported by all the authorities, is thus stated by Morawetz on Private Cor-

porations, section 758: "If the formation of a corporate association is not only prohibited by this general rule of the common law, but is also in violation of some principle of morality or public policy, or a positive statutory prohibition, the parties forming such association will not be legally bound by their agreement of membership, and the courts will not recognize the association, either as among its members or against third parties." To recognize the defendant as a *de facto* corporation would, as we have seen, be in direct conflict with the express language of the act, which declares that without the payment of the fee the corporation shall have no corporate power.

One object of this statute is to restrict the organization of "wild-cat" corporations, it being supposed that the increased fee required by the act would, in a measure at least, prevent the overcapitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate power, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act.

270 The taking of title to the property in controversy being the exercise of a corporate power, and, as such, forbidden until the fee for filing has been paid, it follows that the title of the Aspen Hardware Company as a corporation cannot be upheld. Having failed to comply with the statute, the Aspen Hardware Company at the time of the transfer was neither a *de jure* nor a *de facto* corporation, but simply a voluntary association of individuals in the nature of a copartnership.

There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisites to the exercise of such powers.

"In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter": *Abbott v. Omaha Smelting etc. Co.*, 4 Neb. 416. The omission in this case is of acts of the former class, and consequently there was no corporation in esse at the time of the levy of the writ, while the evidence leaves it in doubt if this omission had been supplied prior to the institution of the present action.

But although it could not at the time exercise any corporate power, this did not prevent the Aspen Hardware Company from taking title to the property as a copartnership. In other words, under the conceded facts, the company was not at the time a corporation, but this will not preclude it from maintaining the action as a copartnership. The plaintiff sues as the Aspen Hardware Company, and the facts alleged show that such company was a copartnership and not a corporation. There is nothing in the name of the association to conflict with this, as at common law partners may carry on business under any name they choose. They are bound ²⁷¹ rather by their acts than by the style which they give to themselves: *Cook on Stocks and Stockholders*, sec. 233; *Chaffe v. Ludeling*, 27 La. Ann. 607.

This principle has been applied in many cases where parties have set up the defense of individual nonliability by reason of having directed an incorporation to be had, but where none in fact was consummated: *Cook on Stocks and Stockholders*, secs. 233, 234; *Abbott v. Omaha Smelting etc. Co.*, 4 Neb. 416; *Empire Mills v. Alston Grocery Co.* (Tex. App. Feb. 25, 1891), 15 S. W. Rep. 505.

The law having cast this liability upon the members of the association, we think they must be given the advantages accorded a copartnership. So, in this case, while we feel compelled under the statute to deny plaintiff's right of recovery as a corporation, we think they may maintain the action as a copartnership.

The cause will accordingly be reversed and remanded, with directions to the district court to allow the parties to amend their pleadings as they may be advised.

STATUTES—TITLE OF ACT, AND SUBJECT MATTER.—A constitutional provision that "no act shall contain more than one subject, and which shall be clearly expressed in its title," is not infringed by a statute whose subjects are all "referable and cognate" to the subject expressed in its title: *Cohn v. People*, 149 Ill. 486; 41 Am. St. Rep. 304, and note. The object of such a provision is not to prohibit comprehensive titles, but to prevent surreptitious legislation: *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884; 50 Am. St. Rep. 585, and note. All that is necessary is, that the act shall embrace some one general subject; and by this is meant merely that all matters treated of should fall under some one general idea, and be so connected with and relate to each other, either logically or in popular understanding, as to be parts of and germane to one general subject: *Johnson v. Harrison*, 47 Minn. 575; 28 Am. St. Rep. 382.

CORPORATIONS—CORPORATE EXISTENCE—BURDEN OF PROOF.—If a defendant denies all of the allegations of the complaint, the burden of proof is on the plaintiff to establish all of his averments: *Tennessee etc. R. R. Co. v. Hamilton*, 100 Ala. 252; 46

Am. St. Rep. 48. A corporation suing must prove its incorporation under the general issue: Note to *Schloss v. Montgomery Trade Co.*, 13 Am. St. Rep. 51. An association, suing as a corporation, must prove its corporate existence: *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344.

CORPORATIONS MAY TAKE TITLE TO LAND: See monographic note to *Page v. Heineberg*, 94 Am. Dec. 381-387, on the capacity of corporations to take title to realty.

CORPORATIONS—DENIAL OF CORPORATE EXISTENCE—ESTOPPEL.—Ordinarily, one who has contracted with an apparent corporation as such is estopped, in an action upon such contract, to deny the existence of the corporation: Note to *Schloss v. Montgomery Trade Co.*, 13 Am. St. Rep. 55; but the legal corporate existence of a company is not admitted from the mere fact that one dealing with it has, in a contract with the company, designated it by a name appropriate to a corporate body, unless it is distinctly stated in the contract that it is an incorporated company. Such designation admits only the existence of an association acting under that name: *Holloway v. Memphis etc. R. R. Co.*, 23 Tex. 465; 76 Am. Dec. 68, and note. So a party to a contract with a pretended corporation, organized without law, or under an unconstitutional one, is not estopped to deny its existence at the date of the contract: *Heaston v. Cincinnati etc. R. R. Co.*, 16 Ind. 275; 79 Am. Dec. 430; *Snyder v. Studebaker*, 19 Ind. 462; 81 Am. Dec. 415.

CORPORATIONS NEITHER DE JURE NOR DE FACTO—COLLATERAL ATTACK.—A body is regarded as a de facto corporation only where there has been an effort to conform to the forms of law in establishing a corporation, and some formal defect exists merely as to the mode of complying with the law, and the body is dealt with and acts as a corporation; and if there cannot lawfully be a corporation de jure, there cannot be one de facto: *Georgia etc. R. R. Co. v. Mercantile etc. Deposit Co.*, 94 Ga. 306; 47 Am. St. Rep. 153, and note; monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 181, on defective formation of corporations. If the statute requires articles of incorporation to be filed as a condition precedent to corporate existence, such filing is indispensable: Note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 179. The right of a corporation de facto to exercise corporate powers is never open to inquiry in a collateral proceeding, but only in a direct attack at the instance of the state: Note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 181; *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; note to *Schloss v. Montgomery Trade Co.*, 13 Am. St. Rep. 55.

CORPORATIONS, ASSUMED—STATUS OF, AS COPARTNERSHIPS.—If, as the cases hold, an ineffectual effort to create a corporation, followed by the transaction of business in the corporate name, results in the personal liability as partners of the members or shareholders of the assumed corporation (note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 186), it would seem to follow, as held in the principal case, that the converse is true, namely, that if there can be no recovery as a corporation, yet the assumed corporation may recover as a copartnership, if the facts alleged show that the plaintiff is a copartnership and not a corporation.

BROWN v. WILSON.

[21 COLORADO, 309.]

EQUITY—REMEDY BY ONE OUT OF POSSESSION.—If one out of possession can assert only an equitable title, he may have his equitable remedy.

JUDGMENT—JURISDICTION OF PERSON—COLLATERAL ATTACK.—The judgment of a court of general jurisdiction is not void unless it appears from the record itself that the court in pronouncing it acted without jurisdiction. A judgment rendered without bringing the defendants into court is not for this reason void, but voidable only, unless the failure to obtain jurisdiction over them appears from the record. If the proceedings are regular upon the record, the judgment can only be avoided upon extraneous evidence.

EQUITY—LACHES—ASSERTION OF TITLE TO MINING PROPERTY.—The laches that will bar a recovery in a particular case depends, to a large extent, upon the character and nature of the circumstances surrounding the transaction. If the subject matter of litigation is unpatented mining property, purely speculative in value, the necessity for prompt assertion of title has always been recognized.

EQUITY—LACHES—ASSERTION OF TITLE TO MINING PROPERTY.—If mining property has been developed by the courage and energy and at the expense of the defendant, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of the plaintiff's rights.

ESTOPPEL—JUDGMENT—LACHES—GRANTEE.—If a party, by his negligence and laches, loses his right to impeach the validity of a judgment by extraneous evidence, one claiming under him is estopped by the judgment.

RES JUDICATA—PROVIDING FUNDS FOR LITIGATION. If certain persons cause a mining company to institute an action, and others afterward purchase bonds of the company at a heavy discount for the purpose of providing funds for carrying on that litigation, they are, for this reason, bound by the judgment in the action.

Complaint stating two causes of action. For a first cause of action, it was alleged that, on June 23, 1883, the plaintiff, Brown, was, and ever since had been, seised in fee and legally entitled to the possession of certain mining property in Park county, Colorado. This property was described, and the plaintiff averred that, while he was so seised and possessed, the defendants, without right or title, entered into possession of the premises, and ousted and ejected plaintiff therefrom, etc. The second cause of action was in the nature of a bill in equity to remove a cloud from plaintiff's title to the premises. Prior to January 18, 1883, the Great West Mining Company was the owner and in possession of the property, which was, at that time, unpatented mining claims. Two writs of attachment were then levied upon the company's property, real and personal, includ-

ing the premises in controversy. One of these attachment suits was instituted by John T. Perkins, and the other by James Moynahan. After the levy of these writs, the company, on February 15, 1883, executed a deed of trust to one James M. Strickler, to secure the payment of a proposed issue of fifty thousand dollars in bonds. These bonds were afterward issued and a part thereof sold. The "friendly suit" mentioned in the opinion upon rehearing was that brought by Perkins as the assignee for a number of persons who were workmen at the mine and creditors of the Great West Mining Company. A. W. Kellogg, who had the entire management of the corporate business of this company, upon ascertaining that Moynahan was about to sue, directed the Perkins suit to be brought. The claims were assigned to Perkins for convenience to enable him to bring one suit for the recovery of the aggregate of all the claims. There was a personal service in the Perkins case made upon C. S. Purmort, "as the foreman of the defendant company," and in this case there was an amended return showing that service was made upon Purmort, "as the agent of the defendant company." Purmort was, in fact, simply employed by Kellogg as foreman of the mine, and was not a general agent of the company. Furthermore Purmort communicated this information to the sheriff when the latter served the writ and summons upon him. There was, therefore, no service upon the company. Purmort concealed or neglected to inform the company of the fact of service, the defendant made no appearance, and judgment was taken by default. In the Moynahan case, a like service was made as in the Perkins case, and which fact Purmort did not communicate to the company. But in the Moynahan case there was an unauthorized appearance by an attorney named Gwynne. A sort of trial was had, and Moynahan obtained judgment for the amount sued for. Subsequently special executions were issued, and the property was levied upon and sold for a sum of money sufficient to pay both judgments and costs. At such sale, Gwynne, representing Perkins and Moynahan, and acting for himself, became the purchaser, receiving certificates of purchase. The property was sold in September, 1883, and in June, 1884, the nine months period for redemption having expired without the company's redeeming, sheriff's deeds were issued to Gwynne and Moynahan, who, as owners, took, and continued in, possession until December, 1884, when they sold and conveyed the property to Alfred H. and Randall W. Wilson: See *Great West Min. Co. v. Woodman*

etc. Min. Co., 12 Col. 46; 13 Am. St. Rep. 204; 14 Col. 90. After Gwynne bid in the property, Purmort was working it as the lessee of the company, but, in November, 1883, he was enjoined in a suit by Gwynne and Moynahan. In this suit, the company, as owner, and Purmort, as lessee, were defendants. Kellogg and Whitaker, two officers of the company, had knowledge of this. After this time, no work was done by the company for some years. In April, 1885, the Wilsons conveyed to the Woodmas of Alston Mining Company. This company then took possession, and were in possession at the time of the present action. About this time, one Bates claimed an interest in the property, and brought suit against the Wilsons to enforce his claim. A receiver was appointed in that suit. Another suit was afterward brought by one Whitaker, a holder of some of the bonds secured by the Strickler trust deed; and this was followed by a similar suit, brought by one Needham and others, in a federal court. These suits were decided in June, 1886, or thereabouts, in favor of the defendants. As early as April, 1882, the Great West Mining Company became indebted to one Duncan McBride in the sum of three thousand dollars, and, to secure this claim, it executed a note for the amount and secured the same by a deed of trust upon the property in controversy. Upon default in payment, the property was sold under foreclosure and bid in by McBride. Afterward, the McBride judgment was paid by the defendants. Among other suits brought to set aside the judgments and sales made in the attachment suits instituted by Perkins and Moynahan was *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46, 13 Am. St. Rep. 204, in which the defendants had judgment in the trial court. This, however, was reversed by the supreme court on appeal, it appearing that the only service of summons had been upon Purmort; that he was not the general agent of the company, but simply the foreman, and acting in behalf of the general agent, Kellogg; that the plaintiff in the attachment suits, and the sheriff who made the service, knew that he was simply foreman, and the sheriff in the first instance so returned; that Purmort concealed or neglected to inform the company of the fact of such service; that Gwynne, when he entered the appearance of the defendant company in the Moynahan suit, had no authority whatever for this purpose; that he neglected or refused to inform the company of the fact of such suit; and that the company had no actual notice that any suit had been begun, that there had been any sales made under execution, or that

there had ever been a conveyance of the property by the sheriff. The Great West Mining Company was not informed of the false return or of the unauthorized appearance of Gwynne in time to proceed by motion to correct the same in the court where the attachment suits were pending, and had no notice of the sale of its real property until the time for redemption had expired, "but," said the court, "as soon as it did obtain information of the fraud perpetrated upon it, it was diligent in employing counsel and commencing this suit; and as this suit was brought within less than three years from the time of the perpetration of the fraud complained of, and within less than eighteen months from the time of the execution of the sheriff's deeds, and promptly upon the discovery of the fraud that had been practiced upon it, we think the appellant was chargeable with no such laches as should bar it from maintaining this action": See *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204. After the cause was remanded, and it reached the district court, a change of venue was taken and a new trial had, in which much new evidence was given. This new evidence was largely directed to the question of laches, and tended strongly to show that the three principal officers of the plaintiff company—Kellogg, Pomeroy, and Whitaker—had notice, as early as 1883, that its real estate had been attached and sold in the Perkins and Moynahan suits. In fact, it was shown beyond dispute that Kellogg had such notice. The bill was, therefore, dismissed because of the plaintiff's laches, and the judgment was affirmed by the supreme court: See *Great West Min. Co. v. Woodmas etc. Min. Co.*, 14 Col. 90, 93. Up to the time of this decision, nothing had been done in the Needham case, but, when it was rendered, the Needham case was revived, and an amended complaint was filed. A demurrer to this complaint was sustained, and the cause was dismissed. The plaintiff in the present action, Brown, derived his title, as a purchaser, at a sale made by Strickler under a decree of foreclosure upon the deed of trust to the latter. He set up the irregularities occurring in the Perkins and Moynahan suits and the sales made thereunder. The only additional facts disclosed in the record of the present case were that, pursuant to the decree of foreclosure, the property was sold to the plaintiff, Brown, for the sum of one hundred and fifty dollars, and that before the bringing of this suit patents had been obtained by the defendants from the United States for all the property in controversy. Upon the pleadings and evidence, the district court found that the sales

made as a result of the attachment suits might have been avoided by the Great West Mining Company if it had moved in time, but that this right had been lost by laches; that the sales were not absolutely void, but that the present defendants in error had a perfect record title to the property, as the liens of the attachments had priority over the lien of the Strickler trust deed; and that no fraud had been shown to vitiate the defendants' title. The complaint was, therefore, dismissed, and the plaintiff brought a writ of error to reverse the judgment of dismissal.

H. B. Johnson and J. M. Washburn, for the appellant.

Hugh Butler, for the appellees.

³¹⁴ HAYT, C. J. The fee simple title to the property in controversy being in the defendants by patent from the United States government, the plaintiff cannot recover upon his first cause of action, unless he succeeds in establishing the second.

A recovery upon the second cause of action was denied by the district court for the reason that, in the opinion of that court, a lien was established against the property by the attachment proceedings having priority over the lien created by the trust deed. In this court, objection is made to the sufficiency of the second cause of action, upon the ground that the plaintiff, being out of possession, cannot maintain the action under the code provision with reference to determining an adverse claim, estate, or interest in the property. It has been held, however, by this court, after careful consideration, that where one out of possession can assert only an equitable title, he may have his equitable remedy: *Stock-Growers' Bank v. Newton*, 13 Col. 245; *Mullock v. Wilson*, 19 Col. 296.

In this suit, as in the previous ones, it is urged by plaintiff in error that the Perkins and Moynahan judgments were void because there was no proper service upon the Great West Mining Company. This question was, however, put at rest by the last opinion filed in the case. It is there said:

"As a rule, a judgment of a court of general jurisdiction is not void, unless it appears from the record itself that the court in pronouncing it acted without jurisdiction. A judgment rendered without bringing the defendants into court is not for this reason void, but voidable only, unless the failure to obtain jurisdiction over them appears from the record.

"That this distinction has been kept constantly in mind ³¹⁵ by this court is quite apparent from the qualification expressed in each instance in which the judgments are alluded to in the

former opinions of this court as being 'absolute nullities' under certain conditions.

"The proceedings being regular upon the record, the judgments can only be avoided upon extraneous evidence": *Great West Min. Co. v. Woodmas etc. Min. Co.*, 14 Col. 90, 103, 104. And it was held that plaintiff had been guilty of such laches as precluded it from introducing such evidence.

It is to be borne in mind that the record shows personal service in the one case and appearance by attorney in the other, and as the same evidence upon the question of the character of the judgments is now before us as in the former case, the conclusion in this case, as in that, must be that the judgments are not absolutely void. This result necessarily follows, irrespective of any question as to whether or not the former decision is *res adjudicata* in this case.

Has the present plaintiff the right to contest these judgments rendered against his grantor, the grantor itself having forfeited and lost the right by reason of its laches? In *Great West Min. Co. v. Woodmas etc. Min. Co.*, 14 Col. 90, the plaintiff was shown to have had notice of the fraud complained of for a little more than two years before instituting suit, and it was held for this reason that the courts should refuse relief. The laches that will bar a recovery in a particular case depend to a large extent upon the character and nature of the circumstances surrounding the transaction. Where the subject matter of the litigation is unpatented mining property, purely speculative in value, the necessity for prompt assertion of title has always been recognized by the English and American courts: See *Great West Min. Co. v. Woodmas etc. Min. Co.*, 14 Col. 90, and cases cited. In this case, both the trustee and the bondholders, as it is claimed, were chargeable with laches, with full knowledge of all the facts, which should preclude a recovery.

From the record it appears that one McBride commenced a suit as early as 1884, to subject the property to his claim. In that suit, Strickler, the trustee for the bondholders, was ³¹⁶ made a party, and in his answer admitted that McBride had a prior lien and consented to a decree for complainant: 33 Fed. Rep. 402. And this constitutes one of the sources of title under which defendants now hold. Nothing more was attempted by the trustee until 1892, when he commenced a foreclosure suit upon his trust deed. In this suit he obtained a decree of foreclosure, but as the deed gave him power to sell, the suit was unnecessary. During all these years the interest upon the bonds

was in default, and by the terms of the trust deed the trustee was authorized to sell for any failure to pay the interest as it fell due, and yet for eight years he allowed the matter to rest. During this time the defendants defended many suits involving the title to the property, procured patents from the United States, and by an expenditure made by them and their grantors the mine was reclaimed from its worthless condition and put upon a paying basis.

At one time a block of these bonds of a par value of ten thousand dollars was sold for about three thousand dollars, and the money used to prosecute the suit instituted by the Great West Mining Company against the Woodmas of Alston Mining Company. The facts upon which plaintiff now relies to impeach the judgment and sales were well known to all parties as early as 1884, and, in 1886, Whitaker brought suit on behalf of himself and other bondholders, setting up these facts, and made application for an injunction against the defendants and for the appointment of a receiver. In these applications he was defeated, and thereupon abandoned the suit.

In the same year a similar suit was brought by William Needham and other bondholders, in the circuit court of the United States in and for the district of Colorado, against the defendants. In this suit the issuance of bonds aggregating the sum of fifty thousand dollars was alleged to have been made by the Great West Mining Company, on or about the fifteenth day of February, 1883; that the same were secured by trust deed upon the property in controversy; that said Needham and others were the owners and holders of said bonds. It was further alleged that the judgments rendered in favor of ³¹⁷ Gwynne and Moynahan, and the sales made thereunder, were fraudulent and void. The plaintiffs prayed that such judgments and sales be declared fraudulent and void, and for an accounting. Various proceedings were had in that suit, but the suit was finally dismissed some time in 1891.

It is alleged, however, that the bondholders could not be guilty of laches until after the principal of the bonds fell due, and that laches cannot be imputed to them unless they failed to act within a reasonable time thereafter. We do not think this contention is well founded when applied to the facts in this case. Defendants have a perfect record title to the property. No fraud is shown upon their part. The title dated back and took priority to the issuance of the bonds in question. As we have seen, the property conveyed was unpatented mining property,

purely speculative in value. The purchasers made the property valuable as the result of their hazard and enterprise, and, as soon as the value had been established, their title was contested to an extent that is seldom paralleled. For ten years they have been called upon to defend their title against a multitude of claimants, attracted by the value given the property as the result of the enterprise and expenditure of defendants and their grantors, and eventually procured patents to the property from the United States. The litigation was notorious, and the facts now relied upon must have been within the knowledge of all the parties. Under these circumstances, it would be unjust and inequitable to allow the plaintiff to maintain this action.

In the original suit brought by the Great West Mining Company, a period of delay of less than two years was held sufficient to bar a recovery. Under the most favorable view of the evidence, the plaintiff in this suit had been guilty of a delay of six years, and, under a view which the evidence warrants, he has been guilty of delay for a much longer time.

Great West Min. Co. v. Woodmas etc. Min. Co., 14 Col. 90, was cited with approval in the recent case of Johnston v. Standard Min. Co., 148 U. S. 360, and in speaking of the necessity of diligence in actions of this character involving the title to mines where the property ³¹⁸ has been developed and its value established by the enterprise of others, the court says: "Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights."

The delay that barred a recovery in that case was trivial compared with that in this case. In fact, a stronger case for the interposition of the doctrine of equitable laches can seldom be found.

The judgment of the district court will be affirmed.

OPINION UPON REHEARING.

PER CURIAM. Although the argument of senior counsel in this case in support of the petition for rehearing is not characterized by that courtesy which always should, and to the credit of the bar of this state be it said has, with rare exceptions, characterized the conduct and arguments of members of this bar, the prayer of the petitioner was granted in order that the court

might review the record for the purpose of ascertaining if any injustice had been done plaintiff in error by the former opinion of this court.

The controversy over this property has been waged for a period of more than ten years, and has been reviewed by this court upon several occasions. To restate the facts would be a work of supererogation. Every fact bearing upon the rights of the parties appearing from the pleadings, or which the evidence tends to establish, will be found stated in some one or more of the opinions or statements of fact preceding the various opinions which have been heretofore announced, and we shall not do more than refer to the cases with the volumes and pages where the same may be found: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 12 Col. 55; 13 Am. St. Rep. 204; 14 Col. 90; 14 Col. 98.

³¹⁹ It is claimed for the first time upon this rehearing that the Wilsons had implied notice at the time of their purchase of the true character of the service in the Purmort case and appearance by an unauthorized attorney in the Moynahan case. The argument in this behalf is based upon notice to Bates from Gwynne, communicated, as it is said, to Bates in his professional capacity as attorney, it having been adjudicated in another action that the transaction between Bates and the Wilsons constituted them mining partners with reference to this property. This claim cannot be sustained, as Bates was acting as attorney for Gwynne at the time he received notice of the character of the judgments and sales, and before he was engaged by the Wilsons. If it be conceded that Bates had information as claimed, there is no evidence that he ever communicated such information to the Wilsons, and it would have been of doubtful professional propriety on his part to have done so. Under these circumstances, notice cannot be imputed to the Wilsons. Moreover, there is nothing before this court in this case to establish a partnership relation between Bates and the Wilsons: *Wade on Notice*, sec. 692; *McCormick v. Wheeler*, 36 Ill. 114; 85 Am. Dec. 388.

Counsel contend that there is an irreconcilable conflict between the following statements, the first appearing in the opinion of Mr. Justice Gerry, at page 49 of 12 Colorado, and the other in the opinion recently filed by this court, to wit:

"The mining property described in the complaint, and the subject matter of this suit, has been worked by the appellees, and

a large amount of ore extracted therefrom, and they have derived in profits an amount largely in excess of the amount of the judgments in question."

"The purchasers made the property valuable as the result of their hazard and enterprise, and, as soon as the value had been established, their title was contested to an extent that is seldom paralleled."

The two statements are entirely consistent, and both are supported by the record. It is undisputed, and indisputable by the record, that the mines were being worked at a loss at ³²⁰ the time of the attachment levies. It is equally certain that afterward they were made valuable. If this change was not brought about by the expenditure and hazard of plaintiffs and their grantors, who did put the properties upon a paying basis?

It is said that the suit instituted by the men employed at the mine was a friendly suit, set on foot at the instance of the company; that this suit was afterward turned into a hostile suit, and that the court has never alluded to this fact. In this statement counsel is in error as to the court: See page 93 of the opinion in 14 Colorado. In addition to what is there said as to the effect of that judgment, the suit never was other than a hostile suit, the suggestion made by Kellogg being for the purpose of giving the men an opportunity to place a first lien upon the property before Moynahan could institute suit. The men did commence suit and caused an attachment to be levied upon the property prior to the lien of the trust deed, and the title secured under the attachment sales antedates that obtained by the proceedings and sales under the trust deed. The suit was instituted as a hostile suit against the company, and was maintained and prosecuted to final judgment as such.

It is claimed that under the decision in *Raynolds v. Ray*, 12 Col. 108, no attachment lien was ever perfected, for the reason that no service was had upon the defendant company in either the Perkins or Moynahan suits. The record shows personal service in one case and appearance in the other; and it has been decided, as the result of protracted litigation, that the Great West Mining Company, by its negligence and laches, lost its right to impeach the validity of the judgments by extraneous evidence. Plaintiff in error claims under the Great West title, and is estopped by that judgment: *Bigelow on Estoppel*, 587; *Wood v. Seely*, 32 N. Y. 105; *Parker v. Crittenden*, 37 Conn. 148; *International Bank v. Bowen*, 80 Ill. 541.

The Purmort and Moynahan suits were instituted nearly a month before the Strickler trust deed was executed. Strickler ³²¹ knew at the time he accepted the trust deed that there were prior liens by attachment upon this property, and, if he had information that the service was incomplete in one or both of the cases, he knew that under the law the service might be perfected or an appearance entered by the defendants, and that the same could be followed by a valid judgment, which would relate back to the levy of attachment, and convert the same into a valid lien: *Raynolds v. Ray*, 12 Col. 108.

Aside from this, it is shown that the present suit is being prosecuted in the interest of Whitaker, Washburn, Griffith, Pomeroy, and others, who were active in the prosecution of the suits instituted for the same purpose by the Great West Mining Company. It is further shown that the bonds secured by the trust deed to Strickler were sold, in part at least, for the purpose of procuring money for the purpose of prosecuting that suit. This is shown by the evidence of the witness Whitaker, who, upon being interrogated as to the reason why ten thousand dollars of these bonds were sold for the sum of three thousand dollars, said: "Q. Par? A. Oh, no! They got bonds 51 to 90 inclusive, for three thousand dollars; as this money was to go into the litigation, of course, we could not sell them at par."

The evidence leaves no doubt that Whitaker, Purmort, Washburn, and Griffith caused the Great West suit to be instituted, and that the bondholders who purchased after that time purchased at a heavy discount for the purpose of providing funds for carrying on that litigation, and are for this reason bound by that judgment: *Hurd v. McClellan*, 1 Col. App. 327; affirmed *McClellan v. Hurd*, 21 Col. 197; 1 *Herman on Estoppel and Res Judicata*, secs. 156, 186.

As we have said, the title of defendants in error relates back and takes effect from the time of the levy of the writs of attachment. It antedates the trust deed; hence the decisions that have been cited to show that the record of the trust deed is notice to subsequent purchasers and encumbrancers are not applicable. And cases in reference to forged instruments, ³²² like *Meley v. Collins*, 41 Cal. 663, 10 Am. Rep. 279, are not in point, for the manifest reason that the title set up by the Great West company to the properties has been conclusively adjudged against that company in favor of the Wilsons and the Woodmas of Alston Mining Company.

For these reasons, in addition to those given upon the former opinion, the judgment of affirmance must be adhered to.

Affirmed.

JUDGMENTS—DIRECT AND COLLATERAL ATTACK.—As a general rule, a judgment is void in no case except where it appears, from the judgment itself, that the court had no jurisdiction: *Allen v. Huntington*, 2 Aik. 249; 16 Am. Dec. 702. A judgment of a court of competent jurisdiction cannot be collaterally impeached, unless the record shows affirmatively the want of jurisdiction: *Williams v. Haynes*, 77 Tex. 283; 19 Am. St. Rep. 752. On a collateral attack upon a judgment, the record only can be inspected; but on a direct attack, the true facts may be shown in contradiction of the record: *Note to Williams v. Haynes*, 19 Am. St. Rep. 755. In collateral proceedings, as between parties and privies, the only contingency in which the judgment of a court of general jurisdiction can be questioned is where the record shows affirmatively that jurisdiction did not attach in the particular case. If the judgment entry of such a court is silent as to jurisdiction, the entire record may be looked to, and if it affirmatively appears therefrom that jurisdiction did not exist, the judgment is void in collateral as well as in direct proceedings, and between all persons: *Wilkerson v. Schoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 808; *note to Falls v. Wright*, 29 Am. St. Rep. 78.

EQUITY—LACHES—ESTOPPEL.—What delay in bringing suit will constitute such laches as will bar relief, in the absence of the defense of the statute of limitations by plea or demurrer, depends upon the facts and circumstances of each particular case, and is within the sound discretion of the court to determine. The delay of a party holding the equitable title to land, in standing by and permitting the owner of the legal title to expend large sums in improving and developing the property until it has largely increased in value, without notice of his claim, constitutes such laches as will bar relief: *Gibson v. Herriott*, 55 Ark. 85; 29 Am. St. Rep. 17. Mining titles cannot be questioned collaterally: *Omar v. Soper*, 11 Col. 850; 7 Am. St. Rep. 246. One who, though not a party to the record, defends or prosecutes an action by employing counsel, paying costs, and doing those things that are generally done by a party, is bound by the judgment therein: *Note to Hill v. Bain*, 2 Am. St. Rep. 878.

DENVER CITY RAILWAY CO. v. DENVER.

[21 COLORADO, 850.]

MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS.—A city ordinance cannot be pronounced unreasonable as a police regulation without some data or evidence showing its unreasonableness.

MUNICIPAL CORPORATIONS—LICENSE TAX—RUNNING STREET-CARS.—The charter of a city conferring upon it power "exclusively to license, regulate, and tax any or all lawful occupations," etc., authorizes it to exact, of a company running street-cars, a fixed sum per car, as a license tax, and does not conflict with a constitutional provision requiring taxes to be uniform.

TAXES—CONSTITUTIONAL PROVISION AS TO UNIFORMITY.—A constitutional provision requiring all taxes to "be uniform," etc., applies only to a direct tax upon property, and does not apply to taxation imposed upon privileges and occupations.

TAXES—SPECIFIC TAX—LEGISLATIVE POWER.—The levy of a specific tax, such as imposing a license tax upon the business of running street-cars, is a valid exercise of the legislative power.

MUNICIPAL CORPORATIONS—PENALTY—FAILURE TO PAY LAWFUL LICENSE TAX.—A city council has power to prescribe a penalty for a failure to pay a lawful license tax, where the charter gives the council power to exact such a tax and to make all ordinances which shall be necessary and proper for carrying into execution the power specified in its charter, and to enforce the same by appropriate fines, imprisonment, or other penalties.

Wolcott & Vaile and H. F. May, for the appellant.

F. A. Williams, G. W. Whitford, and A. B. Seaman, for the appellee.

³⁵⁰ **GODDARD, J.** On the third day of October, 1889, the Denver City Railway Company instituted this action to restrain the city of Denver and its officers from prosecuting cases against it and its employes for operating its horse-cars, in violation of a certain ordinance of the city adopted in 1886, and amended in 1888, which provides, inter alia, as follows:

"Section 1. It shall be unlawful for any person or persons to hire out, keep or use for hire, or cause to be kept or used for hire, for the carrying or conveying of persons, or run on ³⁵¹ established lines within the city limits of the city of Denver, any hackney coach, cab, omnibus, express wagon, herdic coach, street-car, vehicle or vehicles, carriage or carriages of any description or name whatsoever, without a license first had and obtained so to do."

"Sec. 14. There shall be charged and paid to the city treasurer for the use of the city of Denver, on issuing the said licenses, by the parties to whom they may be granted, the following sums:

... 2. For all omnibuses and accommodation coaches, herdic coaches, and street-cars running upon established lines and at stated periods, from place to place within the city, shall be charged for license, each, the sum of ten dollars per annum."

By section 14, as amended in 1888, the license fee for each car was increased from ten dollars to twenty-five dollars per annum. The company averred its willingness to pay a fee of ten dollars, as it had theretofore done, but refused to pay the sum of twenty-five dollars, on the ground that the latter is unreasonable and in excess of the amount necessary to pay the expenses

of police regulation, and is, in fact, a tax upon its property, and hence unlawful and void. The evidence introduced upon the trial of the cause is not preserved by a bill of exceptions, but the court below made the following findings: "1. That the license for police regulation does not, under the testimony offered, justify a greater license than seventeen dollars and fifty cents per car, as heretofore found, but that the wording of the city charter gives the city the right to tax as well as to license for police regulation, and that the charter of the plaintiff company, approved January 10, 1867, in no way exempts it from paying such tax; 2. That the city council, having the power to assess said tax at the sum of twenty-five dollars per car, and having elected to do so, that the same is legal; 3. That the temporary injunction heretofore issued in this cause should be dissolved at the cost of the plaintiff."

To the judgment dissolving the temporary injunction and dismissing the action, the company and the city prosecuted writs of error from the court of appeals. That court, in an elaborate opinion, reported in 2 Col. App. 34, reversed the court below upon its finding that the city was empowered to tax, as well as to license, for police regulation, but affirmed its judgment of dismissal upon the ground that the record was devoid of any showing that the sum of twenty-five dollars was an unreasonable charge for police regulation. Both parties, being dissatisfied with this judgment, bring the case here for review. The company insist that the finding of the court below—that the testimony offered did not justify a charge of twenty-five dollars for police regulation—is conclusive as to its right to maintain the action, under the doctrine, announced by the court of appeals, that the city is not authorized to assess a license tax. The city, on the contrary, contends that the court of appeals erred in holding that the ordinance could not be upheld as a legitimate exercise of its power to tax the business of running street railway cars.

In the view we take of these respective contentions, it becomes unnecessary to discuss the validity of the ordinance as a police regulation, or to determine whether, upon the record, the finding of the court below is conclusive upon the fact that twenty-five dollars exceeds the necessary and legitimate expense of issuing the license and providing police supervision. And in this regard, if the court of appeals was correct in holding that the finding of the court below was not an authoritative finding of fact based upon the evidence, but the result of personal observa-

tion only, and hence not conclusive upon this review, we fully concur in the conclusions reached by the learned writer of that opinion, that "this court cannot interpose its opinion and guess at a cost of administration, nor take the judgment of the court below, as against the judgment of the city council," and without sufficient data or evidence, pronounce the ordinance unreasonable as a police regulation.

But upon the more important, and, as we regard it, the decisive, question in the case—"whether the city, under its charter, has the power to tax, as well as to license and regulate, ³⁵³ the business of the railway company"—we are unable to concur with either the reasoning or the conclusion of the court of appeals. That taxation is clearly a legislative prerogative, and may be conferred upon a municipality by that branch of the government in such measure and for such purposes as it may deem expedient, so long as it observes the limitations and restraints of the organic law, is not questioned or denied. Nor do we understand that the language of the charter of 1885, which in express terms confers upon the city of Denver power, "exclusively, to license, regulate, and tax any or all lawful occupations," etc., is held to be insufficient to authorize the city to impose the tax in question, if such grant of power is not inhibited by our state constitution. But it is asserted that the charter provision, in so far as it attempts to confer the power to tax, is in conflict with section 3, article 10, which provides: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

In this we think the court of appeals is in error. It seems to be almost universally accepted that this, and like constitutional provisions, refer to the levy of ad valorem taxes upon property, and do not apply to taxation imposed on privileges and occupations. Sedgwick on Statutory and Constitutional Law, second edition, 504-507, referring to similar provisions contained in the constitutions of various states, says: "In construing these provisions, it has been held, in many of the states, that the words 'equal and uniform' apply only to a direct tax on property; and that the clause in regard to uniformity of taxation does not limit the power of the legislature as to the objects of taxation, but is only intended to prevent an arbitrary taxation of property, ac-

cording to kind or quality, without regard to value. Specific taxes, have, therefore, been sustained as a valid exercise of the legislative power."

³⁵⁴ Burroughs on Taxation, section 54, referring to the same subject, says: "These provisions, as a general rule, are held to apply to property alone, and not to include taxation on privileges or occupations." Among the numerous decisions to the same effect, see *Desty on Taxation*, sec. 36, p. 191; *Newton v. Atchison*, 31 Kan. 151; 47 Am. Rep. 486; *Ex parte Robinson*, 12 Nev. 263; 28 Am. Rep. 794; *Walcott v. People*, 17 Mich. 68; *San Jose v. San Jose etc. R. R. Co.*, 53 Cal. 475; *Ex parte Mirande*, 73 Cal. 365; *Sawyer v. Alton*, 3 Scam. 129; *Marmet v. State*, 45 Ohio St. 63; *Commonwealth v. Moore*, 25 Gratt. 951; *American Union Ex. Co. v. St. Joseph*, 66 Mo. 675; 27 Am. Rep. 382; *St. Louis v. Green*, 7 Mo. App. 468; *Davis v. Mayor etc. of Macon*, 64 Ga. 128; 37 Am. Rep. 60.

In the latter case, the court had under consideration an ordinance enacted by the city of Macon providing that, among others, retail butchers should pay a license of fifty dollars per annum; and that further imposed a tax of twenty-five dollars upon each wagon used in their business. The contention there was, that the ordinance was violative of the constitutional requirement that all taxes shall be uniform, and upon this point Justice Bleckley, speaking for the court, says: "It is insisted, further, that by the tax upon the wagon, the *ad valorem* principle of the constitution is violated. This objection proceeds upon the theory that the wagon is mere property, and subject only to state and county taxes; . . . which taxes have been duly assessed and paid. The complainants contend that, having paid all taxes on the value of the wagon as property with which they are chargeable, they cannot be required to pay an additional specific tax to the city upon the same property. But, as already stated, the tax now in question is not a property tax, but a business tax. The wagon is treated as an instrument used in carrying on the business of the complainants within the city, and it has been ruled, and no doubt rightly ruled, that the number and kind of vehicles may be regarded in measuring a tax of ³⁵⁵ this description. That the complainants are in no default to the state and county in respect to taxes upon the value of the wagon as property is no protection to them against the business tax now demanded."

We quote thus fully because of the similarity of that case in principle with the one at bar, and because the language of the learned justice is pertinent to the contention of counsel for the company in this case. In the case of *St. Louis v. Green*, 7

Mo. App. 468, the court had under consideration the validity of an ordinance imposing a tax upon wagons used in the streets of St. Louis for purposes of traffic, and for private purposes. The validity of the ordinance was attacked upon the ground that it was in derogation of a like provision of the constitution of Missouri; and in an elaborate argument upholding the validity of the ordinance, Judge Bakewell, who delivered the opinion of the court, used this language: "The constitutional provision that all property subject to taxation in the state shall be taxed according to its value is undoubtedly binding upon the legislative body when it exercises the taxing power; but this provision is not violated when, as in the case at bar, the tax is not a tax precisely upon the object itself, but rather upon the exercise of the civil right of using that object. . . . And though imposed for revenue, and not for police purposes at all, it is a tax of the nature of a license, because it is a permission to do that which, after the passage of the ordinance, it becomes unlawful to do without having obtained the permission."

The pertinency of this decision to the question we have under consideration is found in the fact that the tax therein upheld was imposed upon vehicles subject also to taxation as property, and in the further fact that the grant of power in the charter of the city of St. Louis was identical with that in the charter of the city of Denver, to wit, "to license, regulate, and tax," etc.

This case, on appeal to the supreme court, was affirmed in all particulars, except the holding of the court of appeals ³⁵³ to the effect that the ordinance was invalid in so far as it authorized the conviction for a misdemeanor, and a punishment by fine. The case of *Palmer v. Way*, 6 Col. 106, is relied on by the learned writer of the opinion of the court of appeals as announcing a different doctrine; and the case of *Wilson v. Chilcott*, 12 Col. 600, accepting the doctrine therein laid down as *stare decisis*, is cited therewith in support of the conclusion reached in that opinion. But since its rendition those cases have been expressly overruled by this court in the case of *Denver v. Knowles*, 17 Col. 204, as being "against the strong current of authority." And the rule announced in the latter case, in so far as it has any application to the question before us, is in conformity with the views herein expressed.

It is clear from the foregoing that the imposition of a tax upon occupations is not governed by the rule of uniformity prescribed in article 10, section 3, of the state constitution, and neither expressly nor by implication is the legislature inhibited

thereby from conferring upon the city the power to exact such a tax. And our conclusion is, that the legislature, having in express terms conferred upon the city the power to tax, as well as to license and regulate, that the enactment of the ordinance under consideration was a legitimate exercise of that power, and the charge for license therein provided may be enforced as a valid tax.

It is further contended by counsel for plaintiff in error that if the tax be valid, the ordinance cannot be enforced in the manner provided; that it must be collected as other taxes, and not by enforcing a penalty for failure to pay for the license. We cannot give our assent to this proposition. Section 21, article 2, of the city charter provides: "The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, . . . and to enforce the same by appropriate fines, imprisonment, or other penalties."

In *St. Louis v. Sternberg*, 69 Mo. 289, Norton, J., speaking to this point, said: ³⁵⁷ "Such ordinances have been uniformly upheld when brought to the attention of this court." In support of the power of municipal corporations to recover fines and penalties against persons not complying with similar ordinances, he cites *Cincinnati v. Buckingham*, 10 Ohio, 257, *Shelton v. Mayor of Mobile*, 30 Ala. 540, 68 Am. Dec. 143, *Vandine*, Petitioner, etc., 6 Pick. 187, 17 Am. Dec. 351, *Chilvers v. People*, 11 Mich. 43, and adds: "This is not a proceeding on the part of the city to collect the amount of license required by the ordinance, but is instituted to recover a fine for a breach of it committed by defendant in practicing law without such license, and although he may be subjected to the payment of the fine, he would not thereby be entitled to the license."

We are, therefore, of the opinion that the trial court was correct in holding that the city had the right to exact the sum claimed as a license tax, under the terms of its charter, and upon this ground its judgment should be sustained, and the judgment of the court of appeals affirming the dismissal of the action is affirmed.

MUNICIPAL CORPORATIONS—LICENSE TAX—RUNNING STREET-CARS.—Persons carrying on various occupations may, without a violation of the Fourteenth Amendment, be required to take out a license and pay a fee therefor: See monographic note to *State v. Goodwill*, 25 Am. St. Rep. 870, 885, on the Fourteenth Amendment, considered with relation to special privileges, burdens, and restrictions. The legislature may, by general law, confer upon

cities and towns the power to impose occupation or license taxes for municipal purposes: *Magneau v. Kremont*, 30 Neb. 843; 27 Am. St. Rep. 436. A state has the right to tax railway cars found within its boundaries: *Denver etc. Ry. Co. v. Church*, 17 Col. 1; 31 Am. St. Rep. 252; and a municipal ordinance imposing a license tax upon railway cars traversing the streets of the municipality is a police regulation, and is valid as such, there being nothing to show that it is unreasonable: *Frankford etc. Ry. Co. v. Philadelphia*, 58 Pa. St. 119; 98 Am. Dec. 242. The exaction of a license, whether by the state or a municipality, does not violate a constitutional provision respecting uniformity and equality of taxation: See monographic notes to *People v. Naglee*, 52 Am. Dec. 332, on the power of the state to exact licenses, and charge therefor, and *Robinson v. Mayor of Franklin*, 34 Am. Dec. 638, on general limitations upon the power of municipal corporations to pass ordinances. Irrespective of statutory authority, a municipality has implied power to provide for the enforcement of its ordinances by the imposition of reasonable and proper fines or pecuniary penalties. The power to enact them involves all the incidents necessary to enforce them: *Detroit v. Fort Wayne etc. Ry. Co.*, 95 Mich. 456; 35 Am. St. Rep. 580; *Ulrich v. St. Louis*, 112 Mo. 138; 34 Am. St. Rep. 372, and note; *Tarkio v. Cook*, 120 Mo. 1; 41 Am. St. Rep. 678.

TAXES—EQUALITY AND UNIFORMITY.—The constitutional provision that "taxation shall be equal and uniform" applies only to direct taxation upon property as such: *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581.

WILCOX v. JOHN.

[21 COLORADO, 367.]

PUBLIC LANDS—MORTGAGE OR DEED OF TRUST BY PRE-EMPTOR.—A pre-emptor of public land may, before making final proof, and obtaining a receiver's certificate, mortgage the land, or, acting in good faith, deed it in trust, as neither instrument is a "grant or conveyance," within the prohibitory clause of section 2262 of the United States Revised Statutes, providing that any grant or conveyance which such pre-emptor may have made, except in the hands of bona fide purchasers for value, shall be null and void.

PUBLIC LANDS—COURTS—LAND DEPARTMENT.—It is of the highest importance that the decisions of the courts respecting public land should be in harmony with the rulings of the land department.

Action in the nature of ejectment brought by the appellee, James M. John, as plaintiff, to recover from the appellants, James Wilcox and William Moad, a quarter section of land situate in Las Animas county. The patentee of the land in question was James Hunt, and each of the parties to this suit deigned title through him. The title to the land was in the United States on November 18, 1886. Hunt was then residing upon it, claiming title thereto under the pre-emption laws of the United States, and executed a deed of trust in which he at-

tempted to convey the land to one A. C. McChesney, as trustee, for the use of one W. F. Hall. This deed was executed to secure the payment of two hundred and four dollars which Hunt at that time borrowed from Hall to pay the expenses of proving up and purchasing the land from the government. No part of it was ever used to pay for the land. Hunt did not, in fact, make final proof and entry at that time, but soon afterward caused the greater part of the money to be paid to A. C. McChesney, the trustee, who returned one hundred and forty dollars of it to William Hall, to be applied in part to the satisfaction of the note given to Hunt. On June 20, 1888, Hunt did prove up and received his certificate of purchase. A judgment for the sum of four hundred and twenty-seven dollars had been obtained, on March 16, 1888, against S. A. Pauley and Henry George, in the district court of Las Animas county, and the plaintiffs claimed a lien on the real estate then owned by the defendant or which he might thereafter acquire. Execution was issued, and delivered to the sheriff, and, after Hunt obtained title to the land, this execution was levied upon the land in question, and it was sold and deeded by the sheriff to the plaintiff in this action. On June 26, 1888, Hunt executed a warranty deed to the defendant, Wilcox, which was immediately recorded with the proper officer of Las Animas county. The levy and sale under the execution were made subsequent to the conveyance to Wilcox, and the filing of the same for record. There was a judgment for the plaintiff under the first claim of title stated in the opinion, and the defendants appealed.

Northcutt & Franks, for the appellants.

James M. John, for the appellee.

²⁵⁹ HAYT, C. J. Appellee claims title through two sources, viz: 1. A purchase made under the trust deed of the pre-emptor to McChesney, to secure the payment of a debt due from him to Hall; 2. The judgment, levy, and sale resulting from the suit of Pauley and George.

It is conceded that the title under the deed of trust is prior in point of time to that claimed by appellants, and it is also admitted that all the necessary steps, such as recording, foreclosures, etc., under the trust deed were duly taken, the single question being as to the right of a pre-emptor to mortgage the land before making final proof and obtaining a receiver's receipt for the same.

Appellants claim that a trust deed given under such circum-

stances is in contravention of section 2262 of the Revised Statutes of the United States, which requires of the pre-emptor, among other things, an oath "that he has not settled upon and improved such land to sell the same on speculation, but in good faith, to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself." It is further provided that "any grant or conveyance which he may have made, except in the hands of bona fide purchasers for a valuable consideration, shall be null and void, except as provided in section 2288."

It has been held in a few cases that a mortgage or a deed of trust upon land is a grant or conveyance within the meaning of the statute, and consequently void: *Brewster v. Madden*, 15 Kan. 249; *Brake v. Ballou*, 19 Kan. 397; *Ainsworth* ³⁷⁰ v. *Miller*, 20 Kan. 220. And this seems to have been the ruling of the land department at one time, but as early as 1882, Mr. Teller, the secretary of the interior, called attention to the unsoundness of the prior decisions of the department, and in a carefully prepared opinion held that the mere possibility of a title resulting for the benefit of another person, as in the case of a mortgage, was not sufficient to prevent the pre-emptor from obtaining patent. The rule then announced has, we think, been uniformly followed by the department since. It is founded upon sound reasons, and in practice it has not infrequently been of benefit to settlers in negotiating loans to carry them over periods of drouth, or of business depression, and should be maintained if not inconsistent with the terms of the statute, as it is of the highest importance that the decisions of the courts in these matters should be in harmony with the rulings of the land department.

The rule contended for by appellants, whereby a mortgage is held to be interdicted, is founded upon a somewhat forced construction of the words "grant" and "conveyance" as used in the statute. By the later, and, as we think, the better considered cases, it is held that neither a mortgage nor a deed of trust is a grant or a conveyance within the prohibitory clause of the statute: *Norris v. Heald*, 12 Mont. 282; 33 Am. St. Rep. 581; *Fuller v. Hunt*, 48 Iowa, 163; *Jones v. Tainter*, 15 Minn. 512.

It is not claimed in this case that the deed of trust was executed for any purpose prohibited by the statute. On the contrary, the bona fides of the transaction is admitted. The title

procured by plaintiff as a result of the foreclosure and sale, being in all respects regular, must be upheld. This renders any consideration of appellee's second source of title unnecessary.

The judgment of the district court is affirmed.

Encumbrances by Pre-emptors and Other Claimants of Public Lands.

All laws authorizing the pre-emption of public lands were repealed by the act of March 3, 1891, with a saving of rights as to pending claims: See 1 Supp. U. S. Rev. Stats., sec. 4, p. 942. The decisions of the courts, under the pre-emption laws, as to the right of a pre-emptor to mortgage his claim have not been uniform. Prior to April 24, 1882, the land department, following the precedent of an early decision, held that an outstanding mortgage given by a pre-emptor upon the lands embraced in his filing defeated his right of entry, upon the ground that such mortgage was a contract or agreement by which title to the lands "might" inure to some other person than himself, contrary to the provisions of section 2262 of the United States Revised Statutes; but a careful consideration of this section, in *Larson v. Weisbecker*, 1 Dec. Dept. Int. 409, lead Mr. Teller, secretary of the interior, to a different conclusion, and to the opinion that, unless it should appear, under the rules of law applicable to the construction of contracts, or otherwise, that the title would inure to another person, it did not debar the right of entry: and that "the mere possibility" that the title might so result, as in the case of an ordinary mortgage, was not sufficient to forfeit the claim. In the secretary's opinion, the pre-emptor's right of entry could not be defeated by the statute under consideration, unless it appeared that there was a contract by the force of which title to the land would vest in some other person, and that such was his intention at the time of making it. On the contrary, if the mortgage was a mere security for money loaned, and the contract did not necessarily divert the title from him, it was not considered to be such a contract or agreement as is prohibited by the statute in question. "This law," said the secretary, "was intended to prevent speculative entries; but if a pioneer settler, struggling for a home for himself and family, is compelled by his necessities temporarily to mortgage his land, that he may pay for it and secure it to himself, and his good faith is manifest, and in the absence of all fraudulent or illegal purposes, I discover no reason why the government can reasonably object thereto, or that it is within any prohibition of the law."

Before *Larson v. Weisbecker*, 1 Dec. Dept. Int. 409, was decided, the decisions of the courts as to the validity of a mortgage, or deed of trust, by a pre-emptor were not uniform. Thus, it was held that a mortgage of pre-empted lands executed by the pre-emptor after the proofs were made, but before the patent issued, pursuant to an agreement made before the proofs, was void: *Woodbury v. Dorman*, 15 Minn. 338; but this case was overruled in *Jones v. Tainter*, 15 Minn. 512, where such a mortgage was held to be valid. In *McQue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100, a verbal agreement with a pre-emptioner, that, in consideration of money advanced for the purpose

of purchasing the land and paying costs and incidental expenses, the lender should have a lien upon the land to secure the repayment thereof, and that the terms of the agreement and charge on the premises should be evidenced by a note and mortgage or other memorandum in writing, as the parties might be advised when the transaction should be consummated, was held to be void under the statute of frauds, where the agreement, as a verbal contract, stood alone. But, where the note and mortgage were executed in performance of such verbal agreement, and received as such, the contract was regarded as executed, and it was considered that the statute of frauds furnished no defense. Yet, the contract having been made prior to the purchase of the land, it was held to be clearly within the prohibitory federal statute as to grants or conveyances. The contract being, therefore, illegal and void, the note and mortgage, being the fruit of that contract, necessarily fell with it. In *Sharon v. Wooldrick*, 18 Minn. 354, the mere facts that a pre-emptor borrowed money to pay for the land pre-empted, and after perfecting the pre-emption, and receiving the pre-emption certificate, conveyed the land on the same day to the lender, were held not to invalidate the deed, or to raise any inference of a previous contract prohibited by the pre-emption law.

Since the ruling in *Larson v. Welsbecker*, 1 Dec. Dept. Int. 409, some of the state courts have held that a contract by a settler upon public lands of the United States, made before his pre-emption of it to convey to another an interest in the land in consideration of money loaned or advanced him to pre-empt it, is in violation of section 2262 of the United States Revised Statutes, and void: *Marshall v. Cowles*, 48 Ark. 362; and that the word "mortgage" is included within the words "grant or conveyance," as used in that section: *Bass v. Buker*, 6 Mont. 442; overruled, however, in *Norris v. Heald*, 12 Mont. 282, 33 Am. St. Rep. 581, in which Chief Justice Blake rendered an able and elaborate opinion, reviewing all of the authorities, and reached the conclusion that an ordinary mortgage of his claim by a pre-emptor of public land prior to the time of making his final proofs is not a "grant or conveyance" within the prohibitory clause of the statute mentioned, and is valid, at least when it is given to secure the repayment of money loaned to pay for the land, or in any manner to aid the mortgagor in perfecting his title. And this is the law: See the principal case; *Larson v. Welsbecker*, 1 Dec. Dept. Int. 409; *Appeal of Ray*, 6 Dec. Dept. Int. 840; *Haling v. Eddy*, 9 Dec. Dept. Int. 337; *Stewart v. Powers*, 98 Cal. 514; *Robbins v. Bunn*, 54 Ill. 48; 5 Am. Rep. 75; *Jones v. Tainter*, 15 Minn. 512; *Wright v. Shumway*, 1 Biss. 23. The point has not been directly determined by the supreme court of the United States.

One taking a mortgage from a pre-emptor before the issuance of a patent, takes it, however, subject to the authority of the commissioner of the general land-office to cancel the pre-emption entry, whereby the rights acquired under the mortgage would be defeated. Hence, a mortgage executed by a grantee of one who made an unlawful entry before such cancellation, and while the title was in the United States, would be invalid: *Freese v. Rusk*, 54 Kan. 274. But

the mortgagee cannot be defrauded by the collusive and fraudulent cancellation of a lawful entry: *Freese v. Scouten*, 53 Kan. 347.

On the other hand, if a proposed pre-emptor has made a mortgage, and afterward pre-empt the land and obtains title, the title inures to the benefit of the mortgagee, though the pre-emptor has sold the land to a third party: *Christy v. Dana*, 34 Cal. 548; 42 Cal. 174; *Camp v. Grider*, 62 Cal. 20, 25; *Stewart v. Powers*, 98 Cal. 514, 521; *Wright v. Shumway*, 1 Biss. 23. So, if the mortgagee of a pre-emption claim gets no title through the mortgage, "this is not an objection to be raised by the man who makes it": *Whitney v. Buckman*, 13 Cal. 536. Hence, if a pre-emptor sells his claim while the title is in the United States, takes a note and mortgage for the purchase money, and sues thereon, the mortgagor is estopped to plead the defense of a want of consideration: *Tartar v. Hall*, 8 Cal. 263. A mortgagor is estopped from asserting the invalidity of a mortgage executed by himself. *Tartar v. Hall*, 8 Cal. 263; *Stewart v. Powers*, 98 Cal. 514, 521. So, if a qualified pre-emptor mortgages his land to procure money for the purpose of entering the land, but sells it subject to the mortgage, and the grantee assumes and agrees to pay the mortgage, the latter, in an action by the mortgagee to foreclose the mortgage, is estopped from showing that the mortgage was void under the pre-emption laws of Congress: *Green v. Houston*, 22 Kan. 35. If a settler on public lands, entitled to a pre-emption, procures a capitalist to pay the purchase money into the land-office of the United States, and allows him to take the receiver's certificate in his own name, or makes an assignment to him of his certificate of location as security for such payment, receiving back the bond of the capitalist for a deed upon the repayment, on a certain day, of the purchase money with interest, this is, in equity, a mortgage of the land, redeemable by the settler or his alienee at or before the time of payment, according to the condition of the contract: *Wright v. Shumway*, 1 Biss. 23. But, if a person residing on public land subject to pre-emption, executes a mortgage thereon, and then sells the land to another, who takes possession and subsequently pre-empt the land and obtains a title from the United States, the mortgage cannot be enforced against the title thus acquired from the United States, because the pre-emptor does not deraign his title from the United States through the person who executed the mortgage: *Bull v. Shaw*, 48 Cal. 455. If a party, after proving up on his pre-emption claim, and on the same day, borrows money to pay for the land and gives a mortgage thereon, the premises may be subjected to the payment of the mortgage, though about two months after executing the mortgage, the pre-emptor deeded away sixty acres of the land in accordance with an agreement made prior to the entry that he would do so, if allowed to enter, prove up, and pay for the same, without interference from the grantee. The deed has no priority over the mortgage, and the sixty acres are subject to the mortgage lien: *Trexler v. Lacy*, 22 Kan. 742. If a pre-emptor, some months after his application, gives a mortgage on the land covered thereby, and, about six months afterward, relinquishes his pre-emption claim, and immediately files a homestead entry on the same land, the mortgage is ex-

tinguished by the relinquishment, and does not attach to the homestead entry: *Hebert v. Brown*, 65 Fed. Rep. 2. But where a party, with right of pre-emption to lands, mortgages his interest for a valuable consideration, and afterward enters as tenant of the mortgagee, and while so in possession makes a new homestead entry, commutes the same, proves his occupation, pays the price, and receives title, such subsequently acquired title inures to the benefit of the mortgagee, and becomes a lien upon the land: *Spless v. Neuberg*, 71 Wis. 279; 5 Am. St. Rep. 211.

Mortgage by Homesteader.—Lands originally public cease to be public after they have been entered at the land-office and a certificate of entry has been obtained: *Hastings etc. R. R. Co. v. Whitney*, 132 U. S. 357, 361. They are then private property, of which the government agrees to make a conveyance as soon as it can. In the meantime, it holds the naked legal fee in trust for the purchaser, who has the equitable title: *Cornelius v. Kessel*, 128 U. S. 456, 460; *Wisconsin Cent. R. R. Co. v. Price County*, 133 U. S. 496. Under the United States homestead laws and a compliance therewith, a vested right is obtained in the homestead at the expiration of five years from the entry thereof: *Newkirk v. Marshall*, 35 Kan. 77. Hence, when a person has done everything necessary under the homestead laws to entitle him to a patent for a tract of public land, he may mortgage it after he has received his final certificate and before the patent therefor is issued to him, and such mortgage may be enforced to secure a debt contracted before the issuance of the patent: *Lewis v. Wetherell*, 36 Minn. 386; 1 Am. St. Rep. 674; *Gilkerson-Sloss Commission Co. v. Forbes*, 54 Ark. 148; 26 Am. St. Rep. 29; *Webster v. Bowman*, 25 Fed. Rep. 889; *Nycum v. McAllister*, 33 Iowa, 374; *Orr v. Stewart*, 67 Cal. 275; *Boggan v. Reid*, 1 Wash. 514; *Cheney v. White*, 5 Neb. 261; 25 Am. Rep. 487; *Jones v. Yoakam*, 5 Neb. 265. These cases proceed upon the principle that, when a person does everything that is necessary to entitle him to a patent for a tract of public land, he becomes the equitable owner thereof, the land is segregated from the public domain, ceases to be the property of the government, and, in the absence of limitations and restrictions legally imposed, becomes subject to private ownership, and all the incidents and liabilities thereof: *Gilkerson-Sloss Commission Co. v. Forbes*, 54 Ark. 148; 26 Am. St. Rep. 29. Section 2296 of the Revised Statutes of the United States, providing that "no lands acquired under the provisions of this chapter shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," was said in *Gilkerson-Sloss Commission Co. v. Forbes*, 54 Ark. 148, 26 Am. St. Rep. 29, not to be "a prohibition upon the right of the settler to alienate by deed or mortgage after he becomes entitled to a patent. It would ill comport with the spirit of the act to place such a restriction upon the power of the settler. The tendency of it would be to defeat the object of the act by making the acquisition of land thereunder less desirable; for it is well known that patents do not issue in the usual course of business in the general land-office until several years after the final receipt or certificate of entry is given; and such a restriction would for many years

deprive the settler of a source of credit which might, in many cases, be valuable. In short, it would be an injury to the prudent and necessitous settler, and serve no important purpose of public policy." The court in that case very tersely said that "the limitation on the right to alienate imposed by the homestead act is confined to the period which expires when the settler becomes entitled to a patent." It is no objection to the validity of a mortgage executed upon a homestead after proofs made, but before patent, that it was given to secure a debt contracted before such proofs were made. The homestead act does not prohibit the owner of a homestead from pledging it voluntarily to secure a pre-existing debt. Its only effect is to protect him against a compulsory payment of such demand out of the land: *Jones v. Yoakam*, 5 Neb. 265. If a mortgage of a homestead purports to convey the fee, any title afterward acquired by the mortgagor will feed the mortgage and inure to the benefit of the mortgagee; and this is so although the title, when the mortgage was made, was in the government of the United States, and was acquired by the mortgagor after a foreclosure of the mortgage: *Orr v. Stewart*, 67 Cal. 275.

On the other hand, it has been held that a mortgage executed on land entered under the homestead act of Congress, before the expiration of the five years' residence thereon required by the statute is void: *Webster v. Bowman*, 25 Fed. Rep. 889; but it is difficult to distinguish between mortgages executed prior and those executed subsequent to final proof and delivery of the final certificate; and some cases hold that a valid mortgage may be given by one who has made entry under the homestead laws of the United States, upon the land so entered, before he has made his final proof and received his final certificate, and before the expiration of the required five years' residence: *Lang v. Morey*, 40 Minn. 396; 12 Am. St. Rep. 748; *Skinner v. Reynick*, 10 Neb. 323; 85 Am. Rep. 479; *Fuller v. Hunt*, 48 Iowa, 163; and that one who purchases the premises subject to and agreeing to pay such mortgage cannot avoid it: *Skinner v. Reynick*, 10 Neb. 323; 85 Am. Rep. 479. The execution of a mortgage is not of itself an alienation, and it is not the purpose of the homestead act to protect land entered as a homestead from a lien created thereon by the person entering it. The fact that the act provides against alienation by the claimant, and does not provide against mortgaging unless alienation includes mortgaging, indicates that it was not deemed to be against the public interest that the claimant should mortgage his homestead: *Fuller v. Hunt*, 48 Iowa, 163. In this case, the mortgage was claimed to be an alienation within the meaning of the statute requiring the claimant, in making final proof, to show by affidavit that he has not alienated the land. "But," said Adams, J., "we think this is not so. The giving of a mortgage may result in alienation, but it is not such of itself, nor can it be said that the mortgage is given with such purpose. Land is often mortgaged with the view of obviating the necessity of alienation. The office of a mortgage is simply to create a lien. Under our statute, the legal title remains in the mortgagor, though the case would probably not be different if it passed to the mortgagee. A conveyance made merely

to create a lien lacks the essential element of alienation." Even where the land mortgaged is public land, at the date of the mortgage, but which is subsequently located as a homestead, any title subsequently acquired by the mortgagor inures to the benefit of the mortgagee, and the mortgagor is estopped from denying the lien of the mortgage, and setting up the title afterward voluntarily acquired to defeat it: *Kirkaldie v. Larrabee*, 31 Cal. 455; 89 Am. Dec. 205. Upon the principles above announced, a settler and occupant upon public lands settled upon and occupied as a townsite, under the federal townsite act, may mortgage the same while the title still remains in the United States, and if he afterward procures the title the mortgage will not be void: *Reasoner v. Markley*, 25 Kan. 635, 638. But an involuntary lien cannot attach to a homestead before the claimant is entitled to a patent. Hence, one who has furnished materials for a house built upon land entered as a homestead, or who has placed machinery upon land which the purchaser of the machinery has entered as a homestead, but before the homestead claimant is entitled to a patent, cannot, under section 2296 of the United States Revised Statutes, claim a lien upon the land for the materials furnished, or to secure payment for the machinery: *Kansas Lumber Co. v. Jones*, 32 Kan. 195; *Palge v. Peters*, 70 Wis. 178; 5 Am. St. Rep. 156.

STATE COURTS—PRE-EMPTION OF PUBLIC LANDS.—State courts cannot interfere with, or control, the officers of the general government in the disposal of public lands, and have no jurisdiction in regard to the pre-emption of such lands, unless the case is affected with fraud or trust: *Lewis v. Lewis*, 9 Mo. 182; 43 Am. Dec. 540.

YOUNG v. SIMPSON.

[21 COLORADO, 460.]

ELECTIONS—COMPLIANCE WITH STATUTE.—Courts will not undertake to disfranchise an elector by rejecting his ballot, where his choice can be gathered from it, viewed in the light of the circumstances surrounding the election, unless the statute declares that a strict compliance with its requirements by the elector is essential to have his ballot counted.

ELECTIONS—PARTICULAR DESIGNATION CONTROLS CROSS AFTER PARTY EMBLEM.—If a voter, under a statute requiring an elector, who desires to vote for all the nominees of a particular party, to place a cross opposite the emblem of such party in the appropriate place, but, if he desires to vote partly for the nominees of one party and partly for those of another, to place a cross opposite the names of the candidates for whom he elects to vote, particularizes his intention, after putting a cross opposite a party emblem, by placing a cross opposite the names of certain candidates upon the ticket, the particular designation controls, and a candidate opposite whose name there is no mark is not entitled to the vote.

ELECTIONS—CROSS AT LEFT OF NAME INSTEAD OF TO THE RIGHT.—Though the customary and better practice is to

put a cross to the right of the name of the candidate intended to be voted for, yet, if the statute does not designate whether the cross shall be placed to the right or to the left of the candidate's name, a ballot marked with a cross to the left and before the candidate's name should be counted.

ELECTIONS—TEMPORARY ABSENCE—DISQUALIFICATION.—An elector's mere temporary absence from his precinct, caused by business and prolonged by sickness, and without any intention of changing his residence, does not disqualify him if he returns to the precinct of his residence in time to vote.

ELECTIONS—NONRESIDENCE—ILLEGAL BALLOT.—A ballot cast by one who has not maintained a residence for the length of time required by statute is illegal, and should not be counted.

ELECTIONS—DEFECTIVE MARKING OPPOSITE PARTY EMBLEM.—Though a voter designates his choice by placing a cross, not in the space prepared for that purpose, but fifteen-sixteenths of an inch to the right of the square opposite the emblem of the party whose candidates he wishes to vote for, the ballot should be counted, as the intent of the voter is clearly manifest.

Contest of election. The appellant, Young, and the appellee, Simpson, were opposing candidates, at the general election of 1894, for the office of county commissioner of Logan county. The county canvassing board found that Young had received four hundred and seventy-seven, and Simpson four hundred and seventy-six. The former was declared elected. Simpson then instituted this contest, averring that in a certain precinct the judges had failed to count for him two votes which were cast for him. Young's answer admitted that the two ballots mentioned were cast for Simpson, and should have been counted for him. Young, however, filed a counter statement setting up several grounds of contest. This new matter was denied by the replication. A trial was had before the county judge and there was a finding that Simpson had received four hundred and seventy-seven votes, and Young, four hundred and seventy-six. Simpson, therefore, had judgment, and Young appealed, the review being had as upon a writ of error.

S. A. Burke and W. L. Hays, for the appellant.

W. E. Criesman and H. D. Hinkley, for the appellee.

403 **HAYT, C. J.** The principal object of rules of procedure prescribed by statute for conducting an election is to protect the voter in his constitutional right to vote in secret, to prevent fraud in balloting, and secure a fair count. Such rules are usually held to be directory, as distinguished from mandatory, and, unless the statute declares that a strict compliance is essential in order to have the ballot counted, the courts will not undertake to disfranchise any voter by rejecting his ballot, where his choice can be gathered from the ballot when viewed in the light of the

circumstances surrounding the election: Kellogg v. Hickman, 12 Col. 256; Allen v. Glynn, 17 Col. 338; 31 Am. St. Rep. 304; People v. District Court, 18 Col. 26; State v. Russell; 34 Neb. 116; 33 Am. St. Rep. 625; Paine on Elections, sec. 498.

Our statute declares, in section 29, that "if a voter marks in ink more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the choice of any voter for any office to be filled, his ballot shall not be counted for such office." Ergo, if the choice of the voter can be determined, the vote must be counted. In the light of these general principles and the statute, it is not difficult to dispose of the assignments of error in this case.

The first of these brings up for review the refusal of the county court to count for plaintiff in error, Young, a certain ballot cast in precinct No. 6, marked exhibit "C." On this ballot the cross appears opposite the emblem of the People's party. Similar crosses are also to be found in the appropriate columns opposite the names of each individual candidate of the People's party, except that the ballot is not so marked opposite the name of the plaintiff in error, Young, nor opposite the names of the candidates for precinct officers.

The statute provides that when any elector desires to vote for all the nominees of a particular party, he may do so by placing a cross opposite the emblem of such party in the appropriate space, but when any elector desires to vote a mixed ⁴⁶³ ticket, partly for the candidates of one party and partly for those of another, he should place a cross opposite the names of the candidates for whom he elects to vote. In this particular instance, it will be noticed that the voter has attempted to adopt both methods. He has placed a cross opposite the emblem of the People's party and also one opposite the names of all the individual candidates of such party, except those mentioned. If the voter had only placed a cross in the appropriate space opposite the emblem of his party, this, under the statute, would have shown conclusively an intention to vote for all the candidates of such party; but having undertaken to particularize by putting a cross opposite the names of certain candidates upon the ticket, by a familiar principle of the law the particular designation of the candidates for whom the voter intended to vote must be held to control the general designation. Consequently, the county judge correctly decided that plaintiff in error, Young, was not entitled to this vote.

The second assignment of error has reference to ballot marked

exhibit "G." Upon this ballot there is no mark opposite any emblem, but the ballot is marked with a cross within the margin of the line to the left, and immediately before the names. The statute does not designate where the cross shall be placed—whether to the right or to the left of the candidate's name. It only provides that the voter shall prepare his ballot by placing a cross opposite the name of each candidate of his choice. Undoubtedly, the more appropriate place on the form before us is to the right of the names of the candidates, and this is the customary and usual practice in such cases. We think, however, that the intention of the voter to vote for the candidate of the People's party is clearly manifest by the marks upon his ticket, and it was error for the county judge to reject ballot marked exhibit "G."

The third and fourth assignments of error relate to the reception and counting of the ballots of N. T. Fisk and his wife. These ballots were cast in precinct No. 3 of Logan ⁴⁶⁴ county. From the evidence introduced, it appears that the Fisks, husband and wife, resided on their homestead near Iliff, in precinct No. 6; that they had resided within the county and precinct prior to October 27, 1894, more than the time required to qualify voters under the statute. On that day, they made final proof of their homestead entry, going to the United States land-office at Sterling for that purpose, not wishing, however, to change their residence by so doing, but intending to return to their homestead in a few days and remain thereon until after the election. They were, however, detained in Sterling by sickness, but returned in time to vote in the precinct in which their homestead was situated. Their right to vote in such precinct, we think, is clear.

This disposes of all the assignments of error that have been argued by plaintiff in error. There are, however, two assignments of cross-error on the part of defendant in error which will be briefly considered.

The first relates to the action of the trial judge in rejecting as illegal the ballot of one E. E. Beeman, and in deducting this vote from the number cast for John H. Simpson. There is no error in this ruling. The vote shows conclusively that Beeman had not maintained a residence in Logan county for a sufficient length of time to become a legal voter under the statute.

The second assignment of cross-error has reference to the action of the trial court in counting the ballot marked exhibit "F." On this ballot the voter has designated his choice by

placing a cross not in the space prepared for that purpose, but fifteen-sixteenths of an inch to the right of the square opposite the cottage home, the emblem of the People's party. We think the intent of the voter is clearly manifest from the manner in which this ticket is marked, and that the county court in counting this ballot committed no error.

The only error intervening at the trial was in rejecting the ballot marked exhibit "G," hereinbefore discussed. This ballot should have been counted for defendant in error, ⁴⁶⁵ thereby increasing his total vote by one, making the result four hundred and seventy-seven instead of four hundred and seventy-six. Correcting this error, and we find that neither candidate received a majority of the legal ballots cast. There being a tie vote, the right to the office must be settled in the manner provided by statute.

The judgment of the county court is reversed and the cause remanded.

ELECTIONS.—If a statute, expressly or by fair implication, declares any act to be essential to a valid election, or that an act shall be performed in a given manner, and no other, such provisions are mandatory, but if the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election: Note to *State v. Gay*, 50 Am. St. Rep. 395. The statute relating to the place of making the cross or stamping the ballot is mandatory, and the ballot is invalid unless so marked: See monographic note to *Taylor v. Bleakley*, 49 Am. St. Rep. 241, on distinguishing marks which invalidate ballots under the Australian ballot law. If a voter stamps the square opposite the party emblem he must not stamp elsewhere on the ballot. If he does, the ballot is invalid as having a distinguishing mark: Note to *Taylor v. Bleakley*, 49 Am. St. Rep. 244. If the statute does not require that the cross shall be in any particular place, the voter's intention should be given effect if it can be gathered from his ballot, having due regard for the requirement of secrecy: Note to *Taylor v. Bleakley*, 49 Am. St. Rep. 242. But even where the statute requires the cross to be placed in a space designated for that purpose, it has been held, under statutes requiring the court to give effect to the voter's intention, that a ballot with a cross outside of the square designated, but opposite the name of a candidate, should be counted according to such manifest intention: Note to *Taylor v. Bleakley*, 49 Am. St. Rep. 241. Temporary absence on business or pleasure does not disqualify a voter on the ground of change of domicile: Note to *Boyer v. Teague*, 19 Am. St. Rep. 567; monographic note to *Berry v. Wilcox*, 48 Am. St. Rep. 715, on residence.

SPANGLER v. GREEN.

[21 COLORADO, 505.]

MECHANIC'S LIEN—ESTATE INVOLVED.—A proceeding to enforce a mechanic's lien does not involve a freehold.

COURTS—JURISDICTION OF SUPREME COURT.—Under a statute providing that no appeal to the supreme court shall lie, with certain exceptions, to review the final judgment of any inferior court, unless it exceeds two thousand five hundred dollars, exclusive of costs, the jurisdiction of that court does not attach, on the ground of the amount involved, where neither of several judgments, as in a proceeding to enforce a mechanic's lien, amounts to two thousand five hundred dollars, although their aggregate amount may exceed that sum.

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—RETROSPECTIVE STATUTES.—While there can be no vested rights in mere remedies, if substantial rights themselves are infringed by an amendatory statute, it violates the constitutional provisions, both state and federal, which prohibit all laws impairing the obligation of contracts, and laws retrospective in their operation.

MECHANIC'S LIEN—CHANGE IN LAW—WHAT GOVERNS.—If the rights of parties to a building contract have accrued under an agreement made before the passage of amendments to the mechanic's lien law, which amendments materially impair the contract rights of the parties, the law in force when such rights accrue, and not the amendments, must govern.

COURTS—JURISDICTION—SUPREME COURT.—Jurisdiction of a cause upon one ground attaches for all. Hence, if a case requires the construction of constitutional provisions, either state or federal, the supreme court has jurisdiction, on appeal, to review all matters necessary to a complete determination of the cause, though the amount involved is less than that prescribed by statute.

APPEAL—SUFFICIENCY OF BILL OF EXCEPTIONS.—Though a bill of exceptions, containing testimony, does not have an express statement that all the evidence has been certified, it is sufficient if, after each party's testimony, there is the expression that such party "here rested his testimony," as this is equivalent to an express statement that the evidence contained in the bill is all that was introduced at the trial.

Actions to recover judgments and to have them established as liens under the mechanics' lien law. There were two actions. One was brought by the appellees, Green and Fisher, partners doing business under the firm name of the Chicago Lumber Company. The other was commenced by Ackroyd and Brindle, partners doing business under the firm name of E. Ackroyd & Co. These actions were brought against Woodbury and Page, partners doing business under the firm name of Woodbury & Co., principal contractors, and against the appellant, Jane T. Spangler, as owner, to recover judgments against Woodbury & Co., which the plaintiffs sought to have established as liens upon Mrs. Spangler's property for materials furnished and labor per-

formed by the appellees, respectively, as subcontractors, under contracts entered into by them with Woodbury & Co. for the construction of a dwelling-house and barn which Woodbury & Co. had contracted to build for the appellant. It appeared from the complaints that the contract between the principal contractors and owner, as well as the subcontracts, were entered into and the performance thereof begun prior to the passage of the amendments of 1889 to the mechanics' lien act of 1883, but that these contracts were not fully performed until after such amendments went into effect. There was no allegation, in either complaint, that, at the time of the filing of the notices of lien, there was anything due from Mrs. Spangler to Woodbury & Co. upon the contract between them. Mrs. Spangler's demurrer to each complaint was overruled, and she answered that she had, before the filing of the lien statements, paid to Woodbury & Co., with the exception of a small balance, the full contract price for constructing the buildings. This balance was twelve hundred and fifty dollars and seven cents, which Mrs. Spangler tendered and paid into court, before trial, to be applied upon such demands as the court might direct. The two actions were consolidated and judgment went against Woodbury & Co., in favor of the Chicago Lumber Company, for over six thousand dollars, and in favor of Ackroyd & Co., for over one thousand dollars. The Chicago Lumber Company judgment was decreed to be a lien upon Mrs. Spangler's property to the extent of two thousand and forty-seven dollars and sixty-nine cents; and the Ackroyd & Co's judgment was decreed to be a lien upon her property to the extent of nine hundred and thirty-nine dollars and forty-five cents. From this decree, in so far as liens were established against Mrs. Spangler's property, she appealed.

Sam P. Rose and S. D. Walling, for the appellant.

Benedict & Phelps and Williams & Whitford, for the appellees.

507 CAMPBELL, J. The objection interposed by the appellees to the jurisdiction of this court to entertain the appeal must first be disposed of before considering the assignments of error. Section 1, page 118, of the Session Laws of 1891 provides that no appeal to the supreme court shall lie to review the final judgment of any inferior court unless the judgment exceeds two thousand five hundred dollars, exclusive of costs; provided, this limitation shall not apply where the matter in controversy re-

lates to a franchise or freehold, or where a construction of the state or federal constitution is necessary to a determination of the case.

The proceeding to enforce a mechanic's lien does not involve a freehold: *McCandless v. Green*, 20 Col. 519. To warrant the assumption of jurisdiction, the amount of the judgment, in a case like the one at bar, must be determined ⁵⁰⁸ by the amount of the judgment in favor of each lien claimant, and not the aggregate amount of the several judgments; and as neither of the several judgments here amounts to two thousand five hundred dollars, jurisdiction on this ground does not attach: *Keystone Min. Co. v. Gallagher*, 5 Col. 23; *Piper v. Jacobson*, 98 Ill. 389; *Farwell v. Becker*, 129 Ill. 261; 16 Am. St. Rep. 267; *Aultman etc. Co. v. Weir*, 134 Ill. 137; *Fourth Nat. Bank v. Stout*, 113 U. S. 684.

Evidently, therefore, the only ground, if any, which invokes the jurisdiction of this court to review this judgment and decree must be one of the constitutional questions referred to. The appellant claims that the court below must necessarily have based its judgment upon the construction given by it to section 11 of article 2 of our state constitution, prohibiting all laws impairing the obligation of contracts, and laws retrospective in their operation, and section 10 of article 1 of the federal constitution, relating to the same matters; or rather that its judgment can be upheld only by giving to the amendments of 1889 to the mechanic's lien act of 1883 a retrospective operation, which necessarily violates the constitutional provisions mentioned.

After a careful examination of the record, we are satisfied that the judgment of the district court is wrong, and for its only support must rest upon the ruling made to the effect that the rights of the parties to this controversy are to be measured by the amendments of 1889.

The rights of the appellees in this case accrued under contracts made before the passage of these amendments, and if their contract rights were materially changed to their injury by the later law, the former, and not the later, law must govern. We are not unmindful of the doctrine that in mere remedies there can be no vested right; but where, under the guise of giving a new or different remedy, substantial rights themselves are infringed, these constitutional provisions are violated.

There can be no pretense that the Chicago Lumber Company in filing its lien statement, or in the procedure to enforce its

500 lien, has complied with the law of 1883; and while Ackroyd & Co. evidently supposed that their rights were to be measured by the amendments of 1889, still they substantially complied with the old law of 1883 in the proceedings necessary to enforce their claim. It needs no argument to show that the amendments of 1889 materially affected both the rights of, and remedies against, the owner of a building, as they existed under the prior act of 1883. A mere reading of these different provisions will manifest the truth of this statement. The later provisions added to the burden of the owner; took from him certain rights of payment to the contractor, which, under the prior law, he might make with safety to himself, before a subcontractor claiming a lien had filed his notice of his intention to assert the same; and attached thereto certain penalties from which he was theretofore exempt, by preserving to the subcontractor his lien, although he neglect to file notice within the time fixed by statute, excepting from said lien the property of the owner only to the extent of such payments, if any, as the owner has made to the contractor after the expiration of the time fixed for the subcontractor to file his lien statement or notice.

This ruling of the district court, and the entire theory upon which it proceeded, were fundamentally wrong, and were in direct contravention of the provisions of the constitution which forbid retrospective legislation and the passage of laws impairing the obligation of contracts. Necessarily, therefore, to determine this case requires us to construe these provisions of the constitution. Having jurisdiction upon this ground, the same attaches as to all other matters necessary to a complete determination of the cause: *Trimble v. People*, 19 Col. 187; 41 Am. St. Rep. 236.

The assignments of error, in the main common to the two suits, relied upon in argument, are:

1. That the plaintiffs fail to aver in their complaint that, at the time of filing their notice of intention to claim a lien, there was something due from the owner to the principal contractor, which averment is said to be necessary in such an action.

510 Conceding this contention to be good, we think the absence from the complaint of an averment to this effect was not prejudicial to the appellant for the reason that the error, if any, was cured by her answering to the complaint after the demurrer was overruled, and by the admission therein, as well as in open court, that at such time there was something due from her to the principal contractors on the building contract. This suffi-

ciently disposes of the objection urged to the insufficiency of the complaint in this respect.

2. The principal objection raised by the appellant is as to the ruling by the trial court that the law of 1889, and not that of 1883, was applicable to this controversy. In so doing, it must be apparent that the constitutional right of appellant to have her contract enforced under the law in existence at the time the contract was made, and not the law in effect when suit was brought, was infringed. The ruling directly was, that the law, as to the conditions giving the right to the lien, in force when the suit to establish the lien was filed—and not the law in effect when the contracts, from which all rights and remedies spring, were made—governs the case. This decision must, in the nature of things, be founded upon the constitutional right of the legislature, under the provisions of the constitution involved, to pass such retrospective acts. This point, which is decisive of the controversy, was made below throughout the trial, was decided against the appellant, has been assigned by her as error, and is argued by her counsel; and it is necessary to determine it in this case.

An objection interposed by the appellees, which, if resolved in their favor, will, it is contended, require an affirmance of the judgment, notwithstanding we have determined that this court has jurisdiction to review the case, is that, conceding, for the sake of argument, that the court erred in refusing to permit the appellant, when the offer was first made by her, to introduce evidence that under her contract with Woodbury & Co. she had paid them all that was due and owing by her except about twelve hundred dollars before the filing of ⁵¹¹ the lien statements by the appellees—in which payment, under the law of 1883, she would be protected as against any claim of appellees—yet as she claims that all the evidence was not returned in the bill of exceptions, the presumption in favor of the findings and decree is, that at some other time during the trial such error was cured by the admission of proper evidence tending to negative such payments, upon which the findings and decision of the court were made; or that the appellant's offer was subsequently renewed by her, and permission given by the court to prove her case, with the result that her proof thus introduced was held insufficient by the court to maintain her claim of payment.

It is true that the bill of exceptions does not contain an express statement that all the evidence introduced at the trial has been certified up, but, at the close of the evidence offered in

behalf of the Chicago Lumber Company, the statement is that "thereupon said Chicago Lumber Company rested its testimony," and at the close of Ackroyd & Co's case it is, "Ackroyd & Co. here rested their testimony," and at the close of appellant's case the statement is, "defendant Jane Spangler here closed her testimony." These expressions are equivalent to that usually found in a bill of exceptions to the effect that all of the testimony taken was preserved: *Ironwood Store Co. v. Harrison*, 75 Mich. 197; *Hitchcock v. Burgett*, 38 Mich. 501.

It is sufficiently apparent, therefore, that the decree of the court, in so far as it relates to the question, and to the time, of payment by the appellant to the principal contractor, rests upon an entire absence of the offered testimony of appellant to the effect that she had in the matter of payments complied with the law of 1883, except, as she herself admitted, as to the sum of about twelve hundred dollars; and from this it follows that this ruling of the court deprived the appellant of her constitutional right to have the terms of her contract enforced and the obligations thereof determined by the law as it was when the contract was made.

512 The decree of the court below, resting upon an erroneous theory, is reversed, and the cause remanded, with instructions for further proceedings in accordance with this opinion.

APPEAL—COURTS—JURISDICTION.—If the amount against each defendant is separate and distinct, the two amounts cannot be united so as to confer jurisdiction, but each must be treated as a separate suit; and if the amount involved as to either one is not large enough to confer jurisdiction, the appeal must fall as to that one: *Farwell v. Becker*, 129 Ill. 261; 16 Am. St. Rep. 267. The supreme court of Virginia has jurisdiction of an appeal by several parties if the amount in controversy as to one amounts to the jurisdictional amount or more, although the amount involved as to the others is below such amount, provided the questions as to all are the same, and the claims have been consolidated and heard together: *Craig v. Williams*, 90 Va. 500; 44 Am. St. Rep. 934. Where a court acquires jurisdiction over the subject matter and person, it becomes its right and duty to determine every question which may arise in the cause without interference from any other tribunal: *Barton v. Saunders*, 16 Or. 51; 8 Am. St. Rep. 261. In an order or proceeding involving the construction of a constitutional provision, the supreme court has jurisdiction on direct appeal from the trial court: *Lester v. People*, 150 Ill. 408; 41 Am. St. Rep. 375, and note.

CONSTITUTIONAL LAW—RETROSPECTIVE LAWS—CHANGE OF REMEDY—IMPAIRING OBLIGATION OF CONTRACT.—The legislature may change the formalities of legal procedure, but it cannot make changes so as to impair the enforcement of rights: *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 438. The constitutional prohibition against the impairment of a contract secures from attack, not merely the contract itself, but all the essential incidents which render it valuable, and enable its owner to enforce it: *Phin-*

ney v. Phinney, 81 Me. 450; 10 Am. St. Rep. 268, and note. A statute tending to impair the obligation of a contract is inoperative as to contracts existing at the time of its passage, but valid and operative as to future contracts: *Burdick v. People*, 149 Ill. 600; 41 Am. St. Rep. 829; note to *Commissioners v. Rosche*, 40 Am. St. Rep. 659. The obligation of a contract cannot be impaired by the legislature, though it may alter the remedy to enforce it at will. If the effect of legislative action is to impair the obligation, it is void, as it is immaterial whether such result is accomplished by acting on the remedy, or directly on the contract itself: *Beverly v. Barnitz*, 55 Kan. 466; 49 Am. St. Rep. 257.

MECHANIC'S LIEN—CHANGE OF LAW.—A vested right to a mechanic's lien, for materials, acquired under one statute is not affected by a change made as to notice by a subsequent statute: *Kirkwood v. Hoxie*, 95 Mich. 62; 35 Am. St. Rep. 549. But a statute which operates retrospectively so as to give a mechanic a lien for work already done is constitutional, as this only affects the remedy: *Bolton v. Johns*, 5 Pa. St. 145; 47 Am. Dec. 404.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

DORRANCE v. RAYNSFORD.

[67 CONNECTICUT, 1.]

PROBATE SALES, WHEN MAY BE ORDERED.—Real estate of a deceased person vests immediately upon his death in his heirs or devisees, and can be taken from them only to satisfy some claim, existing against him in his lifetime, or some condition arising in the settlement of his estate which makes a sale of the land necessary or advantageous, and then only in the manner pointed out by law.

PROBATE SALES—JURISDICTION.—A court of probate when ordering a sale of the real estate of a deceased person, is exercising a special statutory power, and not one that pertains to the ordinary settlement of the estate. Such power must be strictly followed or the order is void.

PROBATE SALES—JURISDICTION, HOW ACQUIRED.—An order of a probate court directing the sale of land of a deceased person, and the administrator's deed given pursuant to such sale, can be valid only when public notice of the application to sell has been given to all parties adversely interested in the estate. The burden of proof is upon the person claiming under the administrator's deed to show that such notice was given.

JUDICIAL PROCEEDINGS—NOTICE.—Before the rights of a person can be determined by judicial sentence, he must have notice, actual or constructive, of the proceedings against him.

Action to recover the possession of certain real estate owned and occupied by one Palmer up to the time of his death. Both parties claim under him, the defendants by adverse possession, the plaintiff under a deed given by the administrator of Palmer. This deed was based upon an order of sale and sale made by the probate court on an oral application of the administrator to sell said land to pay the debts of the deceased. No public notice of

the application for such order was given. Judgment for defendants, and plaintiff appealed.

C. F. Thayer, for the appellant.

J. H. Potter, for the appellees.

* ANDREWS, C. J. The only substantial question presented by this appeal is, whether or not the deed under which the plaintiff claimed was valid to convey the real estate that had belonged to George W. Palmer in his lifetime. All the other questions in the case are included in this one.

* "It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act in pais, the party claiming under that deed is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he became a purchaser, and the evidence of them should be preserved as a necessary muniment of title": *Williams v. Peyton*, 4 Wheat. 79 (Marshall, C. J.); *Ransom v. Williams*, 2 Wall. 313, 319; *Early v. Doe*, 16 How. 610; *Mason v. Fearson*, 9 How. 248; *Thatcher v. Powell*, 6 Wheat. 119, 125; *Beekman v. Bigham*, 5 N. Y. 366; *Mutual Ben. Life Ins. Co. v. Tisdale*, 91 U. S. 238; *Wharton on Evidence*, secs. 176, 923.

To support his title under this deed, it was necessary for the plaintiff to show that the said administrator had a valid power to sell the land of his intestate, and that such power had been exercised in the manner required by law. To do this, he put in evidence the order of the court of probate and the other evidence mentioned in the finding.

By the law of Connecticut, as by the common law, the real estate of a deceased person vests at once in his heirs or legatees: 2 Blackstone's Commentaries, 201; 1 Swift's Digest, 113. George W. Palmer died intestate, and whatever real estate he owned at the time of his death vested immediately in his heirs, and could be taken from them only to satisfy some claim existing against him in his lifetime, or some condition arising in the settlement of his estate which made the sale of land necessary or advantageous, and then only in the manner pointed out by law: *Shelton v. Hadlock*, 62 Conn. 143; *Buel's Appeal*, 60 Conn. 65-67.

The several statutes and statutory changes according to which

the courts of probate have from time to time been empowered to authorize the sale of any interest which a deceased person, whose estate was being settled, had in such ⁷ real estate, have been very recently considered by this court in Buel's Appeal, 60 Conn. 65. We have no occasion to repeat that examination.

Originally, courts exercising jurisdiction over the settlement of estates of deceased persons had no authority whatever over the real property belonging to the deceased. In later times, such courts could, by the authority of the statutes, order the sale of so much, and only so much, of the land of the deceased as was necessary to pay any excess there might be of the indebtedness of the deceased over the value of the personal property. This was the law of Connecticut down to very recent times, as is shown in Buel's Appeal, 60 Conn. 65. But under the later statutes, as well as under all former ones, a court of probate, when ordering a sale of any of the real estate of a deceased person, is exercising a special statutory power. It is a power not regarded as one that pertains to the ordinary settlement of the estate. In all such cases, the rule is that the authority must be strictly followed, otherwise the order will be void: *Wattles v. Hyde*, 9 Conn. 10; *Watson v. Watson*, 10 Conn. 77; *Howard v. Lee*, 25 Conn. 1; 65 Am. Dec. 550; *Atwater v. Barnes*, 21 Conn. 237; *Parsons v. Lyman*, 32 Conn. 566, 571; *Potwine's Appeal*, 31 Conn. 383; *Thatcher v. Powell*, 6 Wheat. 127.

The evidence offered by the plaintiff was insufficient to support the deed. Whenever the land of a deceased person is sold by an order of the court of probate, the only prudent course is, that the application to the court should be in writing, so that the facts on which the sale of the land was sought, and on which the sale was authorized, should appear distinctly on the record. If an oral application could ever be tolerated, it could only be in a case when the record itself set forth the facts in full. In this case the record is fatally defective, and is not saved by the provisions of section 436 of the General Statutes.

But there is a much stronger reason. The statute (Gen. Stats., sec. 600), under which the court of probate acted, requires that there should be a hearing after a public notice, before any order for the sale of any land of a deceased person can be made. In this case, there is no evidence that any public notice, or any notice whatever, of the application to sell, was given ⁸ to the parties interested adversely in the estate sought to be sold. The order of sale was invalid for this reason. It appears that among the persons so adversely interested were the present defendants;

as also were the heirs of George W. Palmer. They had no notice of any hearing, nor did they have any hearing as to the proposed sale. As to them the proceedings before the court of probate were coram non iudice and wholly void. It is a principle of natural justice of universal obligation, that before the right of an individual can be bound by judicial sentence, he shall have notice, either actual or constructive, of the proceedings against him: *The Mary*, 9 Cranch, 126; *Bradstreet v. Neptune Ins. Co.*, 3 Sum. 607.

The evidence failed to show that the said administrator had power to sell the land described in the deed.

There is no error.

In this opinion the other judges concurred.

DESCENT OF REAL ESTATE.—The lands of an intestate descend to his heirs on his death, and may be sold under execution against them, subject, however, to the rights of the administrator in case they are needed for the payment of debts: *Douglass v. Massie*, 16 Ohio, 271; 47 Am. Dec. 375, and note. Under the Texas statute the whole estate immediately on death vests at once in the heirs subject to administration only: *Ansley v. Baker*, 14 Tex. 607; 65 Am. Dec. 136, and note.

NOTICE OF JUDICIAL PROCEEDINGS.—The sentence of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal: *Evans v. Johnson*, 39 W. Va. 209; 45 Am. St. Rep. 912, and note; *Great West etc. Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204.

EXECUTORS AND ADMINISTRATORS—SALES—NOTICE.—An order of publication is necessary to give a probate court jurisdiction to order a sale of land for the payment of debts: *Cunningham v. Anderson*, 107 Mo. 371; 28 Am. St. Rep. 417, and note. A sale of the land of a decedent to make assets for the payment of his debts is void and passes no title as against his heirs or devisees not made parties in some sufficient way to the proceeding in which the order directing such sale was made: *Perry v. Adams*, 98 N. C. 167; 2 Am. St. Rep. 328, and note. See, also, the notes to *Mitchell v. Bowen*, 65 Am. Dec. 760; *Haynes v. Meeks*, 70 Am. Dec. 710, and *Schnell v. Chicago*, 87 Am. Dec. 314.

PROBATE SALES.—In exercising its jurisdiction to order a sale of realty, a court need not comply literally with the provisions of the statute, a substantial compliance being enough: *Stuart v. Allen*, 16 Cal. 478; 76 Am. Dec. 551, and note.

FISHER v. FIELDING.

[67 CONNECTICUT, 91.]

JUDGMENTS—FOREIGN—PLEADING.—In an action upon a foreign judgment, the plaintiff need not specifically allege that the foreign court had jurisdiction of the action, of the parties, or of the subject matter, nor that the defendant had notice of its pendency, or was summoned to appear, or that any hearing or trial was had. These facts are necessarily implied in the averment that such court "duly adjudged" against defendant, and are indispensable conditions to the due adjudication of that court.

JUDGMENTS—FOREIGN—DEFENSES.—In an action upon a foreign judgment, it is no defense that the action in which the judgment was recovered was brought when the defendant was about to leave the foreign country, for the purpose of embarrassing and impeding him, and to prevent his having a fair opportunity to defend the suit, unless he prolonged his stay indefinitely.

JUDGMENTS—FOREIGN—CONCLUSIVENESS.—A foreign judgment in personam for a money demand, not procured by fraud, and rendered by a competent court of England against a citizen of one of the states of the American Union, who was personally served with process within the jurisdiction of the foreign court, is conclusive upon the merits in an action to collect the judgment brought in the state of which the defendant is a citizen.

EVIDENCE OF FORM OF FOREIGN JUDICIAL PROCEEDINGS.—The law and practice determining the form of judicial proceedings in a foreign court may always be shown by parol or other evidence.

JUDGMENTS—PARTNERSHIP DEMANDS—PLEADING.—Whenever a judgment on a partnership demand can lawfully be given in favor of the partnership, without stating the names of the copartners, it is, in effect, a judgment in favor of such copartners individually, and may properly be declared on as such in any proceeding subsequently brought to enforce it.

Action to recover on a foreign judgment. Plaintiffs were J. B. Clarke and J. E. H. Brown of Birmingham, England, doing business as partners under the firm name of Fisher, Brown & Company, and under such name they recovered the judgment sued on in England against the defendant, then and at the time this action was brought, a citizen of Connecticut. The complaint in the present action merely alleged that on April 3, 1889, at Birmingham, England, the high court of justice, queen's bench division, Birmingham district registry, in an action therein pending between plaintiffs and defendant, duly adjudged that defendant should pay plaintiffs the sum of two hundred and ninety-three pounds, thirteen shillings, and three pence, damages, and four pounds and fourteen shillings costs, which, in lawful money of the United States, is fourteen hundred and fifty dollars and four cents, and that defendant has not paid said sum or any part thereof. Demurrer to the complaint was

overruled, and demurrers to the defenses interposed by the defendant were sustained. Judgment for plaintiffs, and defendant appealed.

T. H. Hungerford and J. H. Kirkham, for the appellant.

H. G. Newton and L. W. Cleaveland, for the appellees.

¹⁰² BALDWIN, J. The plaintiff's complaint was drawn in the form authorized by the Practice Book, No. 169, page 107, in actions on a foreign judgment. In actions on a domestic judgment, the authorized forms (Practice Book, Nos. 166, 167, pp. 106, 107) state the fact, but not the manner, of ¹⁰³ its recovery; but, in declaring on the judgment of a foreign court, the approved averment is, that such court, "in an action therein pending between the plaintiffs and the defendant, duly adjudged that the defendant should pay to the plaintiffs" the sum in question. No court can "duly" adjudge such a payment, except in an action conducted in due course of law. Due course or process of law, with respect to such a judicial proceeding, necessarily involves reasonable notice to the defendant of the institution and nature of the action, given (unless this be waived), if he be a nonresident, by personal service within the jurisdiction, and a fair opportunity to be heard before a tribunal of competent jurisdiction. So much is due to every person from whom another seeks to recover in a judicial controversy before a court of justice: *Pennoyer v. Neff*, 95 U. S. 714, 733.

In the case of a domestic judgment, it is unnecessary to allege that these conditions have been fulfilled, because our law requires it, and it is to be presumed that the law has been obeyed. In respect to a foreign judgment, nothing can safely be taken for granted, and the Practice Book has therefore provided a different form of complaint.

The practice act was designed to simplify our legal procedure, and to abbreviate pleadings by the omission of all unnecessary allegations. The demurrer to the complaint, on the ground that it did not allege that the high court of justice, queen's bench division, Birmingham district registry, had jurisdiction of the action, or of the parties, or of the subject matter, nor that the defendant had notice of its pendency, or was summoned to appear, was therefore properly overruled. These facts were the indispensable conditions of a due adjudication by the foreign court; and whatever is necessarily implied is sufficiently pleaded. Nor was it cause of demurrer that the complaint did not state that any hearing or trial was had. The averment as to a due

adjudication implied that there was a fair opportunity for a hearing; and the defendant could not complain that he did not avail himself of it.

Three special defenses were pleaded, and, on demurrer, held insufficient.

¹⁰⁴ The second of these set up that the defendant was served with the process in the English action, while transiently stopping at a hotel in Birmingham, and when he was about to take his departure for home; and that such service was so made and timed for the purpose of embarrassing him, and obtaining an unjust and unfair advantage, by preventing his having a fair opportunity to make his defense, unless he prolonged his stay abroad indefinitely.

The rights of sovereignty extend to all persons and things, not excepted by some special privilege, that are within the territory of the sovereign. An alien friend, however transient his presence may be, is entitled to a temporary protection, and owes in return a temporary allegiance: Story on Conflict of Laws, secs. 18, 22, 541; *Carlisle v. United States*, 16 Wall. 147, 154.

The fact that the defendant was a foreigner, making but a brief stay in the country, and on the point of leaving it for his own, did not deprive the courts of England of all jurisdiction over him. The Roman maxim, *Actor sequitur forum rei*, if it has any force in English or American jurisprudence, operates as a permission, rather than a command. A man who is absent from his domicile can still be sued there; but he can also be sued wherever he is found, if personally served with legal process within the jurisdiction where the plaintiff seeks his remedy. The action must be brought, indeed, in a court to which the defendant is subject, and subject at the time of suit; but, unless protected by treaty stipulation or official privilege, he is subject to every court within reach of whose process he may enter. The Roman law allowed a nonresident to be sued where he had established a temporary seat of business, and, in some cases, where he had simply contracted a single obligation: Dig. V, 1, *de iudiciis*, et ubi quisque agere vel conveniri debeat, 2, 19, 24. The common law, so far as concerns the enforcement of a pecuniary liability, goes farther, and operates alike upon every private individual who may be found, however transiently, within the territory, where it is in force: Wharton on Conflict of Laws, sec. 653. An English court will take cognizance of an action on a contract ¹⁰⁵ wherever made and between whatever parties: *Holland on Jurisprudence*, 5th ed., 349. So the courts of this state

have always regarded transitory actions as following the person, and entertained them against foreigners found within our jurisdiction, whether brought by a foreigner or a citizen: *Place v. Lyon*, Kirb. 404, 406; *Potter v. Allin*, 2 Root, 63, 66, 67. "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country": *Sirdar Gurdial Singh v. Rajah of Faridkote* (1894), L. R. App. Cas. 670, 683.

The several states of the United States are, as respects their relations to each other, excepting only such of these as are regulated by the constitution of the United States, independent and foreign sovereignties: *Buckner v. Finley*, 2 Pet. 586, 590; *Pennoyer v. Neff*, 95 U. S. 714, 722. The effect in one of them of a suit brought or judgment rendered in another is precisely the same as if the latter were a foreign country, except so far as article 4, section 1, of the constitution of the United States may have established a different rule: *Hatch v. Spofford*, 22 Conn. 485, 498; 58 Am. Dec. 433; *M'Elmoyle v. Cohen*, 13 Pet. 312, 324; *Thompson v. Whitman*, 18 Wall. 457, 461. Notwithstanding that provision of the constitution and the statute passed to enforce it (U. S. Rev. Stats., sec. 905), the jurisdiction of a state court whose judgment is brought in question in another state is always open to inquiry. In that respect, every state court is to be regarded as a foreign court: *Hall v. Lanning*, 91 U. S. 160, 165; *Grover etc. Machine Co. v. Radcliffe*, 137 U. S. 287, 294, 298.

The courts of this state have never before had occasion to pass directly upon the defenses which may be open here to an action upon a judgment of a court of a foreign country, but they have often been called to consider the effect of legal proceedings instituted in one of the United States against a citizen of another; and the right to secure jurisdiction over a nonresident, who is served with process while ¹⁰⁶ transiently in the state, has been uniformly upheld: *Hart v. Granger*, 1 Conn. 154, 165, 173; *Wood v. Watkinson*, 17 Conn. 500, 504; 44 Am. Dec. 562; *Hatch v. Spofford*, 22 Conn. 485; 58 Am. Dec. 433; *Bishop v. Vose*, 27 Conn. 1, 11, 12; *Duryee v. Hale*, 31 Conn. 217, 223; *Easterly v. Goodwin*, 35 Conn. 273, 278; *O'Sullivan v. Overton*, 56 Conn. 102, 103.

These decisions are based on what has been deemed an accepted principle of international law, applicable between the

states, on no other ground than that they are, as to such a question, in the position of foreign nations to each other: *Grover etc. Machine Co. v. Radcliffe*, 137 U. S. 287, 298; *Lazier v. Westcott*, 26 N. Y. 146, 154; 82 Am. Dec. 404.

The English court having, then, jurisdiction of the parties, and presumably of the action, and the subject matter, as to which no question has been made, there is nothing in the defense now pleaded that the suit was brought as it was and when it was, "for the purpose of embarrassing and impeding the defendant, and to prevent his having a fair opportunity to defend said suit unless he prolonged his stay indefinitely at said Birmingham, and thereby said plaintiff sought to obtain an unjust and unfair advantage over said defendant." Where there is a legal right to do a certain act, the motive which induces the exercise of the right is of no importance: *McCune v. Norwich City Gas. Co.*, 30 Conn. 521, 524; 79 Am. Dec. 278; *Occum Co. v. Sprague Mfg. Co.*, 34 Conn. 529, 540. Nullus videtur dolo facere, qui suo jure utitur. The act complained of having been fully stated, and being one which the law permitted, whatever advantage it gave the plaintiffs could be neither unjust nor unfair, and these epithets are therefore of no effect: *Middletown v. Boston etc. R. R. Co.*, 53 Conn. 351, 359. They had the right to sue the defendant where they found him, or at his domicile in Connecticut, and in the choice of the forum were free to consult their own convenience, without regard to any loss he might sustain from "the law's delays": *Lovell v. Hammond Co.*, 66 Conn. 500, 512.

The demurrer to the second defense also admitted that the defendant, when served with the process of the foreign court, ¹⁰⁷ was president of the National Wire Mattress Company, a Connecticut corporation, and "was in nowise indebted to the plaintiffs in said suit, all of which was well known to said plaintiffs, but any claim that they had or may have had in which the defendant was in any way interested was a claim against said National Wire Mattress Company, all which was well known to said plaintiffs."

By this, and by the third defense, is raised the question as to how far a foreign judgment for a sum of money, rendered against one of our citizens by a competent tribunal, acting within its jurisdiction, should be held conclusive in a suit brought here for its collection.

It is the settled rule in England, that in an action instituted there on a foreign judgment, rendered by a court of competent jurisdiction, the proceedings before which were not so con-

ducted as to be clearly contrary to natural justice, the defendant cannot be allowed to go into the merits of the original cause of action, which were tried in the foreign court, unless it be necessary in order to support a claim that the judgment was procured by fraud. In such case, the merits may be retried, not to show that the foreign court came to a wrong conclusion, but that it was fraudulently misled into coming to a wrong conclusion. If the triers are convinced that the foreign judgment should have been rendered, on the merits, the other way, but still do not find that there was fraud, the defense fails: *Abouloff v. Oppenheimer*, L. R. 10 Q. B. Div. 295, 302; *Vadala v. Lawes*, L. R. 25 Q. B. Div. 310, 316, 319.

Judge Story, in his work on the Conflict of Laws, concludes a discussion of this subject, which is referred to in terms of commendation by this court in *Hatch v. Spofford*, 22 Conn. 501, 58 Am. Dec. 433, with the remark that the principle of reciprocity may not improperly be applied, and foreign judgments treated as conclusive in any country, if rendered in another where like effect is conceded to judgments of the courts of the former. "This," he observes, "is certainly a very reasonable rule; and may, perhaps, hereafter work itself firmly ¹⁰⁸ into the structure of international jurisprudence": *Story on Conflict of Laws*, sec. 618.

What is termed the comity of nations is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other, in considering the effects of their official acts. Its source is a sentiment of reciprocal regard, founded on identity of position and similarity of institutions.

The effect to be given to a foreign judgment in personam, for a money demand, must be determined either by the comity of nations, the rule of absolute reciprocity, or the personal obligation resting upon the defendant: *Hilton v. Guyot*, 159 U. S. 113.

Whichever test may be adopted, the result would be the same where the question arises between the courts of England and those of an American state which was once an English colony. They are engaged in administering the same system of jurisprudence, and are bound together by common institutions and modes of thought, no less than by sharing the same language and the same history. The close and extensive commercial intercourse also between the United States and England, and across the long Canadian frontier, makes it especially important

that the many controversies to which it must give rise should be promptly brought to a final settlement. When an American voluntarily places himself on English soil, he comes under a local and temporary allegiance to its sovereign which makes it his duty to respect any summons with which he may there be served to appear before the courts of the country.

The process served upon the defendant gave him full notice of the character and items of the plaintiffs' claim. He was bound either to enter an appearance or submit to the consequences of a default. He put himself under the power of the court, the moment he entered the territory which was subject to its authority. Nor did he put himself under its power, simply in the sense that it could issue process and render judgment against him, which would be of force within ¹⁰⁰ the limits of that territory. To that extent its judgments might be valid, though rendered without any personal service, upon a simple attachment of goods or by publication. But they would be mere expressions of the will of the sovereign, and impose no personal obligation which other sovereigns could recognize or enforce: *Bischoff v. Wethered*, 9 Wall. 812. Judgments rendered against a foreigner who is personally served when personally present stand on a ground wholly different. These and these only, so far as actions for money damages are concerned, are entitled to full respect in the courts of other countries, by the principles of international law. As between the United States and Great Britain, it may be fairly assumed that every citizen of either, while within the territory of the other, assents to the jurisdiction of its courts of justice over all pecuniary controversies to which he may be duly made a party before them.

This doctrine, that presence confers jurisdiction, may not be one recognized in Roman law or the modern civil law: Dig. XLII, 1, *de re judicata*, etc., 53; Story on Conflict of Laws, secs. 611-617; Wharton on Conflict of Laws, sec. 653; Moulon's *Réquisitions Ecrites sur le Code Civil*, Tom. III., sec. 1469. The Romans viewed law as personal rather than territorial in its operation. The traveler carried with him the shield of his own law; and on the same territory there might be, even for its permanent inhabitants, two systems of jurisprudence of equal force, each governing a different race. Such principles of government find no place in the common law of England and of Connecticut. With us, the law of the land protects all who stand upon it, and whenever a right has been violated, gives a remedy, without regard to the nationality of the offender.

In our opinion, the queen's bench division of the high court of justice had full jurisdiction to decide the original controversy between the parties to this action. The defendant accepted the forum, when he voluntarily placed himself on English soil, and so came under an implied obligation to respect such legal process as might be served upon him there, to the extent of satisfying any resulting judgment, duly rendered ¹¹⁰ for a pecuniary demand. The law raises this obligation because the interests of human society require it; and it is not escaped by departing from one country into another, except so far as a judicial sanction may be withheld because reciprocity is refused. The maxim, *Interest reipublicae ut sit finis litium*, is not restricted in its application to controversies or suits originating in the state before whose courts it is invoked. It does not rest on the excellence of any particular system of jurisprudence. It governs wherever the parties come, in the last resort, before a court constituted under an orderly establishment of legal procedure. No one who has been or could have been heard upon a disputed claim, in a cause to which he was duly made a party, pending before a competent judicial tribunal, having jurisdiction over him, proceeding in due course of justice, and not misled by the fraud of the other party, should be allowed, after a final judgment has been pronounced, to renew the contest in another country. The object of courts is hardly less to put an end to controversies, than to decide them justly.

The defenses in question do not, in terms, charge the plaintiffs with fraud. The averments that they well knew, when they brought their suit, that the defendant was in no wise indebted to them, and that the only claim they had or might have, in which he was in any way interested, was one against the corporation of which he was an officer, do not, standing alone, import that they attempted to impose and did impose upon the court. Fraud is never presumed. The claim against the corporation may have been such that the defendant could be held collaterally liable upon it, although it remained the debt of the corporation only. It may have been contracted by him in behalf of the corporation, but without its authority. It may have arisen from a transaction that was *ultra vires*, but which he had falsely represented to be within its powers.

If he was in no way liable to the plaintiffs, the place to show it was in the English court. A state of facts quite similar to that here alleged was set up and established by proof, in one of the leading cases in our reports. A citizen and resident of Con-

necticut, while transiently in New York, was ¹¹¹ served with process from one of her courts, in an action based upon a contract made by the plaintiff with a Connecticut corporation, but which, in his declaration, he had, as the defendant asserted, "falsely assumed" to have been made by the latter personally, and on his own personal credit. The defendant entered no appearance, and judgment by default was rendered against him, for the sum demanded, to collect which suit was instituted against him here. He thereupon brought a bill in equity for an injunction, and in addition to what has been already stated, alleged and proved that the plaintiff's attorney assured him, after the service of the process, that a mistake had been made in suing him individually instead of the corporation, and thereupon agreed that nothing further should be done in relation to the action, without previous notice to him; in consequence of which assurance he had omitted to enter an appearance. The injunction was granted on this last ground; but that founded on the false averments in the declaration in the New York suit was rejected as untenable, in these words: "A suit was commenced in New York, against the present plaintiff by virtue of which, and of the process thereon, he was arrested, and such proceedings were had that a judgment for about six hundred dollars was obtained against him, on a cause of action founded wholly on a contract, with which, personally, he had nothing to do; but which was entered into by him, as the agent of the Norwich Foundry Company, a corporation with which the plaintiff in that suit had had previous dealings, and was well known to him at the time as the party with whom he was contracting. If this was all, the plaintiff would have no remedy, however unjust it might be, to compel him to pay that judgment. Still, as he was duly served with process in that suit, it was his duty to make defense in it; and an injunction ought not to be granted to relieve him from the consequences of his own neglect": *Pearce v. Olney*, 20 Conn. 544, 555; *Embry v. Palmer*, 107 U. S. 3, 12, 13.

The doctrine of *Pearce v. Olney*, 20 Conn. 544, is not less applicable to the case at bar because the judgment in question there was one of a sister state, while here it emanates from the court ¹¹² of a foreign country. It is true that fraud in procuring it is no defense at law to an action on a judgment of the former description: *Christmas v. Russell*, 5 Wall. 290. It is, however, an equitable bar to its enforcement, just as it is in case of a domestic judgment. A judgment may be good at law, and yet equity may deem it against conscience for the plain-

tiff to stand upon his legal rights. In such a case, it is because the judgment is good at law that equitable relief is granted.

In *Pearce v. Olney*, 20 Conn. 544, these principles governed the decision. An injunction was granted on account of a fraud as to a matter which could not have been put in issue in the New York suit. An injunction was refused, on account of a fraud as to a matter which could have been put in issue in the New York suit. In the case at bar, by the force of the practice act, equitable defenses could be pleaded by way of answer, but the defendant had no equity, because the question of his indebtedness to the plaintiffs, if it was to be contested, should have been put in issue before the English court: *Bank of Australasia v. Nias*, 16 Ad. & E., N. S., 735; 4 Eng. L. & Eq. 252.

Nor did the case of *Pearce v. Olney*, 20 Conn. 544, rest on any special duty of a citizen of one of the United States, as such, to submit himself to the jurisdiction of a court of another state, before which he may be duly summoned. The conclusiveness of a judgment rendered in one state, when relied on in another, is in no manner dependent on the citizenship of the parties to it. It has equal weight whether they are Americans or foreigners. The constitution of the United States secures to the citizens of each of them certain privileges and immunities as respects every other state, but it imposes upon them no particular duties in return. It places the citizen of one state, who enters the territory of another, no more under the power of its courts, than if he were an alien visitor: See *Bonaparte v. Tax Court*, 104 U. S. 592, 595.

It follows that the judgment in suit was conclusive as to the merits of the cause of action, and that the several special defenses, so far as they sought a retrial of them, were properly overruled. The defendant had already had his day in court.

The present action was brought by two individuals, described as partners doing business under the firm name of Fisher, Brown & Company, and the English judgment was alleged in the complaint to have been recovered by "the plaintiffs," on April 3, 1889. Upon the trial of the issue closed upon the first defense, they offered in evidence a copy of the record in the English suit, in which the plaintiffs were named throughout simply as Fisher, Brown & Company. They also offered at the same time certain depositions tending to prove that the plaintiffs constituted, during the whole of the year 1889, the copartnership of Fisher, Brown & Company, and as such recovered the judgment in question; and that, by the laws and rules of court in

England, any persons claiming as copartners could sue in the name of the firm of which they were members at the time of the accruing of the cause of action. The defendant objected to all this evidence, on the ground that the record offered varied from that alleged, and did not show whether Fisher, Brown & Company was a corporation or copartnership, or, if a copartnership, that the plaintiffs were members of it, and could not be helped out by parol; and also claimed that the depositions did not show that the plaintiffs were members of such a firm when the original cause of action arose.

The court committed no error in overruling these objections and claims, and admitting the evidence. The law and practice determining the form of judicial proceedings in a foreign court may always be shown, and shown by parol. The testimony that the plaintiffs were the members of a firm styled Fisher, Brown & Company throughout 1889, and as such recovered the judgment in suit, gave an intelligible meaning to the words "Fisher, Brown & Company," as used in the record of the high court of justice, and in connection with it tended to show that they were also copartners when the cause of action accrued; for else they could not have been entitled to such a judgment, under the rules governing suits by copartners in the copartnership name. Wherever a judgment ¹¹⁴ on a partnership demand can lawfully be given in favor of the copartnership, without stating the names of the copartners, it is, in effect, a judgment in favor of such copartners, described by their copartnership name, and may properly be declared on as such, in any proceedings subsequently brought to enforce it. This is merely describing it according to its legal effect.

The defendant admitted that he was the person against whom the English judgment was rendered, but put the plaintiffs on proof that they were the parties by whom it was recovered. Extrinsic evidence of this was therefore required, and the depositions were clearly admissible to identify particular individuals as those to whom the description of the judgment creditors in the record, by a partnership name, properly applied.

There is no error in the judgment appealed from.

In this opinion Andrews, C. J., Torrence, and Fenn, JJ., concurred.

Mr. Justice Hamersley dissented on the ground that a judgment rendered in a foreign country, though regularly obtained, is only prima facie evidence of debt, and that the defendant therein may impeach the justice of it when sued thereon in his own country, or

he may show that it was irregularly or unduly obtained. The learned judge maintained that the defense set up by the defendant in the present action, that he was served with process in the foreign action, while transiently stopping at a hotel in that country, and, when he was about to take his departure for home, that such service was so timed and made for the purpose of embarrassing him and obtaining an unfair and unjust advantage by preventing his having a fair opportunity to make his defense, unless he prolonged his stay abroad indefinitely; and that the cause of action on which the notice to appear in court was based, did not arise in such foreign country and did not concern any conduct, act, or contract of the defendant done or entered into within the jurisdiction of the courts of that country, if proved, constituted a good defense to the present action, that the foreign judgment was not conclusive, and that evidence was admissible to prove the defense set up.

Judge Hamersley stated his conclusion in the following words: "In the present case, the facts alleged in the second defense conclusively show that no obligation can be predicated in respect to the judgment produced, except that of obedience imposed by the act of a foreign sovereign, which has no extraterritorial force, and cannot support this action; that the facts technically established by the judgment are conclusive only for the purposes of the action in which it was rendered, and within the limits of the foreign state; that the conditions which under our law support a legal obligation between the parties arising from the equities of the case and the ties of natural justice, have no existence. The operation of the principle of *res judicata* upon facts actually adjudicated, and the equities involved by some actual participation in such adjudication, are essential to the quasi contract obligation this action is brought to enforce. These conditions are negatived by the allegations of the second defense. The demurrer to that defense should therefore have been overruled."

JUDGMENTS, FOREIGN—ACTION ON—PLEADING JURISDICTION.—A complaint on a foreign judgment need not allege that the court that rendered it had jurisdiction either of the cause or the parties. A judgment of a foreign court complete and regular on its face is *prima facie* valid. *Gunn v. Peakes*, 36 Minn. 177; 1 Am. St. Rep. 661, and note.

JUDGMENTS—ACTIONS ON FOREIGN.—DEFENSES AVAILABLE IN. See the note to *Gunn v. Peakes*, 1 Am. St. Rep. 663.

JUDGMENTS—FOREIGN—CONCLUSIVENESS OF.—A foreign judgment is conclusive upon the merits, and can be impeached only by proving that the court rendering it did not have jurisdiction of the subject matter of the action or of the person of the defendant or that it was procured by fraud: *Dunstan v. Higgins*, 138 N. Y. 70; 34 Am. St. Rep. 431, and note with the cases collected. See, also, the extended notes to *Lazier v. Westcott*, 82 Am. Dec. 412-414, and *Messier v. Amery*, 1 Am. Dec. 324-326.

DAVIDSON v. HANNON.

[67 CONNECTICUT, 312.]

EXEMPTIONS—IMPLEMENTS OF TRADE.—A photographic lens used by a photographer in his business is an implement of his trade, and, as such, is exempt from attachment and execution.

L. F. Robinson, for the appellant.

A. Perkins, for the appellees.

³¹³ FENN, J. This is an action of replevin to recover property attached. The only question necessary for us to decide upon this appeal is, whether the court below erred in holding such property was not exempt from attachment and execution, under that clause of General Statutes, section 1164, which exempts "implements of the debtor's trade."

The property in question is a photographic lens. It belonged to one Peters, for whose debt it was attached. He was a photographer, with a place of business in Hartford. He had mortgaged his photographic apparatus and materials, including this lens, to the plaintiff. This mortgage was duly recorded. The plaintiff never had, before the attachment, the possession of said lens, nor the right to the possession of it, except as such mortgagee. Some time after said mortgage, and before said attachment, said Peters gave up his place of business and stored his photographic apparatus at his residence in Hartford. He there fitted up a room in his barn for the purpose, and continued up to the time of the attachment to take photographs for friends and neighbors for pay, when the opportunity offered. A lens similar to the one in question was a useful and necessary implement to Peters in his photographic work.

The statute in question is ancient, though it has been varied somewhat from time to time, both in form and in substance. Several of its provisions have come before this court for consideration, and, generally, it may be said, that in the ³¹⁴ decisions a liberal construction in favor of the debtor has been adopted. A single reference will be sufficient to illustrate this, as shown in cases referring to other clauses than the one now before us.

In *Hitchcock v. Holmes*, 43 Conn. 528, the words, "household furniture necessary for supporting life," were construed. It was said: "No fixed or precise definition can be given to the word "necessary" as used in the statute; the facts in each case must control its interpretation. Of course, it was susceptible of

being confined within very narrow limits; for we know, as a matter of fact, that many families exist, although they are enabled to use very few of the articles to be found in an ordinary household, and these in their rudest forms. But a proper regard for plain legislative intent requires us to use it in a broader, more liberal, and more humane sense; to pass beyond what is strictly indispensable, and include articles which to the common understanding suggest ideas of comfort and convenience."

The cases in this state which more directly relate to the clause of the statute now in question are *Patten v. Smith*, 4 Conn. 450; 10 Am. Dec. 166; *Atwood v. De Forest*, 19 Conn. 513; *Seeley v. Gwillim*, 40 Conn. 106; *Enscoe v. Dunn*, 44 Conn. 93; 26 Am. Rep. 430. We will briefly refer to each. In *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166, the question was as to the meaning of the word "tools," in the phrase then used in the statute, "necessary apparel, bedding, tools, arms, or implements of his household, necessary for upholding his life." It was held that an apparatus for printing, consisting of a printing press, cases, types, etc., might be tools within the meaning of that statute. The court said that printing was unquestionably a mechanical employment; that the statute concerned the public good, which had a deep interest in the prosperity of mechanical employments, and should be construed liberally; that in relation to the natural description of the goods, of which an exemption is demanded, the exposition of the law ought to be liberal.

In *Atwood v. De Forest*, 19 Conn. 513, the words now under consideration, "implements of the debtor's trade," which had been inserted into the statute in 1821 and have since continued ³¹⁵ there, were construed. The question in that case was whether the debtor was a mechanic or a manufacturer—whether the articles claimed to be exempt were tools or machinery. The work carried on was that of making spectacles. It was held that the articles employed were not exempt; not because spectacle making was not mechanical, not a trade, but because the facts showed the parties were manufacturers, and "that they were not spectacle makers within the meaning of the statute." The court, in defining trade, said: "By the word 'trade,' as used in this statute, we suppose is meant the business of a mechanic, strictly speaking; as the business of a carpenter, blacksmith, silversmith, printer, or the like; and that it was not intended to include the business of a manufacturer, any more than it was intended to extend to the business of a merchant or farmer." It is evident that the court did not intend, by the use of such lan-

guage as we have quoted—especially when used for the purpose and in the connection in which it appears—to give a strict or narrow meaning to the word “mechanic,” but only to show that distinction to which we have referred and upon which the decision rests. Concerning this, the court adds: “If it be said that the distinction between a mechanic and a manufacturer is not as precise as is desirable and that there is difficulty in determining to which class certain individuals belong, especially, in cases where men are engaged in both the business of a mechanic, as well as that of a manufacturer, the answer is, the difficulty is not in the distinction itself—that seems to be precise enough—but it is in the application of the distinction to particular facts; and that is a difficulty common to the application of most of the rules of law, and, in doubtful cases, it can only be solved by the finding of a jury.”

In *Seeley v. Gwillim*, 40 Conn. 106, a similar question as to the distinction between a mechanic and a manufacturer, between machinery and tools, arose. In that case, it appeared that a debtor carried on the business of bookbinding and manufacturing blank-books, working himself and employing four hands. Certain of the articles were held to be exempt, and ³¹⁶ others not. The rule applied is thus stated: “His [the debtor] being a manufacturer does not prevent the statute from operating to exempt the implements of his trade, so far as they are used by him in person. On the other hand, the fact that he is carrying on a trade will not extend the provisions of the statute to articles employed by him as a manufacturer merely.”

In *Enscoe v. Dunn*, 44 Conn. 93, 26 Am. Rep. 430, it was held that the horses and carts of a person engaged in the business of carting coal are not protected from attachment as tools of a debtor's trade. This, it was stated, could not “be said to be the ‘business of a mechanic,’ either by definitions from the books, or by the common understanding and speech of men.” Surely this, as it seems to us, is evident enough.

The rules adopted, the principles established, by the cases in the construction of this statute, are binding upon us at the present time. The fact that the language in question has continued unchanged in the statute for three-quarters of a century indicates conclusively that such language, so liberally construed as it has been by the courts, declares the public policy of the state in relation to the matter. If this be doubted, the remedy of those who thus question lies in an appeal to that body which enacted, and has been content to continue, the law. We think

that to such vocations as those of carpenter, blacksmith, silver-smith, printer, bookbinder, spectacle maker, which have been recognized and declared by this court to be trades—so clearly so as not to require the statement of any reason or explanation why—there is no reason why the vocation of a photographer, carried on as it was by Peters, as stated in the finding, should not be added. Certainly, he was not a manufacturer, as that word has been defined by this court. If his business, carried on in any possible way, could be held to be a trade, we think it should be so held upon the facts before us. He depended, in the conduct of his craft, upon the labor of his hands. It does not appear, nor, taking judicial notice of matters in the realm of common observation and knowledge, are we led to think, that he required for his work either a ³¹⁷ liberal or an extensive education. In all probability, some at least, and perhaps all, of the other vocations referred to above as recognized trades, would require more special knowledge, apprenticeship, and training for their successful exercise than this work of photography as ordinarily carried on, and presumably in this case. We conclude, therefore, that the court below erred in holding the article in question was not exempt.

There is error in the judgment complained of, and it is reversed.

In this opinion the other judges concurred, except Hamersley, J., who dissented.

EXEMPTIONS—IMPLEMENTS OF TRADE: See the discussion of this subject in the notes to *Files v. Stevens*, 30 Am. St. Rep. 334, and *In re McManus*, 22 Am. St. Rep. 253; also the extended notes to *Kilburn v. Demming*, 21 Am. Dec. 545, *Richards v. Hubbard*, 47 Am. Rep. 190, and *Baker v. Willis*, 25 Am. Rep. 63.

MANSFIELD v. SHELTON.

[67 CONNECTICUT, 320.]

DEVISE—ESTATE CREATED BY.—If the primary gift made by will vests in the first taker an absolute interest in personal, or an absolute fee simple in real, property, it exhausts the entire estate, so that there can be no valid remainder.

DEVISE IN FEE made by will cannot be reduced to a life estate by mere implication from a subsequent gift over, but may be by subsequent language clearly indicating such intent and equivalent to a positive provision.

DEVISE.—A LIFE ESTATE expressly created by will is not converted into a fee absolute or qualified, or into any other form of

estate greater than for life, merely by reason of there being coupled with it a power of disposition, however general or extensive.

DEVISE INCLUDING POWER OF DISPOSITION—WORDS VESTING LIFE ESTATE.—Under a devise by a husband to his wife of the residue of his estate, "to be used and appropriated by her so much as she may wish for her happiness, without any restrictions, or limitations whatever," and upon her decease, the payment of her debts, and the settlement of her estate, the remainder to vest in a trustee in trust for the children of a third party during their lives, the wife takes a life estate only, and the trust to take effect upon her death is valid.

W. L. Bennett, for A. L. Woolson, W. R. Shelton, and the executor under the will.

J. F. Kernochan and S. H. Fisher, for Grace Martin, W. Buddington, Z. Grenell, I. Grenell, and Julia Pierson.

³⁹¹ **FENN, J.** This is a case reserved by the superior court for the advice of this court. The questions presented relate to the construction and legal effect of provisions contained in the last will and testament of Charles Shelton, who died about June 4, 1888, seized and possessed of an estate consisting of real and personal property, of the value of about thirty-three thousand dollars.

That portion of the will of Charles Shelton material to the present inquiry is as follows:

"All the rest and residue of my estate, both real and personal and wherever situated, I give, devise, and bequeath to my said wife, to be used and appropriated by her, as much as she may wish for her happiness, without any restrictions ³⁹² or limitations whatsoever; and upon the decease of my said wife, and after the payment of all her debts and the settlement of her estate, I give, devise, and bequeath whatever of property or estate of such residue and remainder shall remain undisposed of at the decease of my said wife to Edward A. Cornwall, of Cheshire, of said New Haven County, in trust, to keep and hold the same, or invest the same, as said trustee shall deem to the best advantage, for the use and benefit of the children of the present wife of my nephew Charles W. Shelton, and of the survivor or survivors of such children, so long as they shall live, or any one or more of them; and that such trustee pay and deliver to such surviving children, in equal portions to each, from time to time, and at least as often as once in each year, the net avails of the income of said estate, so given to him in trust, as aforesaid, upon the annual settlement of his trust account with the court of probate; provided, nevertheless, that in the event of the de-

cease of my said wife, my said sister, Grace A. Buddington, shall, upon the finding of the judge of probate in which my estate shall be pending for settlement, be found to be in needy and in necessitous circumstances, then, upon such finding and decree of such court of probate, I give and bequeath to the said trustee one-third of such residue of said estate so given to my said wife, for the use of my sister during her life, and the remaining two-thirds of the same to be held for the use and benefit of the children of my said nephew's wife, the income of which one-third shall be paid to my said sister annually, so long as she shall live; and upon her decease the whole of said income is to be paid, as aforesaid, to said children and the survivor of them. But if my said nephew shall die without leaving issue surviving him by his present wife, then such part or portion of said residue or remainder of my estate as shall remain undisposed of at the decease of my wife I give, devise, and bequeath to my brother, William R. Shelton, and my said sister, and to their heirs forever, to be equally divided between them, share and share alike; and, in the event of the death of my brother before the decease of my wife, the portion of said ³⁹³ residue so given to my said wife which would thus belong to him, if living, I give, devise, and bequeath to his wife, Anna L. Shelton, and her heirs forever."

Soon after the death of the testator, his will was duly probated in the court of probate for the district of New Haven, and the widow, Caroline M. Shelton, who was named as executrix, duly qualified as such. In July, 1889, she returned her account with the estate, and the same was accepted by the court of probate. After the due settlement of the estate and the payment of the legacies bequeathed by his will, she possessed and enjoyed the residue thereof until her death, which occurred June 28, 1894. Edward A. Cornwall, the trustee named in said will, having died before the decease of Charles Shelton, the said Caroline M. Shelton, on the fourteenth day of February, 1893, was duly appointed by the court of probate for the district of New Haven, trustee under the said will in the place of the said Edward A. Cornwall, deceased, and duly qualified as such trustee. The plaintiff, who is the present trustee under the will of said Charles Shelton in the place of said Caroline M. Shelton, deceased, has received and is possessed of real and personal property of the value of about twenty-three thousand dollars, being the rest and residue of the property of the said Charles Shelton, undisposed of by the said Caroline M. Shelton in her lifetime

under the will of her husband, said Charles Shelton, deceased.

The first and only difficult question presented is stated thus in the complaint: "Whether, under said will of Charles Shelton, the rest and residue of his estate, devised and bequeathed to his wife, as therein set out, became her property and estate in fee, or whether she took therein an estate for life only; and whether or not the disposition attempted to be made of whatever property or estate of such residue and remainder as should remain undisposed of at the decease of said Caroline M. Shelton, and the settlement of her estate, is valid by way of executory devise."

The more recent cases in this state which merit consideration in the present examination are *Sheldon v. Rose*, 41 Conn. 371; *Lewis v. Palmer*, 46 Conn. 454, 455; *Glover v. Stillson*, 56 Conn. 316; *Peckham v. Lego*, 57 Conn. 553; 14 Am. St. Rep. 130; *Hull v. Holloway*, 58 Conn. 210; *Central Meth. etc. Church v. Harris*, 62 Conn. 93; *Sill v. White*, 62 Conn. 430. These decisions are in harmony and consistent with each other, and they establish certain rules or principles as the settled law of this state, which may be stated thus: 1. If the primary gift conveys and vests in the first taker an absolute interest in personal, or an absolute fee simple in real, property, it exhausts the entire estate, so that there can be no valid remainder; 2. A life estate expressly created will not be converted into a fee, absolute or qualified, or into any other form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive; 3. An express gift in fee will not be reduced to a life estate by mere implication from a subsequent gift over, but may be by subsequent language clearly indicating intent and equivalent to a positive provision; 4. Except as restrained by the foregoing limitations—indeed in some instances apparently impinging upon them—the question as to whether the primary gift is in fee, so as to exhaust the entire estate, is in each case to be decided upon a careful examination of the entire will, aided by legitimate extrinsic evidence, to ascertain the actual intent of the testator; which intent, when so discovered and made obvious, is controlling.

In illustration of the scope, limitations, and application of the foregoing rules, a reference to language used by this court in some of the cases cited will be appropriate. In *Sheldon v. Rose*, 41 Conn. 371, the testator gave his wife, in case of her remarriage, "only one-half of the property, . . . which shall go to her for her support during her natural life." The will con-

tained no residuary clause, and there was no specific disposition of any possible remainder, after the death of the wife. This court held the wife had an estate for life only, and not in fee, and so the estate became intestate when the wife's interest terminated. In reaching this conclusion, the ³⁰⁵ court, by Carpenter, J., said: "It is not clear that the testator intended to give her an absolute estate, while the language used seems to indicate a contrary intention. . . . We have come to the conclusion that the testator did not intend to give an estate in fee." The opposite result in *Central Methodist etc. Church v. Harris*, 62 Conn. 93, is based on the same grounds. In that case, the testator gave property to his wife, "and to her heirs forever," with a proviso that, "whatever of the same, if any, she may leave not used by her for her support and comfort, I give and bequeath." The court, by Carpenter, J., said: "The intention to give a fee is clear; and we discover in the subsequent words no evidence of an intention to revoke the gift. It is a bald attempt to limit a fee upon a fee, which the law will not allow." In *Lewis v. Palmer*, 46 Conn. 454, the language of the devise was: "I give to my sister S the use of all the rest of my real estate during her natural life, and for her to dispose of as she may think proper, right, or just." This court, by Carpenter, J., said: "We find no case where a life estate created by express words is enlarged to a fee by the power of sale. There are cases where there is an apparent life estate with power of disposal, but without any disposition of the remainder, in which it is held that the devisee takes a fee. There are other cases where there is a devise of an estate generally, with an express power to sell, in which it is held that the devise over of the remainder is void for repugnancy. But we think none of the cases go so far as to disregard the obvious and acknowledged intention of the testator. All seem to regard that when discovered as conclusive. Courts differ widely as to what the intention is, and oftentimes different courts [might he not have said the same court?] will draw different conclusions from similar language, and sometimes even from language precisely identical. But usually there will be found something in the will, or something omitted, or something in the situation and circumstances of the estate and the parties interested, to account for these apparent differences; and most of them, it is believed, may in that way be reconciled." In *Glover v. Stillson*, 56 Conn. 316, this court ³⁰⁶ by Carpenter, J., said: "We now come to the main question, Does the second clause give a life estate or a fee? There are two methods of con-

struing wills: one is to ascertain the intention of the testator and give effect to that, so far as it is consistent with the policy of the law. Within those limits, all artificial rules of construction must yield to the intent. The other is to apply legal rules and construe the language used accordingly. In the latter case, it cannot be denied that the intention of the testator is often defeated. This case affords an excellent illustration. We are asked to say, as matter of law, that the power of sale enlarges an express life estate to a fee. If we do so, what becomes of the intention of the testator? His intention to give pecuniary legacies to the parties named and the residue to the orphan asylum is just as certain, and, we may add, just as provident, as the intention to provide for his sisters; and that intention, by the construction contended for, is wholly defeated. The power of sale may, in doubtful cases, aid in ascertaining the intention; but to give it an artificial and technical force, and thereby defeat the manifest intention of the testator, is wholly inadmissible." In *Peckham v. Lego*, 57 Conn. 553, 14 Am. St. Rep. 130, this court by Loomis, J., quotes the above language from *Glover v. Stillson*, 56 Conn. 316, and adds: "These utterances we think are in accord with the decided preponderance of judicial authority in the United States." Similar, and perhaps even stronger, expressions are used in *Hull v. Halloway*, 58 Conn. 210, and in *Sill v. White*, 62 Conn. 430.

The leading case of *Smith v. Bell*, 6 Pet. 68, opinion by Chief Justice Marshall, *Brant v. Virginia Coal etc. Co.*, 93 U. S. 326, 334, and *Giles v. Little*, 104 U. S. 291, 296, have been frequently cited by this court, and are among the almost numberless decisions in accord with the foregoing doctrines. In the light and with the assistance of these established principles, let us approach the question presented in this case.

In the language of the clause before us, there is no express gift of a life estate, as in many of the cases cited, or of a fee, as in *Central Methodist Church v. Harris*, 62 Conn. 93. Such arbitrary and technical rules, therefore, as have been in some jurisdictions, indeed in very many cases, applied to such expressions, are not relevant here. The testator at the outset gave his residuary estate to his wife; whether in fee or for life, he did not say. True, had he stopped there and the will contained nothing further, the effect would have been to give his wife a fee in the realty, and an absolute estate in the personal property. But this would have been because his intention to do this would be clearly manifest. If there was anything else in the will in-

dicative of the testator's intent concerning the matter, it would require consideration and be given full weight. The testator did not stop here. He continued, "to be used and appropriated by her." This also would indicate an intention, if this were all, that the gift be absolute; but he added "as much as she may wish for her happiness, without any restrictions or limitations whatsoever." This essentially modifies the preceding words and, taking the entire language down to this point, contained in and forming a part only of a single sentence, shows the purpose of the testator was that all of his residuary estate should go into the hands of his wife, not as an absolute estate—not "to her and her heirs forever," as was the case and expressly stated in *Central Methodist Church v. Harris*, 62 Conn. 93—but for life, the limit beyond which her earthly happiness could not extend, with full power of disposition, for the promotion of such happiness, of as much of the estate as she might wish for that purpose; which it is evident the testator believed would not be all, as, in fact, it was not. Had the testator stopped here, the case would, we think, be stronger in support of the claim that only a life estate was intended to be given to his wife, though coupled with a power of disposition, than in *Sheldon v. Rose*, 41 Conn. 371. Certainly, it could not have been said, as in *Central Methodist Church v. Harris*, 62 Conn. 93, that the intention to give a fee was clear.

But we have not even yet considered the most significant part of the testator's language. He continues: "And upon the decease of my said wife, and after the payment of all her debts and the settlement of her estate, I give, devise, and bequeath whatever of property or estate of such residue and ~~and~~ remainder shall remain undisposed of at the decease of my said wife, to Edward A. Cornwall, of Cheshire, of said New Haven county, in trust," adding somewhat lengthy and elaborate trust provisions for the benefit of those unprovided for in any other portion of the will, who were apparently natural objects of the testator's bounty—provisions which can have no operation except in case that some of the residuary estate of the testator remained undisposed of under the previous part of the residuary clause, and by the wife acting within the scope of its limitations.

Here, then, following the gift to the wife, and introductory to the trust provision, in the residuary clause was language also very unlike the language of the will construed in *Central Methodist Church v. Harris*, 62 Conn. 93. Here was no proviso concerning whatever property, if any, might be left. No doubt

seems to have existed in the mind of the testator concerning this. There were no children to be provided for. The wife was to have full provision for herself, but limited to herself. Even her debts, if any, were to be confined to such as she herself might contract for things necessary or desired for her personal happiness, and, as ascertained upon the settlement of her estate, were to be paid; but then, whatever remained of the residuary estate of the testator was to go as his, not her, gift, devise, and bequest, and to those who were his, and not necessarily her, natural objects of bounty. Our conclusion is, that only a life estate vested by virtue of the will in the widow of the testator, and that the subsequent provisions of the residuary clause are valid and operative.

The recent case of *Chase v. Ladd*, 153 Mass. 126, 25 Am. St. Rep. 614, involved the construction of language so similar to that, but stronger in support of the claim that it created an absolute estate than that before us, with the same result which we have reached, that we deem a reference fitting, as indicating the views of a sister jurisdiction in which such questions, as shown by a long line of decisions, have received unusual examination. In this case, the testator gave and devised all his property to his wife, "to her own use and behoof forever," but provided that if any of such property should not be expended for her support and maintenance during her lifetime, ³⁰⁰ it should be disposed of in the manner designated in the will. It was held that the language used did not vest the property in the wife absolutely, but merely conferred upon her a right to use it for her support, and, if necessary for that purpose, to dispose of it during her life, leaving whatever she had not so disposed of to vest after her death in other persons as provided in the will. The same result was reached in *Kent v. Morrison*, 153 Mass. 137, 25 Am. St. Rep. 616, where the language was: "I give, devise, and bequeath to my beloved wife, Mehitable Kent, all the estate, both real and personal, that I die seised and possessed of, giving her full power to sell and convey the same by deed (part or all of it), and the proceeds thereof are to be used for her comfort, and otherwise as she may think proper."

The other questions presented in the case may be directly answered. They do not require discussion. As bearing upon them, however, it should be stated that it appears that Grace A. Buddington, the sister of said Charles Shelton, named in his said will, died before the decease of the said Caroline M. Shelton. Charles W. Shelton, named in said will, has died, leaving

two children parties to this suit. The mother of said children was, at the time said will was made, and at the time of the death of said Charles Shelton, the wife of said Charles W. Shelton.

The superior court is advised: 1. That the wife of Charles Shelton took under his will a life estate only, not an absolute property or fee simple; and that the disposition made in such will of whatever property or estate of the residue and remainder which remained undisposed of at the decease of Caroline M. Shelton and the settlement of her estate is valid; 2. The trust created by said will for the benefit of the children of Charles W. Shelton is valid; 3. The fee of said property, in the contingency which has happened, was not disposed of, and it vested as intestate estate in the heirs at law of said Charles Shelton.

In this opinion the other judges concurred, except Hamersley, J., who dissented.

DEVISE—ESTATE CREATED BY.—If the first taker under a will is given an estate in fee for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in the first taker and any limitation over is void: *Bradley v. Carnes*, 94 Tenn. 27; 45 Am. St. Rep. 696. The term "remainder" necessarily implies what is left, and if the entire estate is granted there can be no remainder: *Palmer v. Cook*, 159 Ill. 300; 50 Am. St. Rep. 165, and note.

LIFE ESTATES.—A POWER OF SALE added to a life estate does not raise the estate to a fee: Note to *Bradley v. Carnes*, 45 Am. St. Rep. 700.

BEERS v. BOSTON ETC. RAILROAD COMPANY.

[67 CONNECTICUT, 417.]

CARRIERS—LIABILITY FOR BAGGAGE.—If a common carrier, without any contract, express or implied, to carry baggage, received under the mistaken supposition that it belonged to a passenger who had bought a ticket over its road, undertakes to carry such baggage, it assumes no duty to the owner, except to abstain from willful, wanton, or intentional injury to the property while in its possession. It is not liable for the loss of the property if the train carrying it breaks through a bridge which has become defective through the gross negligence of the carrier.

Action to recover damages for the loss of two trunks, delivered to the defendant as a common carrier, and alleged to have been lost through its negligence. The plaintiffs caused two trunks to be checked at Saratoga for carriage to Albany by the Delaware & Hudson River Railroad, thence over the lines of the defendant and the New York, New Haven & Hartford Railroad Company, to New Haven, Connecticut, not intending to go by that route themselves, but by a rival line, and they so informed

the person who gave them the checks. Such person was not the agent or servant of any of the roads over which the trunks were checked, but he informed the plaintiffs that they had a right to have their trunks go by the route indicated by the checks. The defendant was bound by a contract with the Delaware & Hudson River Railroad Company to receive the baggage of passengers holding tickets entitling them to ride over both roads, and was led by the checks to suppose that the said trunks were baggage of such character, and as such took them into its possession. While the trunks were being carried over defendant's line, the train broke through a bridge, which had become defective through the gross negligence of the defendant company, and the trunks and their contents were ruined. Judgment for defendant. Plaintiffs appealed.

E. P. Irvine and L. E. Munson, for the appellants.

G. D. Watrous and E. G. Buckland, for the appellees.

424 BALDWIN, J. If the defendant came under any obligation to make good the plaintiffs' loss, it must have been either by virtue of some contract between them, or of actionable negligence.

No such contract is alleged unless one can be implied from the reception by the defendant, at Albany, of their luggage, so checked as to indicate that it was to be transported over its railroad to Springfield. It is not averred that the person from whom they obtained the checks was an agent of the defendant, or had any authority to act or speak in its behalf; nor even that he was an agent of the Delaware & Hudson Canal Company, with which the defendant was in contract relations. His statements, therefore, and the plaintiffs' reliance upon them, are of no importance, except as evincing their good faith in the transaction. On the other hand, the effect of the reply was to admit that the defendant received the luggage, under the mistaken supposition that it belonged to passengers who had bought tickets over its road, and so that its transportation on its railroad had been duly paid for. Had trunks, marked as destined to Springfield, been received by the defendant without any particular contract or understanding in regard to their transportation, it would have assumed, simply from its position as a common carrier, an obligation to transport them safely, and have had a right to a proper compensation, when the service was performed. But an express contract existed between it and the Delaware & Hudson Canal Company, under which it was bound to receive

the personal luggage of passengers who held tickets entitling them to pass over both roads between Saratoga and Springfield, and the defendant ⁴²⁵ was led by the checks to suppose that the trunks of the plaintiffs were luggage of that character. It did not, therefore, receive them under such circumstances as to create such an implied contract with their owners. An implied contract between two parties is only raised when the facts are such that an intent may fairly be inferred on their part to make such contract. Such an intent may be implied, although it be certain that it never actually existed, but not unless the parties are in such relations that each ought to have had it.

In the case at bar, the facts not only do not justify, but absolutely exclude, such an implication. The plaintiffs did not intend to pay the defendant for the transportation of the trunks. They supposed that they had already paid for this, in purchasing tickets to New Haven by way of the Hudson River. The defendant did not intend to make any charge for their transportation. It supposed that compensation for this had been made already, under and as an incident of an express contract, made in its behalf by the Delaware & Hudson Canal Company, for the transportation of the owners as passengers over its railroad.

The plaintiffs and the defendant were alike misled by appearances. It is one of those cases where a loss must be sustained by one or the other of two parties, who are equally innocent of wrong, but one of whom placed it in the power of a third person to do the act which caused the injury. The plaintiffs acted in good faith in accepting the checks in question from some one in Saratoga, and causing them to be placed on their trunks; but it was this that induced the Delaware & Hudson Canal Company to deliver the luggage to the defendant, at Albany, and the defendant to receive it as belonging to those whose right it was to have it transported over its line to Springfield. The plaintiffs could not in this way force the defendant into a contract relation which it certainly would never have intentionally assumed.

The defendant, having taken the plaintiffs' property into its possession for transportation over a railroad which it operated as a common carrier, was not free from all responsibility ⁴²⁶ for its safekeeping, notwithstanding it accepted its custody without any contract, express or implied.

It is admitted by the pleadings that not only did the defendant run the train, in which the property was, upon a bridge which was, and long had been, so defective that it could not sustain such a burden, but also that no one was stationed there to

give any warning of the danger or signal the train to stop, and that the luggage was destroyed by reason of its gross negligence in these respects, but "without any willfulness, malice, or intentional wrong, or anything equivalent or amounting thereto." The defendant did not receive the trunks in the capacity of a common carrier of goods for hire. They were delivered to it and accepted by it in the capacity of a common carrier of passengers for hire. In fact, there were no passengers to be carried, to whom they belonged, but this, whether then known or unknown to the defendant, would be no excuse for any willful or intentional injury to property actually in its possession. We think, however, that it was a sufficient excuse for the negligence which is confessed. Actionable negligence is the neglect of a duty. What duty did the defendant owe to the plaintiffs? Simply that of abstaining from anything amounting to willful or wanton injury to their property in its possession: *Gardner v. New Haven etc. Co.*, 51 Conn. 143, 150; 50 Am. Rep. 12. That cannot be deemed a wanton exposure of it to destruction which consisted only in running a train of cars upon an unsafe bridge, by which its own property, as well as theirs, was involved in a common loss. "Negligence signifies a want of care in the performance of an act, by one having no positive intention to injure the person complaining of it": *Pitkin v. New York etc. R. R. Co.*, 64 Conn. 482, 490. It is true that this definition might not exclude the liability, in some instances, of a principal, on the ground of negligence, for damage consequent upon a direct act of violence or trespass on the part of servants; but this is not a case of that description. The gross negligence with which the defendant was chargeable consisted wholly of omissions. There was no willful ⁴²⁷ wrong, nor yet such reckless misconduct as can be deemed its equivalent.

Had the defendant voluntarily assumed the position of a depositary (taking this term in its strict meaning of a bailee without reward), it would not have been bound under the rules of the Roman law, which have become a part of the common law, to treat the plaintiffs' property with any more care than it gave to its own: *Coggs v. Bernard*, 2 Ld. Raym. 909; Dig., 16, 3, *de positi vel contra*, 32. Good faith would have been the measure of its obligations: Dig., 16, 3, 20. He who intrusts his property to a careless man, if loss ensues, must lay it to the account of his own imprudence in putting it into such hands: Inst., 3, 15, *quibus modis re contrahitur obligatio*, 3.

But in the case before us, the elements of a bailment are

wanting, for there was no contract, express or implied, between the parties: 2 Kent's Commentaries, *780. The defendant's obligations, not being contractual, were less than those attaching to bailees of any class. No man can have the care of another's property thrust upon him without his invitation or consent, in such a way as to raise a duty calling for the performance of positive acts of protection. He may be bound to refrain from acts of direct injury. This is a mere negation of wrongdoing. A man acts at his peril; but he is never liable for omissions, except in consequence of some duty voluntarily undertaken: Holmes on the Common Law, 82. Had the defendant willfully thrown the plaintiffs' trunks from the bridge into the stream below, a liability would have been incurred; but this would have been an act of violence, not an absence of care. Gross negligence is not actionable where not even slight care was due: Dunlap v. International Steamboat Co., 98 Mass. 371, 379. However blameworthy, it is still essentially different from intentional wrongdoing: *Magna negligentia culpa est; magna culpa, dolus est*; Dig., 50, 16, de verborum significatione, 226.

Had the checks indicated that the trunks were to be sent over the river route, their reception by the defendant for carriage over its route would have presented a very different ⁴²⁸ question: Fairfax v. New York etc. R. R. Co., 73 N. Y. 167, 170; 29 Am. Rep. 119.

The ruling on the demurrer, with which the pleadings under the original complaint were closed, was in conformity to the views which we have expressed. It is, therefore, unnecessary to inquire whether, had there been error, it would not have been waived by filing a substituted complaint.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

CARRIERS—LIABILITY FOR BAGGAGE.—A common carrier is liable to a passenger for the loss of his baggage although no fare has been paid: McGill v. Rowand, 8 Pa. St. 451; 45 Am. Dec. 654. Common carriers of passengers with their ordinary baggage, for hire, are liable for losses occurring from any accident to the baggage while it is in their keeping as carriers, except those arising from the act of God or the public enemy: Roth v. Buffalo etc. R. R. Co., 34 N. Y. 548; 90 Am. Dec. 736, and note; Cole v. Goodwin, 19 Wend. 251; 82 Am. Dec. 470, and note; Camden etc. Transportation Co. v. Burke, 13 Wend. 611; 28 Am. Dec. 488, and note. Passenger carriers are liable for baggage of passengers as common carriers: Dibble v. Brown, 12 Ga. 217; 56 Am. Dec. 460; Oakes v. Northern Pac. R. R. Co., 20 Or. 392; 23 Am. St. Rep. 126, and note. See, also, the extended note to Connolly v. Warren, 8 Am. Rep. 302.

ROBINSON v. CLAPP.

[67 CONNECTICUT, 538.]

BOUNDARIES—TREES UPON—INJUNCTION.—A landowner is not entitled to an injunction restraining an adjoining owner from interfering with a tree and well upon the boundary line, merely because the former has offered to pay such sum for the adjoining premises as may be appraised by persons selected by the parties.

BOUNDARIES—TREES UPON—INJUNCTION.—If a landowner intends to remove so much of a tree standing upon the boundary line as is necessary to enable him to build up to such line, and the granting of an injunction to restrain interference with the tree would work a greater irreparable injury to such owner than the necessary cutting and probable destruction of the tree would cause the adjoining owner, the injunction should not be granted.

Suit to enjoin defendant from cutting down a tree and from injuring a well. Judgment for defendant. Plaintiff appeals.

E. P. Arvine, for the appellant.

H. G. Newton, for the appellee.

⁵³⁹ FENN, J. This is the case of Robinson v. Clapp, 65 Conn. 365. A new trial was then granted, and the case now comes before us again upon another finding, by plaintiff's appeal.

So far as such appeal appears to be only an effort for retrial of questions already decided by this court, it is unnecessary to consider it, for we see no occasion to alter the former opinion. Nor need we repeat, but only refer to such former decision for the facts and the law as this court held it to be upon such facts.

The present finding does not differ very essentially from the previous one; but there are two variations which should be noticed. The plaintiff claims that he was entitled to the injunction prayed for, to restrain the defendant from interfering with the tree and well in question, and the free access of light and air to the windows of the plaintiff's house, because he had offered to buy the land in controversy. The finding, however, states that the defendant has repeatedly offered to sell to the plaintiff; that he claimed the price asked was in excess of the true value, and adds: "I do not find that the price so asked was in excess of its true value; and I find that the plaintiff has never offered, or been willing to pay, the defendant the true value of said land, in any manner other than by his offer to pay a sum for which it ⁵⁴⁰ should be appraised by parties to be selected by the plaintiff and defendant." It seems needless to say that the defendant is under no obligation, legal or equitable, to submit

to any such ordeal, and that the plaintiff has shown nothing to entitle him to consideration on this ground, even if, as we in no way mean to intimate, in case the plaintiff has proved all he claimed, it would have had any relevancy or weight.

Concerning the tree, the finding is, that the defendant intends to remove so much of said tree as is necessary to build his house up to the boundary line. In *Robinson v. Clapp*, 65 Conn. 380, we said in reference to this matter: "The injunction should not extend further than to restrain the defendant from cutting any portion of the trunk and any further cutting of the branches or of the roots than he might lawfully have done had the trunk stood wholly upon the plaintiff's land, but reaching to the defendant's line." The defendant in fact intends to cut away half the trunk, and to clear away branches and roots to the dividing line, and the court below refused to enjoin such proposed action. As bearing upon this matter, the court made the following finding: "If the trunk of said tree was not touched by the defendant, but the roots and branches were cut off up to the boundary line, the tree would probably die; but if it did not die, it would, after such branches were cut, be unsightly, and of no practical value to the plaintiff. If the branches and roots of said tree were so cut off upon the defendant's side of said line, and said house was so constructed by the defendant, the entire removal of said tree would be a benefit to the plaintiff and to his property." This finding was made upon evidence the admission of which was objected to, and exception taken. We think such evidence proper to be received, and that upon the facts found the action of the court was induced from, and warranted by, what we before suggested—*Robinson v. Clapp*, 65 Conn. 380—"It might perhaps fairly be urged that to prevent the defendant from removing that portion of the trunk of the tree upon his own land, thereby depriving him of the opportunity to build upon it as desired, would be likely to produce a greater irreparable ⁵⁴¹ injury to the defendant than such removal and the consequent destruction of the life of the tree would cause the plaintiff, and that, therefore, the equitable remedy of injunction which is not adapted finally to adjust the rights of the parties should have been refused, and the contestants left to settle such rights in methods pertaining to the legal and not the chancery jurisdiction. We are inclined to think such elements of discretion enter into the matter that we ought not to disturb the conclusion of the trial court upon it." There is nothing in the additional facts found, regarding

the well and concerning light, to differentiate the present appeal in those respects from the former one.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

The facts and decision in the case of *Robinson v. Clapp*, 65 Conn. 365, so far as they relate to the decision in the principal case, were as follows: On September 21, 1883, one W. Waite was the owner in fee of the premises in dispute. A dwelling-house stood on the westerly side thereof. On said day Waite, through a third person, conveyed to his wife the westerly part of said lot, forty feet front, on which said dwelling-house stood. On August 23, 1888, said lot was by warranty deed conveyed to plaintiff by an agent of Mr. and Mrs. Waite to whom it had been conveyed for that purpose. On October 6, 1888, W. Waite quitclaimed his interest in the remaining twenty-one feet of the original lot to the defendant. On the boundary line of the premises of plaintiff and defendant there stands a maple tree about sixteen inches in diameter, with branches extending from forty to fifty feet. This tree is valuable to plaintiff, and shades a part of his premises. The boundary line runs through the trunk of the tree. At the time Waite erected the dwelling-house, more than twenty years before plaintiff's purchase, he dug a well, connecting it by pipes with the dwelling-house, and used it in such connection up to within a short time previous to such purchase. Plaintiff never used the well, and it has remained covered up ever since he became owner of the premises. The well is two and one-half feet in diameter and adjoins the boundary line, but is practically all of it upon the land of the defendant, and he does not intend to destroy it. On the trial both the plaintiff and Waite testified that while negotiations for the purchase were pending, Waite told plaintiff that the well went with the house and would be sold to him, and that this statement was a substantial inducement to the plaintiff in making the purchase. The court overruled defendant's objection to the admission of this evidence and found the facts to be as testified. The defendant intends to build a dwelling-house extending along the boundary line and threatens to remove so much of said tree as is on his side of the boundary line. The construction of the dwelling-house as defendant intends to construct it would cover the well and probably kill the tree. It would also deprive plaintiff of the supply of light which has come across said twenty-one feet now owned by defendant, and would make it necessary for plaintiff to light his dwelling-house with artificial light in the daytime. At the time of purchase by plaintiff and defendant there was no visible sign of demarcation marking said boundary between them, and until the time of said purchases the premises were an undivided tract of land. The trial court rendered judgment for plaintiff, enjoining defendant from interfering with the tree to its injury, and from such interference with the well as will deprive plaintiff of its use, or from erecting any building

upon his premises so near as to exclude the light from the plaintiff's dwelling-house. Defendant appealed, assigning as error the granting of the injunction restraining each of the acts thereby enjoined and also in admitting the evidence before mentioned. The supreme court, in passing upon the questions thus presented on appeal decided all of them in favor of defendant and granted a new trial. The supreme court announced as principles of law that a landowner may cut from a tree, the trunk of which stands on the boundary line between himself and an adjoining owner, all the roots and branches on his side of the line up to the trunk; that evidence that a grantor of a tract of land informed the grantee that a well nearly on the boundary line, but on the land not conveyed, belonged to and would be sold with the land conveyed, and that this statement induced the purchase, is inadmissible to show the legal effect of the deed as against a subsequent purchaser of the remaining portion of the same tract of land; nor is such purchaser to whom the statement is made entitled to an injunction against the subsequent purchaser to prevent him from covering the well with a building, when the former has never used the well since his purchase, and it has been covered all that time, and pipes connecting it with his dwelling-house are entirely on his land. That a purchaser of a tract of land on which is a building a short distance from another tract of land retained by the grantor does not obtain, by implied grant, the right to the light which his building receives from the unconveyed portion, as against a subsequent purchaser of the latter.

BOUNDARIES—TREES GROWING ON OR NEAR, AND RIGHTS OF ADJOINING PROPRIETORS.—Where the limbs or branches of trees standing upon a boundary line overhang the land of one, such limbs or branches are his property, and he can cut them off or trim them at his pleasure: *Grandona v. Lovdal*, 78 Cal. 618; 12 Am. St. Rep. 125, and note. See especially the note to *Dubols v. Beaver*, 82 Am. Dec. 330, 331.

STATE v. SMITH.

[67 CONNECTICUT, 541.]

MUNICIPAL CORPORATION—LICENSE FEES—RIGHT TO EXACT.—Under a charter authorizing a city council to license cartmen, truckmen, hackmen, butchers, bakers, petty grocers or hucksters, and common victualers, and to make ordinances relative "to any and all other subjects that shall be deemed necessary and proper for the protection and preservation of the health, property, and lives of the citizens," an ordinance prohibiting the sale of adulterated or impure milk within the city and requiring everyone who sells milk of any kind therein to first procure a license therefor, is void, in so far as it requires a license from all who sell milk, whether they are petty grocers, hucksters, or common victualers or not.

MUNICIPAL CORPORATIONS—LICENSE FEES—RIGHT TO EXACT.—The right of a municipal corporation to license the pur-

suit of a lawful business, which, as usually carried on, does not endanger the public health or safety, and thus to limit the number of those who may engage in it, cannot be extended or enlarged by any doubtful implication.

Prosecution for violation of an ordinance of a city relating to the sale of milk therein without a license. Judgment for the plaintiff. Defendant appealed.

S. Judson, Jr., for the appellant.

J. H. Light and V. R. C. Giddings, for the appellee.

⁵⁴⁷ BALDWIN, J. The charter of the city of Bridgeport, which went into effect July 1, 1895, authorized the common council to make ordinances, not inconsistent with law, relative to commerce; to the inspection of produce brought ⁵⁴⁸ into the city for sale, and the election of inspectors for that purpose; to the sale or offering for sale of unwholesome produce of all kinds; to "licensing cartmen, truckmen, hackmen, butchers, bakers, petty grocers or hucksters, and common victualers, under such restrictions and limitations as said common council may deem necessary and proper"; to the health of the city; and to "any and all other subjects that shall be deemed necessary and proper for the protection and preservation of the health, property, and lives of the citizens": Special Acts of 1895, sec. 41, p. 532.

In the General Statutes, sections 2658 to 2664 are grouped under the heading of "Adulteration of Milk." A public act went into effect August 1, 1895, to regulate the manufacture and sale of food products, which classes as food, under that description, "every article used for food and drink by man, horses, or cattle": Public Acts of 1895, c. 235, sec. 2, p. 578.

General Statutes, section 2661, prohibits the sale or offer for sale of impure or adulterated milk. Section 2660 forbids the sale of any milk from which any cream has been removed, except out of a can, vessel, or package, to which is affixed, not more than six inches from the top, a metallic tag stamped "Skimmed Milk," in letters not less than an inch in height. For any violation of these provisions the offender may be fined not more than seven dollars or imprisoned not more than thirty days, or both.

The act of 1895, section 3, declares that any article of food shall be deemed adulterated if, among other things, any substance be mixed with it so as to lower or injuriously affect its quality or strength, or if any valuable constituent has been wholly or

in part abstracted, or if it is in any part the product of a diseased animal; and that the Connecticut Agricultural Experiment Station shall make analyses of food products on sale which it is suspected may be adulterated, and "may adopt or fix standards of purity, quality, or strength, when such standards are not specified or fixed by statute," and, when it finds by analysis that adulterated food products have been on sale within the state, shall notify ⁵⁴⁹ the grand juror or prosecuting attorney of the town in which they were found. The sale or offer for sale of adulterated food, by one who knows it to be adulterated, and does not disclose this to the purchaser, is made punishable by a fine of not more than five hundred dollars, or imprisonment for not more than one year.

At the same session of the general assembly, two days later, another statute was enacted, but repealed the following week (Public Acts of 1895, pp. 588, 664), which declared the term "adulterated milk," as used in the statute laws of the state, to have the following meaning: "1. Milk containing more than eighty-eight per centum of water or fluids; 2. Milk containing less than twelve per centum of milk solids; 3. Milk containing less than three per centum of fats; 4. Milk drawn from cows within fifteen days before or five days after parturition; 5. Milk drawn from animals fed on distillery waste or on any substance in a state of fermentation or putrefaction or on any unhealthy food; 6. Milk drawn from cows kept in a crowded or unhealthy condition; 7. Milk from which any part of the cream has been removed; 8. Milk which has been diluted with water or any other fluid, or to which has been added, or into which has been introduced, any foreign substance whatever; 9. All adulterated milk shall be deemed unclean, unhealthy, impure, and unwholesome."

It is impossible to compare the ordinance of the city of Bridgeport with these statutory provisions, without seeing that in many respects they cover the same ground, and cover it in a different way.

The ordinance, section 6, defines precisely adulterated milk, and gives conclusive effect to an analysis made by the chemist employed by the local board of health. The general assembly, in 1895, first adopting and then repealing a somewhat similar definition, finally left the matter largely in the hands of the Connecticut Agricultural Experiment Station.

The sale of skimmed milk, by the city ordinance, is to be from cans bearing the words "Skimmed Milk" conspicuously

stamped upon the side; by section 2660 of the General Statutes ⁵⁵⁰ it is to be from cans bearing a metallic tag on which the same words are stamped.

The pecuniary penalties imposed by the ordinance cannot be less than fifty dollars nor more than one hundred dollars. Under the general laws, they may be considerably less, and for some offenses more, besides an additional liability to imprisonment.

The public statutes leave the business of a milkman open to all, on equal terms, throughout the state; only imposing certain regulations upon those who may undertake it, and enforcing them, when necessary, by proceedings of a criminal nature, resulting in a sentence proportioned to the gravity of the offense. The ordinance excludes everyone who has not received a license from the local health officer from participating in it, within the city of Bridgeport, under pain of a fixed pecuniary forfeiture, which, in case of a second offense, is to be doubled and to entail a loss of the license previously granted. Of these differences between the provisions of the by-laws in question and the general statutes, that last mentioned, unless found to be warranted by the terms of the city charter, is decisive of the present case.

Under the constitution of this state, even the general assembly has not unrestricted power to provide for the grant or refusal of licenses, without which a citizen cannot engage in what is one of the common occupations of life: *State v. Conlon*, 65 Conn. 478; 48 Am. St. Rep. 227. It has confided to the common council of Bridgeport the right to make ordinances relative to licensing cartmen, truckmen, hackmen, butchers, bakers, petty grocers, or hucksters, and common victualers. Petty grocers or hucksters and common victualers may, as part of their business, sell milk; but the ordinance in question relates to licenses for all who sell milk, without regard to whether they are petty grocers, hucksters, or common victualers, or not. It therefore goes beyond the power specifically conferred, and the "general welfare" clause, with which section 41 of the charter concludes, must be read with strict reference to what precedes it. The right to license the pursuit of a lawful business, which, as usually carried on, does ⁵⁵¹ not endanger the public health or safety, and thus to limit the number of those who may engage in it, is one of the highest powers of sovereignty. When conferred upon a municipal corporation, the grant cannot be extended by any doubtful implication.

After giving full force to all the provisions of section 41, we are brought to the conclusion that it is, at least, doubtful

whether the charter authorized the licensing of milkmen. It therefore did not authorize it; and that part of the ordinance was void upon which the complaint in the case before us was based: *Crofut v. Danbury*, 65 Conn. 294.

There is error in the judgment appealed from.

In this opinion the other judges concurred.

MUNICIPAL CORPORATIONS—LICENSE FEES.—What business or occupation so far affects the public welfare and good order as to require it to be licensed is a matter of legislative consideration and control, which, when exercised in good faith, cannot be reviewed by the courts: *Oil City v. Oil City Trust Co.*, 151 Pa. St. 454; 31 Am. St. Rep. 770, and note. A city ordinance prohibiting canvassing without a license is valid if it is equal and uniform in its operation and does not discriminate and is not in violation of the federal constitution: Note to *Magneau v. Fremont*, 27 Am. St. Rep. 445. Laws are not in restraint of trade which merely impose taxes on the sales of merchandise: *Harrison v. Mayor*, 3 Smedes & M. 581; 41 Am. Dec. 633. An ordinance exacting a license fee of ten dollars from all persons engaged in selling merchandise is valid: *Van Hook v. Selma*, 70 Ala. 361; 45 Am. Rep. 85. This subject will be found fully treated in the note to *State v. Conlon*, 48 Am. St. Rep. 236, 237, and the extended notes to *Robinson v. Mayor*, 84 Am. Dec. 638-640, and *Ex parte Gregory*, 54 Am. Rep. 523.

AM. ST. REP., VOL. LII.—29

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

MOPHAIL v. PEOPLE.

[160 ILLINOIS, 77.]

QUO WARRANTO.—A STATUTE OF LIMITATIONS applicable to ordinary civil actions does not apply to a quo warranto proceeding to oust a person wrongfully acting as a police magistrate, as this is a matter of public concern, and the maxim, *Nullum tempus occurrit regi*, applies.

OFFICERS.—POLICE MAGISTRATES are public officers, and exercise a part of the judicial powers of the state.

QUO WARRANTO.—AN INFORMATION in the nature of a quo warranto is a matter within the sound legal discretion of the court or judge, and no definite time is fixed beyond which an information will not lie, in matters of public concern, though lapse of time may be considered, with all the other circumstances of the case, as a ground for refusing leave to file it.

PLEADING.—A PLEA must either traverse, or confess and avoid.

PLEADING—VACANCY IN OFFICE.—In pleading a vacancy in office, it is not good and sufficient pleading to say, "there being a vacancy," where there is no direct averment that there is a vacancy, and no facts are stated showing such vacancy.

PLEADING.—A DEMURRER ADMITS only such facts as are well pleaded. It does not admit conclusions of law stated by the pleader, or the construction placed by him upon statutes.

ESTOPPEL—OFFICERS—ELECTIONS.—Street-corner prophecies of success and promises of assistance, made by an officer to a candidate for election to the same office, do not estop the promisor from denying that any election was authorized by law, particularly where it does not appear that he was a candidate, or that he voted, and where it does not appear that any reliance was placed upon such prophecies and promises.

JUSTICES OF THE PEACE.—POLICE MAGISTRATES are justices of the peace, in law and in fact, though different in name.

PLEADING.—A PLEA is to be taken most strongly against the pleader.

ESTOPPEL—RECOGNITION OF OFFICER DE FACTO—CONTESTING RIGHT TO OFFICE.—The fact that a police magistrate recognizes another officer as a de facto police magistrate, by transmitting papers to him in case of a change of venue, does not estop the people from maintaining a quo warranto proceeding to oust the latter from office, or estop the former from being the relator in such proceeding.

H. W. Wells, for the appellant.

R. J. Cooney, state's attorney, and L. F. Meek, for the appellee.

⁷⁸ **BAKER, J.** This is an information in the nature of a quo warranto, prosecuted in the Peoria circuit court by the state's attorney of Peoria county, in the name of the people of the state of Illinois, on the relation of Charles T. Lambert, and against Duncan McPhail, the appellant. The information was filed by leave of the judge of the court in vacation, and process was issued and served to the October term, 1893. The cause was heard at said term upon a demurrer to the first, second, third, fourth, fifth, sixth, and seventh pleas of McPhail, and the court sustained the demurrer to each of said pleas, and McPhail standing by them, the court rendered judgment of ouster against ⁷⁹ him from the office of police magistrate, and that he pay a fine of one dollar and the costs of the proceeding. On an appeal to the appellate court for the second district, the judgment was affirmed, and this further appeal then taken.

It appears from the information that prior to November 6, 1891, the city of Peoria was organized under an act entitled "An act to reduce the charter of the city of Peoria, and the several acts amendatory thereof, into one act, and revise the same," approved February 20, 1869. It also appears that section 1 of an act approved and in force April 13, 1875 (Laws of 1875, p. 91; 1 Starr & Curtis' Annotated Statutes, 533), makes provisions for election of police magistrates in towns, cities, and villages, and that section 2 of said act provides that the election for police magistrates in cities that have one or more police magistrates elected under a former organization, as a town or city, shall not be held until the term for which said police magistrate or magistrates were elected has expired. It also appears from the information that, at a municipal election held in the city of Peoria on the fourth day of November, 1890, Charles T. Lambert was elected police magistrate of the city of Peoria for the term of four years, and that afterward, and within the time prescribed

by law, he duly qualified as such police magistrate, and was duly commissioned as such for four years from the first Tuesday in January, 1891, and ever since had been, and still was, performing the duties and exercising the powers, functions, and jurisdiction of police magistrate of the city of Peoria, and that his term of office would not expire until the first Tuesday in January, 1895. And the information shows that on November 6, 1891, the city of Peoria became incorporated under the general incorporation act, entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, and that there is no provision in said act for the election of police magistrates in cities organized ^{so} under it; and shows that at a special election held in said city of Peoria for the election of city officers, on April 19, 1892, candidates for police magistrate were voted for without authority of law, and that at said election Duncan McPhail received a majority of the votes cast, and afterward assumed to qualify as police magistrate, and has since wrongfully and without authority of law assumed to act as police magistrate of the city of Peoria. The claim of the information is, that at the time of the adoption of the general incorporation law by the city there was already a police magistrate in office, who had been elected while the city was incorporated under the act of February 20, 1869, and whose term of office would not expire until January, 1895, and that, therefore, the election of McPhail in April, 1892, as police magistrate, was not only unauthorized by law, but expressly prohibited by section 2 of the act of April 13, 1875.

The first plea sets up that the cause of action did not accrue within one year next before the commencement of suit, and the second plea that it did not accrue within sixteen months. Even if it should be regarded that the information in the case at bar is in effect a civil remedy for the protection of private rights, and that the statutes barring ordinary civil actions are applicable to it, yet the statute that would govern would be the last clause of section 15 of chapter 83 of the Revised Statutes, which provides that all civil actions not otherwise provided for shall be commenced within five years after the cause of action accrued. But we do not consider this quo warranto proceeding prosecuted by the state's attorney for the purpose of ousting one charged with wrongfully and without authority of law exercising the office, jurisdiction, and powers of a police magistrate, as simply a civil remedy for the protection of private rights only. Police magistrates are public officers that are provided for in the con-

stitution of the state, and by that instrument the judicial powers of the state are, in part, vested in them: ⁸¹ Const., art. 6, secs. 1, 21. The office of police magistrate is one in which the state and the general public have a deep interest, and the jurisdiction attached to it is uniform with that belonging to the office of justice of the peace. It is a matter of public concern to the people of the state, and against their peace and dignity, that anyone should unlawfully, and without authority of right, exercise the jurisdiction, powers, and functions of such office, and also a matter of interest to the state and to the general public that more persons than the law authorizes are acting as police magistrates. In this country the rule is, that the attorney general or state's attorney may file the information in behalf of the people, where the interests of the general public are involved, at any time, and that, in conformity with the maxim, *Nullum tempus occurrit regi*, lapse of time constitutes no bar to the proceeding: *High on Extraordinary Legal Remedies*, sec. 621; *Commonwealth v. Allen*, 128 Mass. 308.

It is, however, to be borne in mind that granting leave to file an information in the nature of a *quo warranto* is a matter within the sound legal discretion of the court, or, under our statute, of the judge thereof in vacation; that in the application for such leave, the length of time which has elapsed is a ground for refusing leave, to be considered along with all the other circumstances of the case, and that the common law furnishes no definite time beyond which an information will not lie: *Rev. Stats.*, c. 112, sec. 1; *The King v. Stacey*, 1 Durn. & E. 1; *People v. Waite*, 70 Ill. 25. In the case at bar, the appellant began to use and exercise the office of police magistrate on and after April 29, 1892, and on September 16, 1893, in vacation, the judge of the circuit court gave leave to file the information. No equitable reasons appear in the case for withholding the writ of *quo warranto*, and it cannot be said that there was no probable ground for the proceeding, or that there was an abuse by the circuit judge of the discretionary power given him by the statute.

⁸² The substance of the third plea is, that on April 19, 1892, "there being a vacancy in all the offices of said city, and especially there being a vacancy in the office of police magistrate of the city of Peoria," an election was held, and the defendant was duly and legally elected to the office of police magistrate, and duly qualified within twenty days, and was commissioned and was legally in said office, without this, that the relator, Charles T. Lambert, was ever legally elected police magistrate of the city

of Peoria under the act of February 20, 1869. The plea also contains an averment that the city of Peoria had wholly failed and neglected to elect any police magistrate under any law, at any time prior to the last mentioned law (Cities and Villages Act, approved April 10, 1872), and the said failure to elect, as aforesaid, was the cause of said before-mentioned vacancy.

A plea must either traverse or confess and avoid. It is alleged in the information that at a municipal election for officers held in the city of Peoria on November 4, 1890, the relator was elected police magistrate of the city of Peoria for the term of four years; that he qualified as such and was commissioned, "and ever since has been, and still is, performing the duties and exercising the powers, functions, and jurisdiction of police magistrate of the city of Peoria," and that his term of office would not expire until the first Tuesday in January, 1895. The plea does not traverse all or any of these allegations, or in direct terms state any fact or facts in avoidance. There is no direct averment that there was a vacancy in the office, and no facts stated showing such vacancy. It is not good and sufficient pleading to say, "there being a vacancy," etc. The defendant was called upon by the people of the state to either disclaim or justify, and, if he justified, it was required of him to set out his title fully and particularly, and it was necessary for him to set up all the facts necessary to constitute a good and sufficient title to the office. This he did not do in this plea. The demurrer ^{ss} admits only such facts as are well pleaded, and it does not admit the conclusions of law stated by the pleader, nor the construction placed by him upon the statutes.

It would seem to be wholly immaterial whether, under the amendatory and revised charter of February 20, 1869, the police magistrates were to be elected by the people or appointed by the city council, for the constitution of 1870 provides that all police magistrates "shall be elected," and the act of April 13, 1875, makes ample provision for the election of a police magistrate quadrennially, at the annual election of city officers, in cities incorporated under special acts, in all cases where the law under which the city is incorporated "does not authorize the election of a police magistrate."

The case made by this third plea is wholly unlike *Soucy v. People*, 113 Ill. 109, which seems to be largely relied on by appellant. In that case Soucy had been elected to the office for a stated time, and until his successor should be elected and qualified, and it was held that he could lawfully hold over until his

successor was elected and qualified without being guilty of usurpation of office, and that the relator, McCracken, had failed to establish his election to the office. Here, on the other hand, McPhail, the defendant, was not the incumbent of the office at and before the time of the supposed election, but, on the contrary thereof, the relator was such incumbent, and no question of the right to hold over after the expiration of a term of office is involved.

The fourth plea sets up that prior to the election of April 19, 1892, at which defendant was the candidate of one of the political parties for the office of police magistrate, the relator, Lambert, said to him, in substance, that he, Lambert, would assist the defendant to secure his election by all means in his power and also said to him, in substance, "You can beat that other fellow"—meaning the opposing candidate of the other political ⁸⁴ party. The fifth and sixth pleas are substantially like the fourth plea. It does not appear from either of said pleas that the relator, Lambert, was a candidate at said election of April 19, 1892, or that he voted at said election, or that he rendered any assistance, either at or before the election, in securing the election of either appellant or his opponent, or that he was even in the city of Peoria when the election was held. We are unable to see that these street-corner prophecies and promises of assistance, upon which it does not appear that even the slightest reliance was ever placed by appellant, can have the effect of an estoppel—and especially in a case like this, where the interests of the state and of the general public are involved. *People v. Waite*, 70 Ill. 25, is not in point. There the relator participated in the election by voting, and by running as an opposing candidate. Nor is *People v. Moore*, 73 Ill. 132, an authority for appellant, for there the relator was present at and took part in the election of trustees of the church.

The seventh plea avers that on, and ever since, April 30, 1892, Lambert, the relator, was and has continued to be an acting police magistrate for the city of Peoria, and during all that time has kept an office as such, and that relator, from April 30, 1892, until the commencement of this suit, sent many cases wherein changes of venue were taken from him to the defendant for trial, and tried many cases which were sent to him by defendant on change of venue. McPhail, the defendant, was a police magistrate *de facto*. Police magistrates are justices of the peace in law and in fact, though different in name (*People v. Palmer*, 64 Ill. 41), and Lambert, himself a police magistrate, had no juris-

diction or authority to officially determine that appellant was not a police magistrate and justice of the peace, de jure as well as de facto. The statute (Rev. Stats., c. 79, sec. 30) made it Lambert's duty, in case of a change of venue, to transmit all the papers and documents belonging to the suit to the nearest justice⁸⁵ of the peace, and also made it his duty to proceed in all suits sent to him on change of venue "as if the suit had been instituted before him." The plea is to be taken most strongly against the defendant below (appellant here), whose pleading it is, and so the presumption must be that appellant and the relator, each respectively, was the nearest police magistrate or justice of the peace, each to the other. We perceive nothing in this plea that would preclude or estop the people from maintaining this quo warranto suit or Lambert from being the relator therein.

There was no error in sustaining the demurrer to the several pleas, or in rendering judgment of ouster and for a fine and costs.

The judgment of the appellate court is affirmed.

POLICE JUSTICES ARE MAGISTRATES: Kurtz v. State, 22 Fla. 80; 1 Am. St. Rep. 178.

PLEADING.—In quo warranto proceedings the defendant must either disclaim or justify. If he justifies he must set out his title specially: Distilling etc. Feeding Co. v. People, 156 Ill. 448; 47 Am. St. Rep. 200, and note. A demurrer admits all facts properly alleged: Bomar v. Means, 87 S. C. 520; 34 Am. St. Rep. 772, and note; but not conclusions of fact or of law: Longshore Printing Co. v. Howell, 26 Or. 527; 46 Am. St. Rep. 640, and note. Pleadings must be taken most strongly against the pleader: Chipman v. Emeric, 5 Cal. 49; 63 Am. Dec. 80, and note.

STATUTE OF LIMITATIONS IN QUO WARRANTO PROCEEDINGS.—Whatever the proceeding by information in the nature of a quo warranto may have been originally, it is now regarded as in the nature of a civil remedy: People v. Boyd, 132 Ill. 60; and a statute which limits the prosecution of an information under any penal law does not apply to an information in the nature of a quo warranto: Commonwealth v. Birchett, 2 Va. Cas. 51.

Quo warranto lies to enforce both public and private rights: People v. Boyd, 132 Ill. 60. In public matters a writ of quo warranto is a writ of right at the suit of the state, and issues as a matter of course upon demand of the proper officer: State v. Stone, 25 Mo. 555; note to Commonwealth v. Cluley, 94 Am. Dec. 83; State v. Harris, 8 Ark. 570; 86 Am. Dec. 460; People v. River Raisin etc. R. R. Co., 12 Mich. 389; 86 Am. Dec. 64; State v. Rose, 84 Mo. 198; Commonwealth v. Allen, 128 Mass. 308. The attorney general has the right, in the name and on the behalf of the commonwealth, at his own discretion, to file an information against one usurping a public office. The court has no authority to grant or to withhold leave to file it: Commonwealth v. Allen, 128 Mass. 308. But leave of court is necessary where the information is filed by an officer at the relation of an individual, as a quo warranto is not a writ of right where its object is to enforce private rights as distinguished from public

rights. Its issuance, in such cases, rests in the discretion of the court: *State v. Rose*, 84 Mo. 198; *Commonwealth v. Cluley*, 56 Pa. St. 270; 94 Am. Dec. 75; *People v. Moore*, 73 Ill. 182. Where the state at large is interested in a proceeding in quo warranto, the attorney general is, as at common law, the proper person to institute it, but when the information is filed by an individual to oust the incumbent from an office and install the relator therein, it is a personal remedy on behalf of the individual claiming to be aggrieved, and the state is but a nominal party: *State v. Stein*, 13 Neb. 529; *Boyd v. Nebraska*, 143 U. S. 135, 157. A citizen has a standing as an applicant for a quo warranto when the office is a public one: *State v. Hammer*, 42 N. J. L. 435; but a private person cannot appear as relator where he does not claim the right to the office: *State v. Glenn*, 13 Neb. 529. If he does claim it, he is a proper, if not necessary, party plaintiff: *People v. De Be Voise*, 27 Hun, 596. If he does not claim it the prosecution is on behalf of the public, and must be conducted by the proper public officer: *State v. Glenn*, 13 Neb. 529. The attorney general ought not to institute quo warranto proceedings, upon the information of a private party, to try the right of an incumbent of a public office to hold the same, where such private person has no claim of title to the office, and has no personal interest in the question distinct from the public, unless the showing is such as to afford reasonable grounds for the belief that the incumbent of the office is an intruder therein, or one not competent under the constitution to hold it: *Lamoureux v. Ellis*, 89 Mich. 146; *Barnum v. Gilman*, 27 Minn. 466; 38 Am. Rep. 304. If, however, the complainant does have an interest in the office, distinct from the public, and requests the proper officer to issue a writ of quo warranto to determine the conflicting claims to the office, and his request is refused, he may obtain leave to prosecute the writ in the name of the state, but on his own behalf: *State v. Frazier*, 28 Neb. 488; *Boyd v. Nebraska*, 143 U. S. 135, 157.

The English maxim, *Nullum tempus occurrit regi*, is applicable to the commonwealth in all civil suits: *Nimmo v. Commonwealth*, 4 Hen. & M. 57; 4 Am. Dec. 488; *People v. Herkimer*, 4 Cow. 345; 15 Am. Dec. 379; *French v. Commonwealth*, 5 Leigh, 512; 27 Am. Dec. 618. This maxim, however, applies only to the state at large, and not to its political subdivisions: *County of St. Charles v. Powell*, 22 Mo. 525; 66 Am. Dec. 637. The statute of limitations does not run against the state: *Commonwealth v. McGowan*, 4 Bibb, 62; 7 Am. Dec. 737; *State v. Arledge*, 2 Ball. 401; 23 Am. Dec. 145; *Hoey v. Furman*, 1 Pa. St. 295; 44 Am. Dec. 129; *Moody v. Fleming*, 4 Ga. 115; 48 Am. Dec. 210; in the absence of express words to that effect: *Lessee etc. of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298; 32 Am. Dec. 718; *Crane v. Reeder*, 21 Mich. 24; 4 Am. Rep. 430; *Catlett v. People*, 151 Ill. 16; and the principle that acts of limitation do not bind the king or the people applies to proceedings by quo warranto, the rule being that, in the absence of any statutory period of limitation the attorney general may file an information on behalf of the king or the people at any time; and that the lapse of time constitutes no bar to the proceeding, in conformity with the maxim, *Nullum tempus occurrit regi*: *Catlett v. People*, 151 Ill. 16; *King v. Stacey*, 1 Term Rep. 2, 8; *Commonwealth v. Allen*, 128 Mass. 306; *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521; 94 Am. Dec. 123. "The lapse of time," says Gray, C. J., in *Commonwealth v. Allen*, 128 Mass. 306, 310, "between the defendant's assumption of the office and the institution of this proceeding, whatever effect it might have as against a private person, cannot bar the right of the commonwealth suing by its attorney general." But there are cases holding that laches may be im-

puted to the commonwealth as well as to an individual. Thus, if the court of common pleas amends the charter of a turnpike company, and the company, no appeal having been taken from the decree, in the exercise of good faith and without any warning or objection on the part of the commonwealth, expends a large amount of money in extending its road under the amended charter, a court of equity will refuse its aid to the commonwealth after the expiration of five years, leaving it to its remedy at law: *Commonwealth v. Bala etc. Turnpike Co.*, 153 Pa. St. 47. The court, in this case, admitted that the statute of limitations does not run against the commonwealth, but declared that the question involved was not one as to the statute of limitations, but one of laches. So, where it is claimed that a railroad corporation is illegal because one of its termini is not sufficiently defined, and the state neglects for eight years after the articles of association are filed, and with notice of such defect, to take advantage thereof, by quo warranto, or otherwise, its right to do so thereafter must be considered as lost: *State v. Bailey*, 19 Ind. 452. In *State v. Gordon*, 87 Ind. 175, a quo warranto proceeding against a turnpike company that had used its franchises for nineteen years, the court said: "We are not prepared to hold that the statute of limitations, *eo nomine*, has a complete application to an information like the one before us, but we think it safe to say that in analogy to the clause of the statute applying a limitation to all actions not specifically enumerated and limited, fifteen years ought to be considered as the *ne plus ultra*, beyond which such an information cannot ordinarily be prosecuted, leaving it to the courts to limit proceedings in any particular case to a shorter period where longer time would be unavailing, unreasonable, or unconscionable, because of laches on the part of the state or of the relator." In that case the articles of incorporation were defective in failing to set forth a line of route or to describe it with sufficient definiteness, but the company had used the franchises of the corporation for nineteen years under such defective articles, and the court held that a prosecution by quo warranto against the persons in possession of such corporate franchises, to show by what right they were held, was barred by lapse of time: *State v. Gordon*, 87 Ind. 171.

Municipal corporations are not within the operation of the statute of limitations as respects public rights. The legal existence of a municipal corporation is a matter of public right, and in a proceeding by information in the nature of a quo warranto to test its existence, or the right of its officers to exercise corporate powers, etc., the statute of limitations does not apply nor does the doctrine of estoppel, except in special and peculiar cases. The doctrine of estoppel in pais is sometimes applied to municipal corporations, even when the quo warranto proceeding involves a question of public right, but such cases are exceptional and, when they do occur, the public is only held to be estopped on account of special circumstances, which would make it highly inequitable or oppressive to enforce public rights: *Catlett v. People*, 151 Ill. 16.

The inconvenience and vexation arising from having no rule as to limitation of time in quo warranto proceedings to enforce private rights, as distinguished from public rights, was early recognized in England. The time was indefinite by the common law and was fixed by no statute. The courts were desirous to go by a certain rule, and so they drew a line by analogy to the statute of limitations in ejectment. They drew it for twenty years. This was "acquiesced in by the bar, and in Parliament, where it was once mentioned. Now no person can apply for an information in opposition to enjoyment and undisputed possession for twenty years": *King v. Stacey*,

1 Term Rep. 2, 3, per Lord Mansfield; *King v. Bond*, 2 Term Rep. 771. In Illinois, the statute of limitations, requiring all civil actions to be commenced within five years next after the cause of action accrued, has been applied to a quo warranto proceeding to compel school directors to show by what right they claimed to hold their office: *People v. Boyd*, 132 Ill. 60. Under the Ohio statute regulating proceedings in quo warranto, an action against a corporation for the forfeiture of its charter must be brought "within five years after the act complained of was done or committed": *State v. Standard Oil Co.*, 49 Ohio St. 137; 34 Am. St. Rep. 541; *State v. Railroad Company*, 50 Ohio St. 239; but the right of the state to bring an action for the purpose of ousting a corporation from "the exercise of a power or franchise under its charter" is not barred until such power or franchise has been exercised for twenty years: *State v. Standard Oil Co.*, 49 Ohio St. 137; 34 Am. St. Rep. 541. A court may refuse a writ of quo warranto, even before the statute of limitations has run, in certain cases, when the object sought is to enforce private rights, and in some other proper cases when public policy requires that the writ should not issue: *People v. Boyd*, 132 Ill. 60.

NEVITT v. WOODBURN.

[160 ILLINOIS, 203.]

A JUDGMENT AGAINST AN ADMINISTRATOR OR EXECUTOR for money due from him, as such, to the estate is, in the absence of fraud or collusion, binding upon the sureties on his bond, and cannot be collaterally attacked in an action on the bond.

LIMITATIONS OF ACTIONS—SUIT PENDING.—The statute of limitations does not run while an action to recover the matter in dispute is pending, and the action is pending until final judgment.

LIMITATIONS OF ACTIONS—SUIT ON EXECUTOR'S BOND.—In a suit on an executor's bond, for a sum of money found due from him, as executor, to the estate, where the judgment has been reversed on appeal, as being too large, and the case has been remanded, the statute of limitations begins to run from the date of a new and final judgment for the amount as reduced by the direction of the appellate court.

EXECUTORS AND ADMINISTRATORS—REMOVAL OF EXECUTOR PENDING SETTLEMENT OF ACCOUNTS—LIABILITY OF SURETY.—A surety on an executor's bond is not relieved from liability for an amount found due from the executor to the estate, where the original judgment was rendered against the executor, as such, before his removal, though after such removal this judgment was reversed on appeal, the cause remanded with directions to reduce the judgment, and a new and final judgment was entered against him individually, as the court did not lose jurisdiction.

EXECUTORS AND ADMINISTRATORS—JUDGMENT—RECOVERY ON EXECUTOR'S BOND BY ADMINISTRATOR DE BONIS NON.—The fact that a judgment against an executor, who has been removed from office, does not order the amount to be paid to the administrator de bonis non, who is not appointed at the time the judgment is rendered, does not prevent a recovery, on the executor's bond, by such administrator, when he is appointed, of the amount found due from the executor to the estate.

EXECUTORS AND ADMINISTRATORS—SUIT ON EXECUTOR'S BOND—DEMAND.—In a suit upon an executor's bond, a demand is not necessary where the statute does not require it.

Jarvis Dinsmoor, for the appellant.

John G. Manahan, for the appellee.

²⁰⁵ **MAGRUDER, J.** This is an action of debt, begun on April 28, 1893, in the name of the people for the use of Charles H. Woodburn, administrator de bonis non of the estate of George W. Woodburn, deceased, against the appellant, Edward H. Nevitt and others, sureties upon the bond of Peter Ege as executor of the will of said George W. Woodburn. Appellant was the only one of the defendants who was served. Pleas were filed to the declaration; replications were filed to the pleas; the cause was tried before a jury; and the trial resulted in verdict and judgment for the plaintiff for \$7,000 debt and \$2,412 damages, the latter being the sum of \$1,841 hereinafter mentioned and interest thereon.

George W. Woodburn died on April 19, 1872, in Whiteside county, and left a will in which he appointed his nephew, Peter Ege, his executor, with power to sell his real estate for the payment of his debts and for the purpose of raising a fund sufficient to pay out of the interest thereon to his wife \$1,000 per year for her support during her lifetime, and, at her death, to go to his son, James H. Woodburn, during his lifetime, etc. Ege was appointed executor on October 2, 1872, and executed a bond, dated on that day, in the sum of \$7,000 with appellant and two others as sureties, conditioned, as required of executors by the statute then in force, that he ²⁰⁶ would make and exhibit in the county court a true and perfect inventory, etc., that he would render to said court a just account of his doings as executor, and well and truly fulfill the duties enjoined upon him in said will; that he would pay and deliver the legacies and bequests therein contained to the parties thereto entitled, so far as the estate of the testator should extend, according to the value thereof, and as the law should charge him; and in general that he would do all other acts that might be required of him by law: Rev. Stats. 1874, c. 3, sec. 7, p. 105.

On October 13, 1882, Ege was removed, and his letters testamentary were revoked by the county court of Whiteside county for waste and mismanagement of the estate and neglect and refusal to perform the duties of his trust. Subsequently Charles H. Woodburn was appointed by said court administrator de bonis

non with the will annexed. This suit is brought under section 39 of the administration act, which provides as follows: "In all cases where any such executor or administrator shall have his letters revoked, he shall be liable on his bond to such subsequent administrator, or to any other person aggrieved, for any mismanagement of the estate committed to his care; and the subsequent administrator may have and maintain actions against such former executor or administrator for all such goods, chattels, debts, and credits, as shall come to his possession, and which are withheld, or have been wasted, embezzled, or misapplied, and no satisfaction made for the same": 1 Starr & Curtis' Annotated Statutes, p. 208.

In order to establish a breach of the conditions of the bond, plaintiff introduced in evidence a decree of the circuit court of Whiteside county entered on July 9, 1888, and, in connection therewith, another decree of said court entered in the same cause theretofore on October 9, 1882. As will appear by reference to *Woodburn v. Woodburn*, 123 Ill. 608, a bill had been filed in said court by James H. ²⁰⁷ Woodburn, the son and heir of George W. Woodburn, deceased, against the widow, Phebe A. Woodburn, to enjoin a suit at law and correct a mistake in a deed, and the widow had therein filed a cross-bill against her son to set aside a certain agreement; a bill had also been filed by the widow against Peter Ege, the executor, for an accounting; there were also then pending in said circuit court two appeals taken by said executor, Peter Ege, from two orders entered by the county court in the matter of said estate, one, an order made upon the final report of said executor to the county court, and the other, an order directing the executor to pay over to the widow a certain sum found to be due from him. These chancery causes and appeals from the county court were consolidated, and one decree was entered therein on October 9, 1882, which is the decree introduced in evidence as above stated. That portion of said decree which has reference to the final report of the executor to the county court recites, that "the court being fully advised in the premises in the matter of the appeal of Peter Ege as executor of the last will and testament of George W. Woodburn, deceased, from the county court of said county on the final report of said executor, doth find that there is due the estate of said deceased from the said executor the sum of \$8,604.52"; and the decree then proceeds to order and adjudge that Ege pay said sum with interest from the date of the decree within thirty days, and, in default thereof, that execution issue, etc.

This decree of October 9, 1882, was taken by writ of error for review to the appellate court, and was thence brought by appeal to this court, and the decision upon it is reported as *Woodburn v. Woodburn*, 123 Ill. 608. We there held that, so far as said sum of \$8,604.52—"with which Ege was charged as executor, and for which judgment was rendered against him in favor of the estate"—was made up of a certain note for \$3,050 and interest thereon, it was erroneous, and we said: "We decide nothing ²⁰⁸ more against the indebtedness found due from Ege as executor to the estate of George W. Woodburn than in respect of this note—that he should not have been charged therewith." The judgment entered in that case was a judgment reversing the decree and judgment of the circuit court, and remanding the cause for further proceedings conformable to the opinion.

The decree of July 9, 1888, recites that James H. Woodburn had sued out from the appellate court a writ of error, directed to said Phebe A. Woodburn and James Ege, to reverse in part said decree of October 9, 1882, and had prosecuted the same to a hearing in said court; that said Phebe A. Woodburn had appealed from the judgment of the appellate court in said cause to the supreme court of Illinois, and had prosecuted her appeal to final judgment; that the parties appeared by counsel, and the mandate and opinion of the supreme court were filed and read; that the said Ege was present pro se; that the cause was referred to the master to state the account against the said Ege in accordance with the decision of the supreme court; and the decree, after the statement of the account by the master was read and heard, adjudges, "that by eliminating the said note of James H. Woodburn for the original sum of \$3,050 in accordance with the order of the supreme court, and correcting said decree made in said cause October 9, 1882, the balance against said Peter Ege shall be the sum of \$1,369.13; and the same shall be, with interest from said ninth day of October, A. D. 1882, the amount due said estate from said Peter Ege, and which is found by the court to be the total amount, the sum of \$1,841; which said last-mentioned sum said Peter Ege is ordered to pay within thirty days," etc.

1. The main point made by appellant is, that the trial court erred in refusing to permit him to introduce certain evidence for the alleged purpose of showing that the sum, stated in the declaration to have come into the ²⁰⁹ executor's hands, to wit, \$1,841, was the proceeds of certain lands sold by the executor as trustee. Upon this branch of the case, counsel for appellant re-

fers us to a large number of authorities, holding that executors may act in a double capacity, as executors by virtue of their office, and as agents or trustees under a warrant of attorney; that only the powers and duties of executor, which result from the nature of that office, devolve upon an administrator with the will annexed; that the authority to act as trustee does not devolve upon such administrator; that sureties on the bond of an executor are not liable for the proceeds of real estate; that default in the payment of the proceeds of real estate, arising from the execution of a trust power in the will, does not contravene any condition of the executor's bond; that the liability to pay over such proceeds is not in consequence of the bond; and, hence, that such liability cannot be enforced against the sureties. We do not deem it necessary to discuss these authorities, or to pass any opinion upon the doctrine announced by them.

It is sufficient to say, so far as the present case is concerned, that the decree of 1888 was produced in evidence and read in connection with the decree of 1882. It thus appears that judgment was rendered against Peter Ege, the principal in the bond, for money due from him as executor to the estate of George W. Woodburn. This finding, that the executor as such owed the money to the estate, is binding on the surety. "As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense; but administration bonds seem to form an exception to this general rule, and the sureties thereon, in respect of their liability for the default of the principal, seem to be classed with such sureties as covenant that their principal shall do a particular act": *Irwin v. Backus*, 25 Cal. 214; 85 Am. Dec. 125. The liability of a surety upon an ²¹⁰ administration bond is fixed by the judgment against his principal; and this is so by reason of the terms of his obligation, which are substantially those of the bond sued on in this case as above set forth. It results from the nature of the obligation entered into by a surety on an administration or executor's bond, that he is bound and concluded by the judgment against his principal in the absence of fraud or collusion: 1 *Woerner's American Law of Administration*, sec. 255; 2 *Black on Judgments*, sec. 589; *Ralston v. Wood*, 15 Ill. 159; 58 Am. Dec. 604; *Housh v. People*, 66 Ill. 178; *Stovall v. Banks*, 10 Wall. 583; *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182. The judgment against the principal in such case is *res judicata*, and cannot be collaterally attacked in the action on the bond.

Counsel for appellant claims that the county court had no jurisdiction to charge the executor with the proceeds of real estate sold under a power in the will, conferred upon him as a personal trust and by reason of the testator's confidence in him; and that, therefore, a judgment, based upon an account, or a report, containing such a charge, could be attacked collaterally. Even if this were so, counsel did not offer to introduce proper evidence to show that the judgment was founded upon a charge for the proceeds of the sale of real estate. He proposed to introduce the first report of the executor as to the disposition of the personal property described in the inventory, and the second report which mentions only the note for \$3,050, but did not offer the final report of the executor mentioned in the decree of 1882. If the sum of \$1,841 represented the proceeds of the sale of real estate, the final report upon which the decree of 1882 was based was the proper evidence of the fact. The account in such report would be considered a part of the judgment itself, and would show the nature of each of the several items therein embraced and of the judgment of the court upon each item. The items, over which the probate court was held to have no jurisdiction, were ²¹¹ shown by the guardian's account in *People v. Seelye*, 146 Ill. 189, and by the administrator's account in *Probate Court of Newport v. Hazard*, 13 R. I. 3. Whatever personal trust the executor was required by the will to execute as trustee related to the sale of the real estate for the purpose of raising a fund for the support of the widow. As the decree of 1882 contains a separate order directing Ege to pay \$859.86 to the widow, it would appear from the face of the decree itself that the amount found due on the final report of the executor did not include the proceeds of real estate derived from the execution of the personal trust.

2. The statute of limitations was pleaded to the declaration, and it is claimed that the action was barred upon the alleged ground that it did not accrue within ten years next before the commencement of the suit. Counsel for appellant claims that execution was issued upon the decree of October 9, 1882; that demand was made thereon by the sheriff on December 11, 1882; that thirty days thereafter, to wit on January 12, 1883, the liability of the surety began to run; and that, as this action was not commenced until April 28, 1893, the ten years had passed and the bar was complete. We think that the cause of action accrued on July 9, 1888, when the final decree for \$1,841 was entered against Ege. Ten years had not elapsed after that date and before the beginning of the suit.

Section 16 of the limitation act provides that "actions on bonds . . . shall be commenced within ten years next after the cause of action accrued": 2 Starr & Curtis' Annotated Statutes, p. 1553. The cause of action is not the making of the bond but consists of the execution of the bond and the breach of the condition of the bond: *Bonham v. People*, 102 Ill. 434. In an action upon an executor's or administrator's bond, the foundation of the right of recovery is the liability of the principal and sureties to pay the judgment against the principal, when such judgment ²¹² has been rendered. The cause of action accrues upon the failure of the executor or administrator to pay the judgment so rendered against him: *People v. Seelye*, 146 Ill. 189; *Frank v. People*, 147 Ill. 105. In the case at bar, although the original judgment or decree was rendered against the executor on October 9, 1882, yet that judgment was taken for review by writ of error to the appellate court and by appeal to the supreme court, and finally reversed as being too large; and, upon a remandment of the cause, a new judgment was rendered for the correct amount as reduced by the reviewing court. The suit was pending until the final decree of July, 1888. The statute of limitations does not run while the action to recover the matter in dispute is pending: *Chicago etc. Ry. Co. v. Jenkins*, 103 Ill. 588. The declaration counts upon the decree of 1888, and the decree of 1882 was introduced as explanatory of that of 1888. We are of the opinion that the plea of the statute of limitations does not constitute a good defense.

The case at bar differs from the case of *Peoria County v. Gordon*, 82 Ill. 435, in that here the judgment taken up by writ of error was reversed before the statutory period had run, while there the judgment appealed from was affirmed.

3. It is said that the decree of 1888 is against Ege individually, and not against him as executor. When the decree of 1888 is read in connection with that of 1882, it sufficiently appears that the former was against the executor. It is true that the letters testamentary of Ege, the executor, were revoked on October 13, 1882, but the decree of October 9, 1882, was rendered against him while he was executor, and for causes arising during his administration of the estate.

The case of *Slagle v. Entrekin*, 44 Ohio St. 637, is an instructive one upon this subject. That was an action by an administrator de bonis non upon the bond of the executors who were his predecessors; and their sureties, ²¹³ to recover the amount found due the estate on the settlement of their accounts in the

probate court. The executors had filed their final account, which was excepted to. A motion being made to remove them, they resigned, and their resignations were accepted before their account was settled. After their resignations the court heard the exceptions, and settled the account, and found a certain amount due from them to the estate, and ordered them to pay it. It was there held that, where an administrator or executor resigns pending the settlement of his accounts, the court does not thereby lose jurisdiction over his person, or over the settlement of his accounts, and may proceed to hear and determine exceptions thereto, and ascertain the amount due from him to the estate, in like manner as if he had continued in the execution of his trust. We apprehend that the same rule applies where an executor has been removed. In the case at bar, the matter of the settlement of the executor's accounts was pending and unsettled when he was removed. The fact that the judgment against him upon his final report was reduced by the reviewing court, and a judgment for the reduced amount rendered against him in accordance with the decision of the reviewing court, did not deprive the court rendering the judgment of its jurisdiction over him, or over the subject matter of the judgment. We do not regard the third objection as well taken.

4. It is said that the judgment against Ege for the amount due from him on his final report did not order such amount to be paid to the administrator de bonis non. We do not regard this as material. The administrator de bonis non had not been appointed when the judgment was rendered. It was found that the amount which he owed was due to the estate of the deceased and this was sufficient. If it had been shown in this suit that the amount so found due had been paid to an authorized representative of the estate before the appointment of the administrator de bonis non, the defense to the action ²¹⁴ would have been complete; but no such proof was made. After his appointment, the administrator de bonis non was entitled, under the statute, to maintain a suit against the former executor and the sureties on his bond, for the indebtedness of such former executor to the estate on account of assets received by him and converted to his own use: *Hanifan v. Needles*, 108 Ill. 403; *Slagle v. Entrekin*, 44 Ohio St. 637.

5. It is furthermore contended that the declaration does not aver that a demand was made of Ege, the executor, for the amount for which the decree was rendered. The averment and proof of such demand are necessary when the suit is brought un-

der section 115 of the administration act: 1 Starr & Curtis' Annotated Statutes, p. 244. But this suit is brought under section 39 above set forth, which does not seem to require a demand to be made. It appears that the executor, Ege, appeared and filed exceptions when the decree of 1882 was entered, and that he was present in court in his own behalf when the decree of 1888 was entered. In each decree he was given thirty days from the filing thereof to pay the amount found due from him. The appellant admits, however, that demand was made of Ege by the sheriff on December 11, 1882, for the sum ordered to be paid by the decree of 1882.

We are inclined to think that there was no error in overruling the motion in arrest of judgment, such motion being based upon the two alleged defects in the declaration which have been last hereinbefore considered, to wit, because there was no order of the county court directing Ege to pay the administrator *de bonis non cum testamento annexo*, and because no demand is alleged in the declaration.

The judgment of the appellate court is affirmed.

EXECUTORS AND ADMINISTRATORS—CONCLUSIVENESS OF JUDGMENT AGAINST, ON SURETY.—A judgment or decree establishing a claim against an executor or administrator is, in the absence of fraud or collusion, conclusive upon the sureties on his bond: See monographic note to *Charles v. Hoskins*, 83 Am. Dec. 383, 384, on judgments against principals as evidence against sureties, showing, however, that in a number of the states, a judgment or decree establishing a claim against an executor or administrator is *prima facie* only against his sureties: See, also, *Morris v. Murphey*, 96 Ga. 307; 51 Am. St. Rep. 81. Probate court orders ascertaining and fixing the amount finally due by an administrator are conclusive against the sureties on his bond, in a suit against them for his failure to pay over such amount as ordered by the court: *Stewart v. Morrison*, 81 Tex. 396; 26 Am. St. Rep. 821, and note; *Judge of Probate v. Claggett*, 86 N. H. 331; 72 Am. Dec. 314; *Ralston v. Wood*, 15 Ill. 159; 58 Am. Dec. 604.

EXECUTORS AND ADMINISTRATORS.—THE STATUTE OF LIMITATIONS begins to run in favor of an executor or administrator from the date of his dismissal: See monographic note to *Miles v. Thorne*, 99 Am. Dec. 394, on the statute of limitations as between trustor and trustee.

AN ADMINISTRATOR DE BONIS NON is entitled to debts due the estate, and may maintain a common-law action against a dismissed executor for assets in his hands. He may either sue on the bond or proceed against his predecessor by summary process. He may, if desirable, resort to the sureties on the bond, or sue the personal representatives of the former administrator to recover the balance of an administration account: See monographic note to *Potts v. Smith*, 24 Am. Dec. 387, discussing administrators *de bonis non administratiis*.

PACIFIC EXPRESS COMPANY v. SHEARER.

[160 ILLINOIS, 215.]

CARRIERS—DELIVERY TO PROPER PERSON.—A carrier is an insurer of the safe delivery of the goods to the person to whom they are consigned.

CARRIERS—LIABILITY FOR DELIVERY TO WRONG PERSON—FRAUD.—A carrier cannot escape liability on the ground that deception, imposition, or fraud may have been resorted to by an impostor to obtain from the agent of the carrier the goods intrusted to its care.

CARRIERS—DELIVERY TO WRONG PERSON—IMPOSITION.—An express company is liable for delivering a package of money to an impostor who represents that he is the consignee, where the one who sent the money, as directed by telegraph, believed that the telegram was from the person by whom it purported to have been sent, although such impostor telegraphed for the money in the name of the supposed consignee, and a reply to the telegram was delivered to the impostor. The company, without reference to the party who may have ordered the money sent, or who may have telegraphed for it, is bound to deliver it to the real person to whom it is consigned.

Action against a carrier to enforce its liability for not delivering a package of money to the person to whom it was not consigned. The plaintiffs and appellees, Shearer & Co., had, for a number of years, conducted business at the stockyards in Chicago, and had had dealings with one J. C. Stubblefield, who was engaged in buying stock in Kansas, Missouri, and Texas, and who, from time to time, applied to Shearer & Co. for advances of money, which they sent him in the form of drafts, letters of credit, and money by express. Stubblefield was acting for himself in the purchase of cattle, and not as agent of Shearer & Co. He arrived in Chetopa, Kansas, about midnight of April 21, 1889, and went to bed at a hotel, without registering, as he was tired. Another man got off at Chetopa, at the same time and from the same train, but went to a hotel farther from the depot than that to which Stubblefield went. This man subsequently claimed that his name was J. C. Stubblefield. On the next day, the real J. C. Stubblefield left Chetopa, but the impostor, who personated him, went to the telegraph office, in Chetopa, and telegraphed Shearer & Co. to express him four thousand dollars on that day. The money was sent as ordered to J. C. Stubblefield, the impostor. He received the answer to the telegram, and, in reply to a request for particulars, telegraphed that he had "bought 240 corn fed Texas, top of 300, at \$20 a head." The hotel at which he stopped was kept by one Davenport, and he informed Davenport that J. C. Stubblefield was his name, though he had not registered. On the after-

noon of April 22d, the impostor had the railroad company place eleven stock-cars on a sidetrack at Chetopa ready for the purpose of carrying cattle for the man known to them as Stubblefield. He informed Davenport that he was buying cattle to ship from Chetopa, and that he was expecting money from Chicago with which to pay for them; and that he had ordered the money from Shearer & Co. by telegraph. On the morning of April 24th he called at the express office, and asked the agent if there was a package there for Stubblefield, saying that that was his name. He was asked what were his initials, and he replied "J. C." The agent then said that there was a package for J. C. Stubblefield, and asked, "What identification have you?" He then took from his pocket two accounts of sales and a telegram and handed them to the agent. The telegram was the one signed by Shearer & Co. and addressed to J. C. Stubblefield at Chetopa. The accounts of sales showed transactions between J. C. Stubblefield and Shearer & Co., and that the latter had sold in Chicago cattle consigned to them by J. C. Stubblefield. The agent then asked the impostor, "Is there anybody here that you are acquainted with?" The man replied, "Nobody, except the landlord." Davenport was then brought in, and the agent inquired of him, "Are you acquainted with this gentleman?" The reply was, "I am." The agent said, "Who is he? What is his name?" and Davenport replied, "J. C. Stubblefield." The agent then said, "How do you know that is his name?" The answer of Davenport was, "At least, that is the only name I ever knew him by. Besides, he has been stopping at my house several days—nearly a week. He is also on a trade with some parties west of town for some stock. He has got the cars ordered. They are on the track at the depot." The agent then asked the impostor, "What are you looking for?" He said, "A package of money." The agent asked, "How much?" The answer was, "Four thousand dollars, from W. W. Shearer & Co., Chicago, Illinois." The package of money was then delivered by the agent to the impostor, who receipted for it as J. C. Stubblefield, and Davenport signed his own name as identifying Stubblefield. The impostor was not afterward seen in Chetopa. The real J. C. Stubblefield, soon after leaving Chetopa, went to Chicago, and called at the office of Shearer & Co., when it was discovered that a fraud had been consummated, and steps were immediately taken to stop the delivery of the package, but it was then too late.

James Frake and W. W. Morsman, for the appellant.

Barnum, Humphrey & Barnum, for the appellees.

²¹⁸ CRAIG, C. J. On the trial in the circuit court before the court, without a jury, the court held as law ten propositions submitted by the appellees and refused four propositions submitted by the appellant. The ruling of the court on ²¹⁹ the propositions submitted led to a judgment in favor of the appellees, the plaintiffs in the action, and that judgment was affirmed in the appellate court. When this case was first submitted, we were inclined to reverse the judgment and remand for another trial, but, upon a petition for a rehearing, on a further consideration of the case, we have reached a different conclusion.

Appellees' third and fourth propositions held were as follows: "3. To relieve the defendant from legal liability in this action it is not enough that the evidence should prove that the man to whom the defendant's agent at Chetopa delivered the package in controversy was in fact the man, and was sufficiently identified to said agent as the man, whose telegram to the plaintiff in evidence caused them to send by express, as they did, the package in question. 4. The defendant in this case, on receiving the package in controversy addressed to J. C. Stubblefield, Chetopa, Kansas, became, as common carrier, an insurer of the safe delivery of said package to J. C. Stubblefield, Chetopa, Kansas, and nothing except the act of God or of the public enemy could discharge the defendant from the duty of so delivering it."

Appellant's first refused proposition was as follows: "If the defendant's agent delivered the package in controversy to the identical person in response to whose telegraphic order the plaintiff sent the same, in good faith, believing such person was J. C. Stubblefield and the person named as consignee, and if, at the time of the delivery of the package in controversy, the defendant's agent correctly ascertained that the person who demanded it and to whom it was delivered was the identical person in response to whose order the plaintiff sent the same, and that plaintiffs had accepted the order of such person and acted upon the same as the order of J. C. Stubblefield, and if, before the delivery of the package in controversy, ²²⁰ the defendant's agent made reasonable efforts and exercised reasonable and ordinary care and diligence to ascertain the identity of the person who demanded the delivery and to whom the delivery was in fact made, and then made such delivery without knowledge or reason to believe that the person to whom such delivery was made was not the person to whom such package was addressed, then the plaintiffs cannot recover in this action, and the finding and judgment must be for the defendant."

It is apparent from the record that the package was delivered to the person in response to whose telegraphic order appellees sent the package, appellees at the time believing such person to be J. C. Stubblefield; and it is, no doubt, also true that, at the time of delivery, the agent of appellant ascertained that the person who demanded the package, and to whom it was delivered, was the person in response to whose order appellees sent the same, and that appellees treated the order for the money as the order of J. C. Stubblefield; and it may also be true that the agent used reasonable diligence to ascertain the identity of the person who demanded the package before it was delivered. Would these facts relieve the carrier of liability for delivering the package to a person to whom it was not consigned?

In *Hutchinson on Carriers*, section 344, the rule with reference to delivery is stated as follows: "No circumstance of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind, and no excuse has ever been allowed for a delivery ²²¹ to a person for whom the goods were not directed or consigned."

In *United States Exp. Co. v. Hutchins*, 67 Ill. 348, 350, where an action was brought against the express company for its failure to deliver a package of money left with it to be carried and delivered, this court said in regard to the liability of the company: "They became insurers for its safe delivery. Being so, nothing can excuse them from their obligation safely to carry and deliver, but the act of God or the public enemy. This rule of the common law, the rigid application of which has given so much satisfaction and security to the commerce of nations, is properly invoked in cases like this."

In *Baldwin v. American Exp. Co.*, 23 Ill. 197, 74 Am. Dec. 190, where an action was brought against the company to recover the value of a package of money which it, as common carrier, undertook to carry from Chicago to Madison, Wisconsin, and deliver to a certain named person, it was held to be the settled doctrine of England and of this country that there must be an actual delivery to the proper person, and in no other way can the company discharge itself of responsibility as a common car-

rier, except by proving that it has performed such engagement, or has been excused from the performance of it, or been prevented by the act of God or the public enemy. After citing authorities in support of this position, it is said: "It is necessary, in order to give one security to property, this rigid rule should obtain, and it has for years been enforced against common carriers. They are considered as insurers, and are under that responsibility." In *Gulliver v. Adams Exp. Co.*, 38 Ill. 503, the rule announced in the case last cited was sanctioned and approved.

In *American etc. Exp. Co. v. Milk*, 73 Ill. 224, an action was brought against the company to recover for a package of money delivered to the company in Du Page county, to be forwarded to Kankakee. When the package arrived at its destination, the agent of the ²²³ company delivered it to a certain person on a forged order of the consignee. It was held that it is the duty of an express company, upon receiving a package of money to be forwarded, to safely carry and deliver it to the consignee, and the only way it can relieve itself from responsibility as a common carrier is by showing performance, or its prevention by the act of God or the public enemy, and that it is not discharged by delivering the same to another on a forged order of the owner. The same doctrine is announced in *American etc. Exp. Co. v. Wolf*, 79 Ill. 430.

The decisions of this court are believed to be in harmony with the law as declared in the text-books and as announced by a large majority of the courts of last resort of the country. The law requires at the hands of the carrier absolute certainty that the person to whom the delivery is made is the real person to whom the goods have been consigned, and the carrier cannot escape liability on the ground that deception, imposition, or fraud may have been resorted to by an impostor to obtain from the agent of the carrier the goods intrusted to its care. The business interests of the country, as well as the rights of a consignee who pays a liberal price for the transmission of his property, alike demand that the carrier should be held to a strict accountability.

There are a number of cases in the books where a delivery of goods has been made by the carrier to the wrong person under circumstances not unlike the facts under which the money was delivered here, where the carrier was held liable. In *American Exp. Co. v. Fletcher*, 25 Ind. 493, a person pretending to be J. O. Riley called on the telegraph operator and agent of the

express company and sent a telegram to plaintiff requesting a certain sum of money by express. In a short time, the same agent received by express a package of money addressed to J. O. Riley. The person who had sent the telegram for the money called on the agent and operator and demanded ²²³ the package of money, which was delivered over to him. Subsequently, it turned out that the person who sent the telegram and to whom the money was delivered was not J. O. Riley, and the express company was held liable for the money. In the decision of the case, the court, among other things, said: "The express undertaking of the appellant was to deliver the package to J. O. Riley in person. The utmost that the answer alleged was, that the delivery was to another person who pretended to be Riley. He identified himself merely as having so pretended on the day before, by transmitting a telegram in Riley's name. This was no better evidence that his name was Riley than if he had so stated to the express agent or any third person. That the package had been sent in response to a telegram purporting to be from J. O. Riley simply proved that Riley had credit, or some arrangement with the plaintiff to furnish him money, and that the package was sent to him—not that he was the person who sent the dispatch or that anyone pretending to be him was to receive it."

Southern Exp. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107, is another case in point. There an instruction had been given which was, substantially, that the express company, without reference to the party who may have ordered the money sent or who may have telegraphed for it, was bound to deliver to the plaintiff if it was sent to him and he was the owner. On behalf of the express company, it was insisted that the instruction did not announce a correct rule of law, but the court held otherwise, and said: "This instruction, viewed in reference to the testimony, is nothing more than that a forged telegram is no excuse for the delivery to a party not the owner and to whom it was the contract of the carrier to deliver it. . . . Notwithstanding the forged telegram, this carrier, in making a personal delivery, was bound by law to deliver to the person to whom the package was addressed, he being its true owner. It is the settled doctrine of England and ²²⁴ this country that there must be an actual delivery to the proper person, . . . and in no other way can the carrier discharge his responsibility, except by proving he has performed such engagement or has been excused from performance, or been prevented by the act of God

or a public enemy": See, also, *American Exp. Co. v. Stack*, 29 Ind. 27.

Price v. Oswego etc. Ry. Co., 50 N. Y. 213, 10 Am. Rep. 475, is an interesting case on the question. There the person who ordered the goods in the name of a fictitious firm, S. H. Wilson & Co., was the same person who received and receipted therefor in the name of such fictitious firm. It seems that the referee found "that the delivery by the carrier was to the same person who made the order for the goods," and he also found, as a conclusion of law, that the delivery to such person, without notice of fraud, relieved the carrier of liability. But the court of appeals reversed the judgment and held the carrier liable, and, among other things, said: "It would hardly be claimed, in case there had been a firm doing business at Oswego under the name of S. H. Wilson & Co., a swindler would make himself consignee of goods, or acquire any right whatever thereto, which were in fact consigned to such firm, simply by showing that he had forged an order in the name of the firm directing such consignment. If he would not thereby acquire any right to the goods delivery to him would not protect the carrier any more than if made to any other person."

Duff v. Budd, 3 Brod. & B. 177, 7 Eng. Com. L. 399, is also a case in point. There the person who received the goods was the same who ordered them in a fictitious name, but it was held the carrier had no authority to deliver them to such person, and the owner was entitled to recover of the carrier.

Dunbar v. Boston etc. R. R. Co., 110 Mass. 26, 14 Am. Rep. 576, and *Edmunds v. Merchants' etc. Co.*, 135 Mass. 283, are relied upon by the appellant to sustain the delivery of the package. In the first case cited, one John F. Gorman called on Dunbar, ²²⁵ in Boston, and represented that he was John H. Young, of Providence, Rhode Island. He purchased on credit a quantity of goods, and had them consigned to John H. Young, Providence, Rhode Island. Upon the arrival of the goods in Providence, Gorman, who had made the purchase in person, presented himself to the carrier, and, as the agent of Young, demanded the goods. The goods having been delivered to him, Dunbar sued the carrier for a misdelivery, but the court held that the action would not lie. The decision, as we understand it, is predicated on the ground that the goods were consigned and delivered to the person who actually, in person, made the purchase under an assumed name. In the other case it appeared that "a swindler,

claiming to be Edward Pape, of Dayton, Ohio, purchased goods from plaintiff by personal negotiation. There was a man whose true name was Edward Pape, in Dayton, Ohio—a reputable business man, who the plaintiff supposed the swindler to be. The goods were delivered by plaintiff to the defendant, to be carried to Dayton and delivered to Edward Pape. The defendant delivered to the swindler." The court held that the carrier was not liable. In the opinion the court said: "The sale was voidable by the plaintiff, but the carrier, by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the directions upon the package, and who was the person to whom the plaintiff sent them." There is a marked distinction between these cases and the one under consideration, and they cannot control here.

Another case relied upon is *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467. That case, in its facts, is more like the one under ²²⁶ consideration than any that has been cited by appellant, and it seems to sustain the position of appellant. But while we recognize the ability of the court in which the case was decided, we do not regard the rule laid down as the correct one, and we are not inclined to follow it.

Some other cases have been cited in the argument of counsel, but it will not be necessary to refer to them here. The cases bearing on the question are not entirely harmonious, but the rule adopted in this state and in the courts of many other states, that the carrier is an insurer for the safe delivery of the goods to the person to whom they are consigned, is, as we think, the only safe rule to be adopted. This rule gives protection to the consignor, who pays his money to the carrier to transport and deliver goods to the consignee, and at the same time imposes no unreasonable responsibility on the carrier. When money or goods have been delivered to a carrier to be carried and delivered to a certain named person, when they reach their destination it is the business of the agent of the carrier to deliver to the real person to whom they are consigned, and, as said by Hutchinson, no circumstance of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. Where the consignee is unknown to the agent of the

carrier, it is his duty to hold the goods until the consignee furnishes ample proof that he is the person to whom the goods were consigned. When Shearer & Co. received the telegram from J. C. Stubblefield, and forwarded a package of money directed to J. C. Stubblefield, they supposed and believed the order came from the man with whom they had previously had dealings and with whom they were personally acquainted, and, when they delivered the package to the carrier, it was consigned to him. The fact that an impostor had sent a telegram in the name of J. C. Stubblefield, and a reply to J. C. Stubblefield was returned which was delivered to the impostor, did not authorize the agent of the carrier to deliver ²²⁷ the package directed to J. C. Stubblefield to an impostor representing that he was J. C. Stubblefield. Here the package of money was consigned to J. C. Stubblefield, and the carrier was directed to deliver the money to him and to him only. This was not done. The money was never delivered to J. C. Stubblefield, but the agent of the carrier delivered it to an impostor, and for a failure to deliver the package to J. C. Stubblefield the carrier is liable.

The judgment of the appellate court will be affirmed.

MR. JUSTICE PHILLIPS DISSENTED in the following language: "I cannot concur in the views held by the majority of the court on this record. The rule of law is well settled that the carrier must deliver the goods carried to the person to whom they are consigned. No fraud or imposition practiced upon the carrier, and no mistake of the carrier or its agent, however satisfactory the circumstances of identification may be, will relieve the carrier. The law requires a delivery to the person to whom the goods are shipped, and the carrier assumes the entire risk of mistake in respect to the identity of the person to whom a delivery may be made. That requirement makes the carrier insurer for safe delivery to the consignee of the goods carried, and no excuse can prevail for a delivery to another than the consignee: *United States Express Co. v. Hutchins*, 67 Ill. 348; *Baldwin v. American Express Co.*, 23 Ill. 197; *American Merchants' Union Express Co. v. Milk*, 73 Ill. 224; *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430; *Gulliver v. Adams Express Co.*, 38 Ill. 503. The duty thus imposed upon the carrier is discharged when it delivers the goods to the person to whom the consignor sent them.

"The facts in this record show that appellees, acting on a telegram purporting to have been sent by one J. C. Stubblefield, forwarded by appellant from Chicago, Illinois, to J. C. Stubblefield, at Chetopa, Kansas, the sum of \$4,000, which was delivered by the carrier to the person who sent the telegram. The person who sent the telegram is shown to have called himself J. C. Stubblefield, and was, during the

short time he remained in Chetopa, so known and called. He was not there known or called by any other name. What other residence he may have had is unknown, so far as the evidence shows, as is also the fact whether that was his real name. It is apparent, from the evidence, his purpose was to defraud the appellees. In reply to the telegram requesting appellees to send money by express and answer the same, the request therein made was complied with and the money forwarded. It does not appear that any directions were imposed upon the carrier as to any investigation as to the sender of the telegram, and no contract made further than that arising under the law, which created the relation and duty between consignor, carrier, and consignee. The sender of that dispatch was also answered, as requested, and particulars asked for by appellees, and particulars were furnished by another telegram from the same person who sent the first, which were satisfactory to appellees. No investigation was made by the consignors as to the personality of the sender of the dispatch, and none by them asked of the carrier, further than what the law imposed as a duty on it. So far as the consignor was concerned, it was intended, at the time the consignment was made, that the money should be delivered to the sender of the dispatch. That intention grew out of the fact that the consignors had done business with one J. O. Stubblefield, in whom they had confidence, and, believing that he was the sender of the dispatch, they acted on it without investigation. They acted upon and complied with it, intending delivery to be made to the person sending it. The person who sent the telegraphic order is the identical person in response to whose order the money was sent, and was the person who demanded the consignment and made proof as to his identity and to whom the goods were delivered.

"It is said in Hutchinson on Carriers, section 344: 'No circumstances of fraud, imposition, or mistake will excuse the common carrier from responsibility for delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistake in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind, and no excuse has ever been allowed for delivery to a person to whom the goods were not intended nor consigned. If, therefore, the person who applies for the goods is not known to the carrier, and he has any doubt as to his being the consignee, he should require the most unquestionable proof of his identity, or if, from any cause, he should have a reasonable doubt as to whether the person claiming the goods was entitled to them, he should refuse delivery to him until he established his right. If, however, the delivery be made to the wrong person, whether by innocent mistake or through fraud practiced upon the carrier, such wrongful delivery will be a conversion.'

"This is the true rule of law. Express companies have so many opportunities to do wrong, so many temptations are spread before

their employ  s, and such is the necessity for intrusting them, that every presumption should, of right, be against them, and should prevail unless rebutted. The law imposes upon common carriers the very strictest liability to carry, and safely deliver to the proper person, goods and valuables intrusted to them. This strict liability should in all proper cases be rigidly enforced and in no way lessened. Nor will the law recognize an excuse by which it may be avoided. But while it is true that no fraud or imposition practiced upon the carrier will relieve or excuse it from responsibility for delivery to the wrong person, yet I am not prepared to go to the extent of holding that the carrier is responsible for loss occasioned by fraud practiced upon the consignor, when the carrier itself has used due diligence, care, and caution, and is free from negligence. If a fraud is perpetrated upon the consignor by reason of ingenious tricks or devices, or because of a want of care on his part, the carrier does not become a party to that fraud, nor does any liability accrue against it by doing the only thing the consignor intended should be done. As is said as to the liability of express companies in *United States Express Co. v. Hutchins*, 67 Ill. 348: 'They become insurers for safe delivery; being so, nothing can excuse them from their obligation safely to carry and deliver but the act of God or the public enemy.' But the carrier is not an insurer against fraud being perpetrated upon the consignor. The opinion of the court here extends the liability of the carrier to the extent of making it an insurer against fraud perpetrated upon appellees. No negligence is shown on the part of appellant to create a liability against it. No fraud or mistake on the part of the carrier is shown. The fraud that was perpetrated was on the consignor, and not on the carrier.

"The case of *American Express Co. v. Fletcher*, 25 Ind. 492, is cited as directly in point, sustaining the views of the majority. In that case, the only question before the court was as to the sufficiency of the second and third paragraphs of the answer, to which demurrers were sustained, and it was held the answer did not set up that the consignment was delivered to the person to whom it was sent. That was the only question before the court. As a pleading the answer set up no defense, and the demurrer was properly sustained.

"Most of the cases in which carriers have been held by the courts liable have been based almost solely upon the ground of negligence. The carrier is, under all circumstances, being a bailee, bound to exercise due diligence in the performance of its undertaking, and it is always essential, where the plaintiff seeks to recover upon the ground of negligence, that it has performed its duty with due diligence.

"In the case of *Duff v. Budd*, 3 Brod. & B. 177, the impostor ordered by mail, under the assumed name of James Parker, goods to be shipped by the carrier and delivered to James Parker in High street, Oxford. There was no James Parker in High street, but there was a William Parker, whom the consignor erroneously believed to be the person who ordered the goods. When the goods arrived at their destination they were offered to William Parker, but he declined them. Subsequently the carrier delivered the goods to

a man who demanded them, and who was known to the carrier as Mr. Parker, but not as James Parker, nor of High street, and without any information that he was the same person who ordered the goods from the consignor. In this case the judgment was for the plaintiff, but was based upon the finding of negligence. Park, J., said in the opinion: 'The real question was whether the defendant and his servants had been guilty of gross negligence in the delivery of the parcel.'

"In *Stephenson v. Hart*, 4 Bing. 476, the impostor in person ordered goods from the plaintiff, who delivered them to the carrier consigned to 'J. West, No. 27 Great Winchester street, London.' The carrier was unable to find such a person on that street, and found house No. 27 was vacant. A week or more later the carrier received a letter signed 'J. West,' requesting the carrier to reship the goods to the 'Pea Hen,' a public house at St. Albans. Without any direction to this effect from the consignor the request was complied with, and the impostor received the goods without further identification than his ability to state the contents of the package. In this case, the consignor recovered, but the recovery was on the ground that the carrier had been guilty of gross negligence in the performance of its undertaking.

"In *Price v. Oswego*, 50 N. Y. 213, 10 Am. Rep. 413, the swindler ordered goods by mail from plaintiff, signing the name of S. H. Wilson & Co. to the order. The plaintiff complied with the order and sent the goods by the defendant, as above. There was, in fact, no such firm as S. H. Wilson & Co. Soon after the arrival of the goods a person called upon the carrier and asked if the goods had arrived, and learning they had, offered to, and did, pay the freight charges, whereupon the goods were delivered to him upon his signing a receipt for them. The carrier had no knowledge or information whether the person to whom the delivery was made was the person who signed the order for the goods and with whom the consignor had dealt as with the true consignee. They were delivered without any evidence of identity whatever, and such delivery was an act of gross negligence on the part of the carrier.

"In *Samuel v. Cheney*, 135 Mass. 273, 46 Am. Rep. 467, an impostor during the time he remained at Saratoga Springs, bore the name of A. Swannick. He rented a house or shop, secured a box at the post-office, and had letterheads printed with his name, upon which was also given the number of his postoffice box, all for the purpose of perpetrating the swindle. There was a reputable merchant in Saratoga Springs named Arthur Swannick, who carried on his business in the name of A. Swannick. The swindler ordered a bill of goods from the plaintiff in Boston, signing the name of A. Swannick, and the plaintiff forwarded the goods by defendant, as carrier, believing the letter was from the reputable merchant, consigning the goods to A. Swannick, Saratoga Springs. At the same time, the plaintiff sent a bill for the goods addressed to 'A. Swannick, postoffice box 1595,' that being the box of the swindler which, of course, went to him. On the arrival of the goods, they were delivered to the swindler without any identification, except that the carrier had previously deliv-

ered a package of cigars at his shop. Action was brought against the carrier on the ground that this was a misdelivery, but the court held that the delivery was good. The court in that case said: 'The defendant would be justified in delivering the goods to him whether he was the owner or not, because he had ascertained that he was the person to whom the plaintiff had sent them.' To the contention of the plaintiff that he intended to send the goods to Arthur Swannick, the court answered: 'We think the more correct statement is that he intended to send them to the man who ordered and agreed to pay for them, supposing, erroneously, that the man was Arthur Swannick. It seems to us that the defendant, in answer to plaintiff's claim, may well say, We have delivered the goods intrusted to us, according to your directions, to the man to whom you sent them, and who, as we were induced to believe by your act in dealing with him, was the man to whom you sent them. We are guilty of no fraud or negligence.'

'In *Edmunds v. Merchants' etc. Co.*, 135 Mass. 283, goods were purchased from plaintiff by one claiming to be Edward Pape, of Dayton, Ohio, by personal negotiation. There was a reputable business man in Dayton named Edward Pape, and plaintiff supposed he was dealing with him. The goods were delivered by plaintiff to the defendant carrier, to be transported to Dayton and delivered to Edward Pape. Delivery was made to the swindler. In the opinion the court says: 'The sale was voidable by the plaintiff, but the carrier by whom they were forwarded had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the directions upon the package, and who was the person to whom the plaintiff sent them.'

'In *Dunbar v. Boston etc. Co.*, 110 Mass. 28, 14 Am. Rep. 576, one Gorman presented himself in Boston to Dunbar, representing that he was John H. Young, of Providence. In the name of Young, he purchased goods and had them consigned by the defendant carrier to 'John H. Young, Providence, R. I.' On the arrival of the goods Gorman pretended to the carrier that he was the agent of John H. Young, and secured the delivery of the goods. Dunbar sued for a misdelivery. The opinion of the supreme court says: 'The plaintiff sold the gin and whisky, which are the subject of this action, to a person calling himself John H. Young, of Providence, and delivered them to the defendants to be carried to the same person in Providence by the same name. As he was the only person in Providence who bore that name, there was no other individual to whom the defendant could deliver the property, and delivery to him would be a performance of the contract.'

'There are numerous cases arising upon commercial paper which adopt the same rule as held in the foregoing cases. Among these are *Palm v. Watt*, 7 Hun, 318; *Kohn v. Watkins*, 28 Kan. 601; 40 Am. Rep. 336; *U. S. v. Nat. Ex. Bank*, 45 Fed. Rep. 163; *Hoge v. First Nat.*

Bank, 18 Ill. App. 501. In the latter case, a person stopping transiently at a hotel in Chebanse, Illinois, gave his name as William Robbins. He procured an application for a loan, distributed by one Sanford, to be filled out in the handwriting of one Trescott, who was known to Sanford, and signed the name 'William Robbins' to the application. With the application was an abstract of title to land lying near Lockport, Illinois, showing title in William Robbins, Jr. The loan was made by one Hoge, and note and mortgage executed in the name of William Robbins. The money was remitted by draft payable to William Robbins, which this person procured to be cashed. There was no evidence whether his real name was Robbins or not, but there was a William Robbins living near Rockport who owned the land, but had nothing to do with the transaction. The entire business was conducted between Sanford and the impostor by mail. Hoge sued the bank that cashed the draft, on the ground that it had been paid on a forged indorsement. The judgment was in favor of the bank. The court in the opinion says: 'The record shows that there was, at the time the fraud in this case was perpetrated, a man at Chebanse who was known in that place, so far as he was known at all, by the name of William Robbins. There is nothing to show that such was not his true name—no evidence that he was ever known anywhere by any other name. . . . He, in the name by which he was known to Sanford and Hoge, executed the note and mortgage which formed the consideration for the draft, and there is not the slightest doubt that they intended the draft should be paid to the identical individual with whom they had corresponded, and who executed the note and mortgage for which it was given.' So, in the present case, there is no evidence that the name of the party to whom delivery was made was not, in fact, J. C. Stubblefield, although not the same J. C. Stubblefield whom plaintiffs knew. He had been at a hotel in Chetopa four days, representing that to be his name, and sent and received telegrams and ordered cars in that name. He was known there by this name only. This was *prima facie* evidence of his true name, and he, being the only person in Chetopa bearing or claiming that name, would satisfy the directions for delivery, and thus put upon the plaintiffs the burden of proof of showing that the delivery was not made to a person named J. C. Stubblefield, or that the defendant company was guilty of negligence."

CARRIERS—DELIVERY TO WRONG PERSON.—No circumstances of fraud, imposition, or mistake excuse a common carrier from responsibility for delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods: *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 345; ante, p. 94; *Adams v. Blankenstein*, 2 Cal. 413; 56 Am. Dec. 350. If the delivery is made to a wrong person, either by an innocent mistake or through the fraud of third persons, as upon a forged order, the carrier will be responsible, and the wrongful delivery will be treated as a conversion: See monographic note to *Weyand v. Atchison etc. Ry. Co.*, 9 Am. St. Rep. 513, showing to whom carriers may lawfully deliver property: *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109; 100 Am. Dec. 541.

NELSON v. DAVIDSON.

[160 ILLINOIS, 254.]

ADVERSE POSSESSION—LIMITATION OF ACTIONS—ESTATE IN REMAINDER, WHEN BARRED.—If the grantee of an estate in remainder, claiming under a deed which purports to convey such estate to him, and which is sufficient to constitute color of title, holds possession for seven years, adverse to the tenant in remainder, and pays the taxes for that period, the estate in remainder is barred by the statute of limitations, notwithstanding the existence of an outstanding life estate, where the remainderman was under no disability during that time.

DEEDS—COLOR OF TITLE.—A grantee of land has claim and color of title where his deed, on its face, purports to convey the title. It is not necessary, to show color of title, that the title, when traced back to its source, should prove to be an apparently legal and valid title.

Effie Henderson, for the appellant.

Winslow Evans, for the appellee.

²⁵⁴ **BAILEY, J.** This was an action of ejectment, brought by Mary J. Nelson, against Adam Davidson, to recover lot 3, of the north half of the northeast quarter of section 26, township 12 north, of range 8 east, of the fourth principal meridian, in Marshall county. The defendant pleaded not guilty, and, the case being submitted to the court for trial without a jury, the court found the defendant not guilty and rendered judgment against the plaintiff for costs. From that judgment the plaintiff has appealed to this court.

The eighty acre tract of land of which lot 3 forms a part was, with other lands, entered and purchased from the United States by Joseph Thompson, but, before a patent was issued to him, he died, leaving, among other heirs at law, Margaret Thompson, the mother of Mary J. Nelson, the plaintiff in this case. In a partition proceeding subsequently had, the eighty acre tract, with other ²⁵⁷ lands, was partitioned and set off in severalty to Margaret Thompson (then Margaret Brown), she having intermarried with John Brown. After becoming seized of this tract as heir of Joseph Thompson, and about the year 1845, Margaret Brown died, leaving surviving her husband, John Brown, and Mary J. Nelson, her only child and heir at law. It seems that the parties then resided in Tazewell county, and, the plaintiff being a minor, the county court of Tazewell county appointed John Brown her guardian. While they were residing in that county, in the year 1852, John Brown, as guardian for Mary J. Nelson, filed a petition in the circuit court of Marshall county,

praying for an order and decree of that court authorizing and directing him to make sale of the title and interest of Mary J. Nelson in all of the northeast quarter of section 26, township 12, etc., and in that proceeding a guardian ad litem was appointed for the minor, and the cause was referred to a master in chancery, and, on the final hearing, a decree was entered authorizing and directing the sale of the premises described in the petition, in pursuance of the prayer thereof. This order or decree was entered at the October term of 1852, and on the twenty-fifth day of November following, John Brown, as the guardian of Mary J. Nelson, conveyed to Thomas Keller and Justin L. Miner the northeast quarter of section 26, in township 12, above mentioned. This deed recited the filing of the petition by John Brown, as guardian for Mary J. Nelson, for the sale of the premises described; also, the order or decree of the court authorizing and directing him to sell the premises as such guardian; the advertising of the premises for sale by posting written notices in three of the most public places, etc., for twenty days prior to the sale, and that Keller and Miner were the highest bidders; that they bid three hundred dollars for the tract, and that it was thereupon struck off to them. The deed was duly acknowledged by John Brown, as guardian for Mary J. Nelson, and recorded December 25, 1852. By a deed ²⁵⁸ dated November 1, 1854, Thomas Keller and wife conveyed to Justin L. Miner the north half of the quarter section above described, and, by warranty deed dated February 27, 1867, Justin L. Miner conveyed the same tract to Catharine Mannock. Subsequently, Catharine Mannock, who, through divorce proceedings, had resumed the name of Miner, her first husband's name, died seised of the eighty acre tract above mentioned, and, in partition proceedings instituted by her heirs at the January term, 1879, of the circuit court of Marshall county, the eighty acre tract was divided into lots 1, 2, and 3—lot 1 being partitioned and set off to Justin L. Miner and Minnie Hull, lot 2 to Catharine Beebe, and lot 3 to Sophronia Miner, Catharine Miner, and Margaret Miner. By a quitclaim deed dated January 30, 1882, Carrie S. Wayne, who is shown by the evidence to be the same person to whom lot 3 was partitioned under the name of Catharine Miner, and G. W. Wayne, her husband, Maggie Sampson, shown by the evidence to be the same person to whom lot 3 was set off under the name of Margaret M. Miner and Alfred Sampson, her husband, and Mary C. Sampson, being shown by the evidence to be the same

person to whom lot 3 was partitioned under the name of Sophronia Miner, and Charles C. Sampson, her husband, conveyed lot 3 to Adam Davidson, the defendant. The evidence shows that Adam Davidson went into possession of lot 3 immediately after the execution of the deed thereof to him, and that he continued in possession of the premises and claimed to own them under that deed up to April 26, 1893, the date of the commencement of this suit—being over seven years—and that during all that time he paid the taxes assessed against the lot. It seems to be conceded that John Brown, upon the death of his wife, in 1845, became tenant for life of the land in question by curtesy consummate. John Brown died November 21, 1892.

It is claimed by the plaintiff that the proceedings in the circuit court of Marshall county by the guardian of ²⁵⁹ Mary J. Nelson, and the deed executed by her guardian in pursuance of the decree rendered in those proceedings, were void for the reason: 1. That the proceedings were not in the county where the ward resided; and 2. Because there was no approval or confirmation of the deed. On the part of the defendant, it is claimed, that, even if that be so, the deed from Carrie S. Wayne and others to the defendant constituted claim and color of title made in good faith, and that, by reason of seven year's possession and payment of taxes, the defendant, under the provisions of section 6 of the statute of limitations, acquired a title to the land paramount to that of the plaintiff. The questions raised by this latter contention constitute the only matters which it will be necessary for us to consider in this case.

The position assumed by the plaintiff is, that as John Brown was entitled to a life estate in the land as tenant by the curtesy, the statute of limitations could commence to run, as against her title, only upon the death of the life tenant.

It should be noticed that even if the guardian's deed executed by John Brown is to be regarded as void for the reasons above stated, the chain of conveyances shown by the evidence is sufficient to establish the fact that the defendant entered into and holds possession of the land, claiming to be seised of the title formerly vested in the plaintiff. His title and possession were not in privity with the life tenant, but, claiming, as he did, through the guardian's deed and meane conveyances, the title which he claims is that of the tenant in remainder herself. The question presented then is, whether possession by the defendant adverse to the tenant in remainder for seven years, coupled with the pay-

ment of taxes for that period, is sufficient to bar the estate in remainder, notwithstanding the existence of an outstanding estate for life.

The case would seem to fall within the rule laid down in *Enos v. Buckley*, 94 Ill. 438, 463. That was a suit in ejectment ²⁶⁰ brought by Agnes D. Enos and Zimri Enos, her husband, against Buckley, to recover lands described in the declaration. The defendant's title was: 1. A tax deed, which, by reason of a defect in its description of the land conveyed, was void for uncertainty; and 2. A deed from the grantee in the tax deed, with proper description, to one Bracken, the latter being set up as color of title. It appeared that possession was taken and held by Bracken under the latter deed for more than seven years. This was held to establish a good title in Bracken, and the defendant, who deraigned title from Bracken, was held to have established a good title in himself. It appeared in that case that the title to the lands then in controversy was vested in Mrs. Enos prior to 1846, when she married Zimri Enos, and that the husband thereby became seised of a life estate in the premises, and, consequently, that the wife had only an estate in remainder, and it was urged that the statute of limitations could not run against Mrs. Enos because she had no immediate right of action for a possession of the land. The court, after discussing the case of *Castner v. Walrod*, 83 Ill. 171, 25 Am. Rep. 369, and distinguishing it from the case then under consideration, held that the estate in remainder of the wife, as well as the possessory life estate of the husband, was barred. In reaching that conclusion, the court said: "The present case involves a different section—section 6, of seven years' payment of taxes with color of title and possession. To prevent the acquirement of the bar under this last section it was only necessary to pay the taxes. The outstanding estate in the husband here formed no impediment to the payment of taxes any time after the act of 1861. The taxes should have been kept paid, not on anyone's particular interest in the land, but on the whole land. As between the owner of the life estate and the reversioner, it is undoubtedly the duty of the former to pay the taxes; but the statute requires the payment of the taxes on the entire interest in the land, ²⁶¹ no matter how it may be divided and owned, and, if they be not kept paid, the whole estate in the land may become barred, as against the owners, under the statute. If, by reason of the husband's estate in the land, the wife might not have been able to derive from it the means to pay the taxes, she might otherwise, under and in consequence of the

married woman's act of 1861, have become possessed of such means, and which she would not except for that act."

It will be noticed that in the present case the owner of the estate in remainder was laboring under no disability, and no question can arise as to her ability to acquire the means to pay the tax on the land, and thus interrupt the running of the statute of limitations. The rule laid down in *Enos v. Buckley*, 94 Ill. 458, would therefore seem to apply, and under it her title must be held to be barred.

In the present case, the deed to the defendant was offered in evidence, not only as tending to prove title, but as color of title. There can be no doubt that it was sufficient to show color of title. It purported on its face to convey the title of the land to the defendant, and that was sufficient to make it constitute claim and color of title. An instrument of writing, to be effectual as color of title, must purport on its face to convey the title. It must apparently transfer title to the grantee. Not that the title, when traced back to its source, should prove to be an apparently legal and valid title, but the instrument under which the claimant holds and upon which he relies must profess to convey title to the grantee: *Dickenson v. Breeden*, 30 Ill. 279; *Holloway v. Clark*, 27 Ill. 483; *Woodward v. Blanchard*, 16 Ill. 424; *Fagan v. Rosier*, 68 Ill. 84; *Dawley v. Van Court*, 21 Ill. 460; *Watts v. Parker*, 27 Ill. 224; *Hinkley v. Greene*, 52 Ill. 223. Where the deed purports, on its face, to convey title, it will be sufficient to show claim and color of title made in good faith, unless bad faith is expressly shown—and there is nothing in this case tending to charge defendant with bad faith or fraud on his part in relation to the claim and color of title set up.

But it is claimed that the rule laid down in *Enos v. Buckley*, 94 Ill. 458, is inconsistent with the doctrine held in other and more recent cases. We have examined all the decisions having any bearing on the question to which our attention has been called, and find that all are clearly distinguishable from *Enos v. Buckley*, 94 Ill. 458. In *Mettler v. Miller*, 129 Ill. 630, a life tenant conveyed to a third person by a deed purporting to pass an absolute estate, and it was held that possession by the tenant for life cannot be adverse to the remainderman or reversioner, and that the possession of his grantee could not, during the continuance of the life estate, be adverse to the remainderman or reversioner, so as to set the statute of limitations running against the latter. In that case *Enos v. Buckley*, 94 Ill. 458, and other similar cases were expressly referred to and held to be

not in point. In the present case, the defendant did not hold under or in privity with the life tenant, but adversely to the tenant in remainder. In *Miller v. Pence*, 132 Ill. 149, it was held that one entering into the possession of land under color of title acquired in good faith, by means of a tax deed, and continuing such possession for seven years, paying all taxes legally assessed thereon, will establish a good title to the land as against the prior owner resting under no disability, but not as against a merely inchoate right of dower. This was upon the principle that, the right of dower being only inchoate during the lifetime of the husband, the wife is under no duty to pay taxes on the land, or any part of it, for the protection of her inchoate right. In *Rohn v. Harris*, 130 Ill. 525, the possession which was sought to be set up by way of limitation was taken and held under a conveyance from the life tenant, and it was held that the title of the reversioner was not barred.

Some other cases are referred to, but in none of them do we find a state of facts similar to those appearing in *Enos v. Buckley*, 94 Ill. 458, or to the facts appearing here. We are disposed to hold, therefore, that the case must be governed by the rule established in *Enos v. Buckley*, 94 Ill. 458, and, under the doctrine of that case, it must be held that the defendant had acquired title by limitation, as against the plaintiff, prior to the commencement of this suit.

The judgment of the circuit court will, therefore, be affirmed.

LIMITATIONS OF ACTIONS—REMAINDERS.—ADVERSE POSSESSION for seven years is a good title, by operation of the statute of limitations: *Moody v. Fleming*, 4 Ga. 115; 48 Am. Dec. 210. Payment of taxes for seven successive years, under claim and color of title, made in good faith, and after possession taken under such color of title, creates a legal conclusion, by virtue of the statute, that the possessor was the true owner to the extent and according to the purport of his paper title: *McCagg v. Heacock*, 84 Ill. 476; 85 Am. Dec. 327. The fact that an adverse occupier of land has paid the taxes upon it is clearly admissible to prove his claim of ownership: *Wren v. Parker*, 57 Conn. 529; 14 Am. St. Rep. 127; *Frick v. Simon*, 75 Cal. 337; 7 Am. St. Rep. 177. Remaindermen cannot sue for possession during the continuance of the life estate. Therefore, the statute of limitations cannot affect them until the termination of such estate: *Allen v. De Groodt*, 98 Mo. 150; 14 Am. St. Rep. 626, and monographic note, 634, 635, discussing the rights and remedies of reversioners and remaindermen. The statute of limitations does not run against a reversioner or remainderman during the existence of the particular estate: *Notes to Woodstock Iron Co. v. Fullenwider*, 13 Am. St. Rep. 79; *Orthwein v. Thomas*, 11 Am. St. Rep. 173.

DEEDS.—COLOR OF TITLE is that which in appearance is title, but which in reality is no title. A person has color of title to lands when he has an apparent, though not real, title thereto, founded

upon a deed which purports to convey them to him: *Edgerton v. Bird*, 6 Wis. 527; 70 Am. Dec. 473, and note, and monographic note to *Tate v. Southard*, 14 Am. Dec. 580-584, on what is color of title.

HARDING v. PEOPLE.

[160 ILLINOIS, 450.]

CONSTITUTIONAL LAW—COAL MINING.—“DUE PROCESS OF LAW” AND “LAW OF THE LAND” are synonymous phrases. They refer to general, public law, operating upon all alike, and not to partial or private laws, such as those which make an arbitrary division of the business of coal mining and impose special burdens and restrictions upon the operators of one class of mines, whose product is shipped by rail or water, but which burdens and restrictions are not imposed upon the other.

CONSTITUTIONAL LAW—COAL MINING—STATUTES—UNAUTHORIZED DISCRIMINATION.—The enactment of a statute which divides the operators of coal mines, and has provisions applicable only to those whose product is shipped in a certain manner, is not justified as an exercise of the police power, and is not authorized by a constitutional provision providing for laws to secure safety to coal miners.

CONSTITUTIONAL LAW—COAL MINING—VOID PENAL STATUTE.—If two persons are engaged in different branches of the business of coal mining, the statute that makes the act of one an offense, which, if done by the other, would be lawful, is unconstitutional, where there is no reason for any distinction.

CONSTITUTIONAL LAW—COAL MINING—STATUTES—WEIGHING OF COAL.—A statute which requires the product of certain coal mines, which is shipped by rail or water, to be weighed in a specified manner, but which does not require the product of another coal mine, that is sold on the spot, to be weighed, is unconstitutional, as there is no reason why the one product should be weighed and the other not weighed. The distinction is purely arbitrary.

CONSTITUTIONAL LAW—COAL MINING—STATUTES RESTRICTING RIGHT TO CONTRACT.—If coal miners are paid by weight, a statute which deprives them and their employers of the right to fix upon the amount of coal mined, or the amount due for mining it, in any manner mutually satisfactory, is unconstitutional.

CONSTITUTIONAL LAW—COAL MINING—UNCONSTITUTIONAL STATUTE.—A statute which singles out operators of one class of coal mines and imposes restrictions upon them not required to be borne by operators of other mines, or by persons engaged in other business, or which interferes with the right of employer and laborer to contract with each other, is unconstitutional and void.

W. J. Calhoun and H. M. Steely, for the appellants.

Maurice T. Moloney, attorney general, G. T. Buckingham, T. J. Scofield, M. L. Newell, and S. G. Wilson, state's attorney, for the appellees.

⁴⁶² CARTWRIGHT, J. Plaintiffs in error were indicted and convicted for a violation of the act requiring the weighing of coal at the mines, in force July 1, 1887, as amended by act in force July 1, 1891. Some of the counts upon which they were found guilty charged them with a failure to weigh all the coal delivered from the mine, and others charged them with not keeping a correct record of the weight of each miner's car. The portion of the act under which the prosecution was had, material to the same, is as follows:

"Sec. 1. That the owner, agent, or operator of every coal mine in this state at which the miners are paid by weight shall provide at such mines suitable and accurate scales of standard manufacture, for the weighing of all coal which shall be hoisted or delivered from such mines.

"Sec. 2. All coal so delivered from such mines shall be carefully weighed upon the scales as above provided, and a correct record shall be kept of the weight of each miner's car, which record shall be kept open at all reasonable hours for the inspection of all miners or others pecuniarily interested in the product of such mine. The person designated and authorized to weigh the coal and keep such record shall, before entering upon his duties, make and subscribe to an oath before some magistrate or other officer authorized to administer oaths, that he will accurately weigh and carefully keep a true record of all coal delivered from such mine, and such oath shall be kept conspicuously posted at the place of weighing.

"Sec. 5. Any person, owner, or agent operating a coal mine in this state who shall fail to comply with the provisions of this act, or who shall obstruct or hinder the carrying out of its requirements, shall be fined for the first offense not less than fifty dollars (\$50) nor more than two hundred dollars (\$200), for the second offense not less than two hundred dollars (\$200) nor more than five hundred ⁴⁶³ dollars (\$500), and for a third offense not less than five hundred dollars (\$500), or be imprisoned in the county jail not less than six months nor more than one year; provided, that the provisions of this act shall apply only to coal mines whose product is shipped by rail or water."

The constitutionality of this act is challenged by plaintiffs in error, and this is the only question that will be considered, although the application of the statute to this case is disputed, and questions of variance, and of error in the giving and refusing of instructions, are also raised.

It is objected that the act is in violation of section 2 of article

2 of our constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law, because it singles out operators of one class of coal mines and imposes restrictions upon them not required to be borne by operators of other mines or by persons engaged in other business, and also by interfering with the right of employer and laborer to contract with each other.

The Consolidated Coal Company had owned and operated the mine where plaintiffs in error were employed for six or seven years. The greater part of its product was shipped from the mine by rail, on the Wabash railroad, and sold in other markets. All the coal so shipped was correctly weighed on scales of standard manufacture, by the company, at the mine, before being dumped into the railroad cars, and a correct record was made of the weight of each miner's car, and that record was posted and kept open at all reasonable hours for the inspection of the miners or any person interested. During this time the company had also furnished the Wabash Railroad Company with coal for its locomotives, which was delivered at the mine into the tenders of the locomotives as they stopped there for coal. There were about two hundred and fifty miners employed, and the average output of the mine was from seven hundred to nine hundred and ⁴⁰⁰ fifty tons of screened coal per day. The miners were paid fifty-five cents per ton for screened coal. About the last hundred miners' cars that came up in the evening of each day would be placed on the storage tracks, for the purpose of coaling the locomotives during the night and the next day. This last coal was not weighed, but each miner was given the average weight of the cars sent up by him and weighed during the day as the weight of his last car, crediting him with the average weight of the cars mined by him that day that had been actually weighed.

By the act under consideration, its provisions are applied only to coal mines whose product is shipped by rail or water, and the learned attorney general and counsel for the people construe the provision as making the law applicable to each mine where the major portion of its product is so shipped. However that may be, it is plain that the act not only singles out the operator of a mine, and imposes restrictions and burdens upon him as to the use and enjoyment of his property that are not imposed upon other branches of business similarly situated and conducted, but it divides the operators of mines, and only applies its provisions to those whose product is shipped in a certain manner. In the various constitutions the phrases "due process of law" and "the

law of the land" are used interchangeably, sometimes one being employed and sometimes the other; but they are synonymous, and the meaning is the same in every case: Cooley's Constitutional Limitations, 353. In *Millett v. People*, 117 Ill. 294, 301, 57 Am. Rep. 869, it was said of this phrase: "And this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals": Citing *James v. Reynolds*, 2 Tex. 251; *Wyenhamer v. People*, 13 N. Y. 432; *Vanzant v. Waddel*, 2 Yerg. 269. And the same declaration was made in *Frorer v. People*, 141 Ill. 171, where the statute prohibiting engaging in ⁴⁶⁵ keeping a truck store was held unconstitutional, and in *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, where the same conclusion was reached as to an act to provide for the weekly payment of wages by a corporation.

The right to enact such a statute does not arise out of the police power, where much latitude is allowed in determining what may tend to insure the comfort, safety, or welfare of society, and it is not authorized by section 29 of article 4 of the constitution, providing for laws to secure safety to coal miners: *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869.

Each person subject to the laws has a right that he shall be governed by general, public rules. Laws and regulations entirely arbitrary in their character, singling out particular persons not distinguished from others in the community by any reason applicable to such persons, are not of that class. Distinctions in rights and privileges must be based upon some distinction or reason not applicable to others. In *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, it is said: "And it is only when such distinctions exist that differentiate, in important particulars, persons or classes of persons from the body of the people, that laws having operation only on such particular persons or classes of persons have been held to be valid enactments." No possible reason or distinction affecting any interest, justifying the division of mines made by the act, has been suggested, except that it might be intended to reach mines in which the larger number of miners were employed. But this is not the division or distinction made, and does not in any manner follow from such division. It is not the language or purport of the act, and, if such had been the intention of the legislature, it would certainly have been made manifest by basing the division or distinction upon the number of miners employed. The act

applies equally to the owner of a small mine, where the product may not exceed a carload per day, and the owner of a mine such as that of the Consolidated Coal Company. The distinction is based solely upon the fact ⁴⁶⁶ of the product being shipped by rail or water, and counsel have been able to suggest no reason why the legislature should require the product of such a mine to be weighed in the manner specified and not that of another mine where the product is sold on the spot. The distinction between operators who sell their product at the mine to some shipper who ships it away to the market, and those who themselves ship their coal by rail or water, is purely arbitrary. Any reason that would apply to one, calling for a restriction upon the manner of doing business, would be equally applicable to the other, and special burdens and restrictions upon one class not imposed upon the other constitute an arbitrary deprivation of rights. As the act makes that an offense if committed by a person engaged in one branch of mining which, if done by persons in another branch of the same business, is lawful, without any reason for distinction between the two, we must regard it as unconstitutional.

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, and *Ramsey v. People*, 142 Ill. 380, where provisions similar to those of the act now under consideration were held to be unconstitutional and void, the general right of the laborer and employer to contract in regard to the price of labor and the method of ascertaining the price was asserted, and the rule was laid down that any restriction upon that right is a deprivation of both liberty and property, within the meaning of the constitutional provision. In view of the discussion of the principles involved in those cases, no extended statement of them will be necessary here. This act makes it an offense against the law for the employer and laborer at any coal mine at which the miners are paid by weight to determine upon the weight of any miner's car or any lot of coal by any other method than that pointed out by the statute. A failure to weigh a car and to keep a correct record of the weight renders the operator liable to the penalties prescribed by the act, although he and the laborer may have agreed upon the weight of the car or ⁴⁶⁷ contracted for other methods of determining the weight. This is well illustrated by the facts of this case. The last cars that came up in the evening of each day, designed for coaling the locomotives, would not be weighed until the coal was dumped into the tenders, so that the miners could not obtain the weights until the next day, and they wanted them

the same evening. For this reason, and at the instance of the miners, it had been the custom for six years to give each miner the weight according to the system above stated. When the company attempted to change this system and weigh the coal, the miners objected, and insisted upon the custom of averaging weights. No objection was ever made by any miner to this manner of arriving at the weight instead of weighing the cars on the scales. Here was an arrangement, amounting to a contract between the parties, with which all the contracting parties were satisfied, and the testimony upon which plaintiffs in error were convicted came from miners who left during the miner's strike of 1894 and were not again employed by the company.

It seems that a law which deprives men engaged in the business of mining from contracting with each other for the purpose of ascertaining the weight of the coal mined or the amount due them, in any manner mutually satisfactory, cannot be sustained. That such is the effect of this law is the contention of counsel for the people, and it is only upon the assumption that the law does so control the power to contract that a conviction could have been had in this case, for, as already seen, the parties had contracted otherwise. The act takes away the freedom of contracting by the parties for the ascertainment of the weight of coal, except by a certain method, and, in our opinion, it is unconstitutional.

The judgment will be reversed and the cause remanded, with directions to the circuit court to discharge the defendants.

CONSTITUTIONAL LAW.—“Due process of law” or “law of the land,” means general public law, binding upon all members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals, in a way in which the same rights of other persons are not affected by existing laws: Note to *State v. Julow*, 50 Am. St. Rep. 449; *Attorney General v. Jochim*, 99 Mich. 358; 41 Am. St. Rep. 606, and note. These two phrases are legal equivalents: *State v. Julow*, 120 Mo. 163; 50 Am. St. Rep. 443. The law cannot discriminate in favor of one citizen to the detriment of another: Note to *State v. Conlon*, 48 Am. St. Rep. 236. A statute which selects particular individuals from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations or burdens, from which others in the same class or locality are exempt, is unconstitutional: *State v. Hinman*, 65 N. H. 103; 23 Am. St. Rep. 22, and note. But laws, public in their objects, may be confined to a particular class of persons, if they are general in their application to the cases to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy: Note to *Foster v. Board of Police Commrs.*, 41 Am. St. Rep. 200. A statute providing a penalty for its violation, which does not apply to all corporations or individuals of the same nature, but operates only upon certain corporations therein

named, is unconstitutional and void, as depriving the corporations named of liberty and property without due process of law: *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206. The legislature has no power to prevent persons who are sui juris from making their own contracts, nor can it interfere with the freedom to contract between workmen and employers: *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 316. A law singling out persons, corporations, or associations engaged in any particular business, and depriving them of the right to contract as persons, corporations, or associations engaged in other business may lawfully do, is unconstitutional and void: *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206. and note.

GRISWOLD v. BREGA.

[160 ILLINOIS, 490.]

INJUNCTION—MOVING BUILDING INTO “FIRE LIMITS” —COMPLIANCE WITH ORDINANCE.—Persons who desire to remove a wooden building in a city to premises within the “fire limits” may be enjoined from so doing by neighboring property owners, until they have complied with the requirements of the ordinance regulating such removal. Fraudulently obtaining the written consent of property owners to such removal does not satisfy the ordinance.

INJUNCTION—MOVING BUILDING INTO “FIRE LIMITS” —WRITTEN CONSENT—FRAUD.—Neighboring property owners may enjoin persons from seeking to obtain, and restrain a city and its officers from issuing, a permit to remove a wooden building into a block within the “fire limits,” where the written consent of the property owners, required by ordinance, was obtained by fraud, and such removal would increase fire hazards and be a permanent detriment to other property.

Injunction. The appellees, Brega and Roster, filed a bill in equity against the appellants, Griswold and Day and the city of Chicago and its commissioners of public works and public buildings, for an injunction and for other relief. The appellees owned improved property within the “fire limits” of the city of Chicago, and, at the time of the filing of the bill, the appellants were intending to remove a frame building to a lot owned by Griswold and which was near the premises owned by the appellees. The written consent of property owners to such removal, as required by ordinance, was not fairly obtained. The appellants answered, and the other defendants were defaulted. There was a decree in substantial conformity with the prayer of the bill, which was affirmed on appeal to the appellate court. The record of the proceedings in the lower courts was presented for review by the present appeal.

Duncan & Gilbert, for the appellants.

Julius Rosenthal and Lessing Rosenthal, for the appellees.

⁴⁹³ CARTER, J. The findings of fact set forth in the decree fully sustain the allegations of the bill, and, as no certificate of evidence was filed, no question of fact is presented for our decision.

The only contention of counsel for appellants is, that, conceding all that is alleged in the bill and found by the decree, equity has no jurisdiction to enjoin appellants from removing the wooden building onto the premises in question within what is known as the "fire limits" in the city of Chicago, contrary to the provisions of the city ordinance. It is contended, and numerous authorities are cited to support the contention, that the ordinances of a city cannot be enforced by bill in equity, but resort must be had to a court of law for relief in such cases. We deem it unnecessary here to review the cases cited, or to determine the question whether or not a bill would lie by the city to enjoin the erection or removal of a wooden building within what is commonly called the "fire limits," in violation of the ordinances of the city. This is not such a case. By virtue of the ordinances of the city of Chicago, it was unlawful for the appellants to remove the building to the premises in question without first having obtained to a petition the signatures of the owners of a majority of the front feet of the adjacent lots lying within certain prescribed limits, and without first having obtained from the proper municipal authorities an official permit, to be issued upon the filing of the petition, subscribed and sworn to as prescribed by the ordinance. A paper purporting to be such a petition was presented and filed, but the court found that certain signatures thereto were obtained by misrepresentation and deceit, and certain other signatures were attached without any authority, and that as to such signatures the petition ⁴⁹⁴ had been revoked and withdrawn in a writing filed by those whose signatures were so wrongfully attached and procured, and that without such signatures the petition did not contain the requisite number of signers. The court also found that the city authorities were nevertheless about to issue the permit to appellants to so remove and locate said wooden building, and that, upon obtaining such permit, appellants intended and threatened to remove said building to the premises mentioned. The court also decreed that the names of appellees and others so improperly attached to the petition be stricken and canceled from the petition. We think it clear that a bill for an injunction will lie in such a case. The bill alleged, and the ordinance recognized, the special injury which would result to those owning adjacent property, and, by virtue of

the ordinance, they had the power to prevent such injury by refusing to sign the petition. But here was a fraudulent petition presented in the names of appellees and others, appearing on its face to be sufficient, under the ordinance, to authorize the proper municipal officer to issue the permit, and upon which such officer was about to issue it. We know of no remedy, and none is pointed out by counsel, whereby, in a court of law, appellees could have prevented the granting of such permit and the removal of the building and its location adjacent to their property, or which would have afforded proper redress for the injuries, special as to their property, which the bill and proof show appellees would have sustained had the contemplated action been taken. Those cases which hold that the municipality itself cannot maintain a bill to enjoin the erection of wooden buildings in violation of its ordinances do not, it seems to us, have any controlling force in cases of this character. It has a remedy at law, or may provide one.

The supreme court of Indiana has held that a bill for injunction would lie, at the suit of the property owner who would sustain special injury, to prevent the erection ⁴⁹⁵ of wooden buildings where they were prohibited by ordinance: *First Nat. Bank v. Sarlls*, 129 Ind. 201; 28 Am. St. Rep. 185; *Kaufman v. Stein*, 138 Ind. 49; 46 Am. St. Rep. 368. Questions of a kindred character were decided in *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89. But without considering whether or not the doctrine of the Indiana cases is in accord with the weight of authority, we must hold that the bill in this case was properly brought to restrain appellants from seeking to obtain, and the city authorities from issuing, the permit upon this fraudulent petition, and that in view of the allegations and proof, as a part of the relief necessary to dispose of the controversy and to make the writ effectual, it was proper, and in full accord with the principles of equity jurisdiction and decided cases, to enjoin the appellants from removing the building to the lot in question without first having complied with the requirements of the ordinance.

The judgment of the appellate court is affirmed.

INJUNCTION—ERECTOR OF PROHIBITED BUILDINGS IN CITY—FRAUD.—While a city cannot maintain a bill to enjoin the erection of wooden buildings in violation of its ordinances (*Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123; *St. Johns v. McFarlan*, 33 Mich. 72; 20 Am. Rep. 671; *Waupun v. Moore*, 84 Wis. 450; 17 Am. Rep. 446), yet such a bill will lie at the suit of a property owner who will sustain special injury, to prevent the erection of such buildings, where they are prohibited by ordinance, though they are not nuisances per se: *First Nat. Bank v. Sarlls*, 129 Ind. 201; 28 Am. St.

Rep. 185; Kaufman v. Stein, 138 Ind. 49; 46 Am. St. Rep. 368. Courts of equity may interfere by injunction to prevent irreparable damage caused by acts done without authority of law: Reddall v. Bryan, 14 Md. 444; 74 Am. Dec. 550; and the jurisdiction of such courts extends to cases of fraud: Witmer's Appeal, 45 Pa. St. 455; 84 Am. Dec. 505.

HEFFRAN v. HUTCHINS.

[100 ILLINOIS, 550.]

MUNICIPAL CORPORATIONS—REMOVAL OF CITY OFFICERS.—Under a statute authorizing the mayor of a city to remove any officer appointed by him, on any formal charge, whenever the interests of the city demand it, but which requires him to report the reasons for such removal to the council, at a subsequent meeting, within a specified time, and that the officer shall be restored to office, if the council disapproves of such removal, the mayor's removal of a city officer takes effect at once, and deprives the removed officer of the right to further discharge the functions of the office, notwithstanding the provisions as to subsequent proceedings.

EQUITY—INJUNCTION—POLITICAL RIGHTS—OFFICERS. A court of equity has no jurisdiction to determine political questions between the mayor and council of a city concerning the appointment and removal of officers, nor can it exercise jurisdiction in determining the right of a party to an office. Hence, an injunction will not lie to restrain the mayor of a city from interfering with the exercise of an office by an officer whom he has removed, upon the ground that the removal was illegal, and that no successor was appointed.

Injunction to prevent interference with a city officer who had been removed. The appellant, Heffran, was chief of the fire department of the city of Rockford. The appellee, Hutchins, was mayor of that city. The mayor, with the consent of the city council, had the power to appoint the fire marshal, who was chief of the fire department. After Hutchins became mayor, Heffran desired to be reappointed; the mayor, however, appointed others who were one after another rejected by the city council. Finally, after the expiration of about a year, Hutchins removed Heffran, directed him to vacate the office and turn over the property of the department in his possession to a subordinate officer, and threatened to eject him if he refused to comply. On the next day after the removal, Heffran obtained an injunction restraining the mayor from removing or interfering with him. Upon a motion to dissolve, the injunction was modified so as to restrain Hutchins, as mayor, from all interference with Heffran in his office until he should be lawfully removed or his successor appointed and qualified. This decree was made perpetual, and Hutchins appealed to the appellate court, where the decree was

reversed, with directions to dissolve the injunction and to dismiss the bill. From this judgment Heffran appealed to the supreme court.

N. C. Warner, for the appellant.

Garver & Fisher, for the appellee.

⁵⁵³ PHILLIPS, J. Two questions are presented on this record. The first is as to the right of the mayor of the city to remove an officer appointed and confirmed, etc., and the second is as to the jurisdiction of the court of chancery to enjoin the mayor from so removing such officer.

By section 7, article 2, chapter 24, of the Revised Statutes, it is declared: "The mayor shall have power to remove any officer appointed by him, on any formal charge, whenever he shall be of the opinion that the interests of the city demand such removal, but he shall report the reasons for such removal to the council at a meeting to be held not less than five days nor more than ten days after such removal; and if the mayor shall fail or refuse to file with the city clerk a statement of the reasons for such removal, or if the council, by a two-thirds ($\frac{2}{3}$) vote ⁵⁵⁴ of all its members authorized by law to be elected, by yeas and nays to be entered upon its record, disapprove of such removal, such officer shall thereupon become restored to the office from which he was so removed; but he shall give new bonds and take a new oath of office. No officer shall be removed the second time for the same offense."

Under this section, the right to remove is conferred, and, when exercised, the officer so removed no longer has a right to exercise the duties of the office. The fact that after such removal time is given the mayor to file charges with the clerk, and the further fact that if by a two-thirds vote the council disapproves the removal, etc., such officer shall thereupon become restored and shall file new bond, etc., preclude the idea that after removal by the mayor such officer shall act until after the action of the city council. When the order for removal was made and the officer directed to turn over the property in his possession to another, it was his duty to comply with that order, and he no longer had any right to discharge the functions of the office.

It is not within the jurisdiction of a court of equity to interfere with the public duties of the departments of government: *Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372. Its jurisdiction pertains only to questions of the maintenance of civil rights—property rights as contradistinguished from

political rights: *Chicago v. Wright*, 69 Ill. 318; *Delahanty v. Warner*, 75 Ill. 185; 20 Am. Rep. 237; *Sheridan v. Colvin*, 78 Ill. 237. It can have no jurisdiction to determine political questions between the mayor and council of a city concerning the appointment and removal of officers, nor can it exercise jurisdiction in determining the right of a party to an office.

The injunction was improperly issued, and should have been dissolved. The judgment of the appellate court is affirmed.

Cartwright, J., took no part.

OFFICERS—SUSPENSION—RETROACTIVE EFFECT.—If a city officer has been, for cause, suspended by the mayor until the next regular meeting of the city council, the declaration of the council, when it meets, that such cause did not exist, does not have such a retroactive effect as to render the suspension invalid during the time of its continuance: *Steubenville v. Culp*, 38 Ohio St. 18; 43 Am. Rep. 417.

EQUITY—INJUNCTION—POLITICAL RIGHTS—OFFICERS.—A court of chancery has no jurisdiction of a bill to enjoin the removal of a party from a public office, and the appointment of a successor, and to prevent the removing power from interfering with him in the discharge of his duties after his removal. An injunction in such a case would be absolutely void: See monographic note to *Fletcher v. Tuttle*, 42 Am. St. Rep. 237, on the jurisdiction of equity to protect and enforce political rights.

TRAVELERS' INSURANCE COMPANY v. DUNLAP.

[180 ILLINOIS, 642.]

INSURANCE, ACCIDENT—MEANING OF "TAKING POISON."—The words "taking poison," as employed in a clause of an accident insurance policy exempting the company from liability for death from "taking poison," mean the voluntary, intentional taking of poison, and do not include cases of accidental poisoning. Hence, the company is liable for the death of one who, by mistake, drinks carbolic acid for peppermint, which he wishes to take for some ailment, and dies from the effects of the poison.

INSURANCE—CONSTRUCTION OF POLICY IN FAVOR OF INSURED.—If there is doubt or uncertainty as to the meaning of terms employed in a policy of insurance, the language must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in effecting the insurance, it was his object to secure.

INSURANCE, ACCIDENT—"TAKING POISON" DOES NOT INCLUDE ACCIDENTAL TAKING.—"Taking poison," within the meaning of an exception in an accident insurance policy, cannot be construed to mean the accidental taking of poison merely on the ground that, if the cause of injury or death is not accidental, it is manifestly not within the scope of the policy, where suicide and other causes of death and injury not accidental are embraced in the same exception.

INSURANCE, ACCIDENT—"TAKING POISON" IS LIMITED TO INTENTIONAL TAKING.—The term "taking poison" in an exception of an accident insurance policy, is limited to the intentional taking of poison, although death so caused is covered by the clause relating to suicide, where the entire exceptions of the policy recognize that death may result wholly or partly, directly or indirectly, from voluntarily taking poison without suicidal intent.

Assumpsit, by the appellee, Mary J. Dunlap, upon a policy of accident insurance, issued by the insurance company to William T. Dunlap. The policy did not cover cases of suicide, or death resulting from "taking poison."

C. C. Bonney and Lyman M. Paine, for the appellant.

Peck, Miller & Starr, for the appellee.*

645 **CARTER, J.** It is settled by the judgments below that the death of the insured was caused by accident. Mistaking a bottle of carbolic acid for peppermint, which he wished to take for some ailment, he poured a portion of the acid into a glass of water, drank it, and died from the poison. The only question presented for our decision is, Is the appellant exempted from liability on the ground that the insured died from "taking poison," within the meaning of the policy? Appellant contends that it is so exempt by the terms of the contract; that the term "taking poison," as used in the policy and according to its ordinary signification, includes accidental as well as intentional taking, and cites *Pollock v. United States Mut. Acc. Assn.*, 102 Pa. St. 230, 48 Am. Rep. 204, which so holds. Appellee, however, contends (and in this she is supported by the appellate and circuit courts) that the words "taking poison," as employed in the policy, and in view of the rules of construction applied by the courts to such instruments, mean the voluntary, intentional taking of poison, and do not include cases of accidental poisoning; and counsel contend that this court has, in effect, so decided in *Healey v. Mutual Acc. Assn.*, 133 Ill. 556; 23 Am. St. Rep. 637. While the precise point here at issue was not discussed in the opinion in *Healey v. Mutual Acc. Assn.*, 133 Ill. 556, 23 Am. St. Rep. 637, yet it was involved in the decision, and is within the reasoning there employed. The leading cases on this subject were reviewed in *Healey v. Mutual Acc. Assn.*, 133 Ill. 556, 23 Am. St. Rep. 637, including *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, and *Pollock v. United States Mutual Acc. Assn.*, 102 Pa. St. 230, 48 Am. Rep. 204, and it was said in *Healey v. Mutual Acc. Assn.*, 133 Ill. 564, 23 Am. St. Rep. 637: "While we recognize the high ability of the court in which the case [the Pennsylvania case] was decided, we are not disposed to

follow the rule there adopted. We think the rule established by the court of appeals ⁶⁴⁶ of New York one better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question": See, also, *Pickett v. Pacific Mut. Life Ins. Co.*, 144 Pa. St. 79; 27 Am. St. Rep. 618; *Menneiley v. Employers' Liability Assur. Corp.*, 148 N. Y. 596; 51 Am. St. Rep. 716.

We are inclined to the opinion that the term "taking poison" would also, in common parlance, when used without any qualifying words, be understood to mean an intelligent and conscious act. If, in speaking of the cause of the death of another, we should say "he took poison," we would most commonly be understood to mean that his act in taking poison was intentional, rather than accidental, and it would hardly be deemed necessary to say "he intentionally took poison," and, if it were designed to avoid such understanding, we would naturally say "he accidentally took poison," or would use some other qualifying words indicating that the act was accidental or its cause doubtful or unknown. It must, however, be conceded that the meaning of the term in the respect mentioned is not free from doubt. Able and learned arguments have been made on each side of the question by counsel, and cases are cited showing that courts of high authority do not agree on the subject. It would therefore seem to be eminently proper, in such a case, to apply the well-known rule of construction applicable to such instruments, that where there is doubt or uncertainty as to the meaning of the terms employed, the language, being that of the insurer, must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in making the insurance, it was his object to secure: *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Healey v. Mutual Acc. Assn.*, 133 Ill. 556; 23 Am. St. Rep. 637; *May on Insurance*, sec. 175.

Counsel for appellant insist that, using their own language, "an exception from an accident policy can only be ⁶⁴⁷ of some accident otherwise included within it, for if the cause of injury or death be not accidental, it is manifestly not within the scope of the policy at all. Hence, an exception of 'taking poison' means, *ex vi termini*, the exception of an accidental taking of poison." It is clear, however, that the so-called exception is something more than a mere exception excluding what would otherwise be included as accidents, for suicide by a sane person

could not be said to be an accident, yet it, with other causes of death and injury not accidental, is embraced in the exception.

It is also said that the term "taking poison" cannot be limited in its meaning to the intentional taking of poison, for the reason that death so caused is covered by the clause relating to suicide, and to so construe it would give no force whatever to the words "taking poison." Counsel are mistaken also in this contention. When the entire provision in which these words occur is considered, it is too clear for argument that it is recognized that death may result, wholly or partly, directly or indirectly, from voluntarily taking poison without any suicidal intent, and that death so caused, while excepted from the risks covered by the policy, would not be so excepted by the suicide clause. Besides, different kinds of accidents and injuries not resulting in death, caused by the voluntary taking of poison, might be excluded from such risks by this provision. It would not be difficult for the insurer to use language which, in respect to the question here under consideration, would be free from doubt. A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent, and of quite a different one in the hands of the adjuster.

Finding no error in the record the judgment of the appellate court is affirmed.

INSURANCE—CONSTRUCTION OF POLICY IN FAVOR OF INSURED.—Conditions in a policy of insurance should be strictly construed against the insurer, and liberally in favor of the insured (*Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305; 50 Am. St. Rep. 932), so as not to defeat, without plain necessity, his claim to indemnity: *American Accident Co. v. Relgart*, 94 Ky. 547; 42 Am. St. Rep. 374, and note.

INSURANCE, ACCIDENT—UNINTENTIONALLY INHALING GAS—TAKING POISON BY MISTAKE.—Under a policy excepting from its risk death or injury arising from "anything accidentally taken, administered, or inhaled," an insurance company is liable for a death caused by the accidental inhaling of illuminating gas, as the leading and controlling idea of such exceptions is the performance of a voluntary act which accidentally causes the death or injury of the insured. Such exceptions apply only to cases where something has been voluntarily and intentionally, although mistakenly, taken, administered, or inhaled. They do not apply to involuntary and unconscious acts: *Mennelley v. Employers' etc. Assur. Corp.*, 148 N. Y. 696; 61 Am. St. Rep. 716; *Pickett v. Pacific Mutual Ins. Co.*, 144 Pa. St. 79; 27 Am. St. Rep. 618. These principles, as applied to "taking poison," are discussed in the monographic note to *Metropolitan etc. Assn. v. Frelland*, 161 Ill. 30; post, p. 359. A death caused by accidentally taking poison is regarded as caused by external and violent means: Note to *Healey v. Mutual Accident Assn.*, 23 Am. St. Rep. 641.

METROPOLITAN ACCIDENT ASSOCIATION v. FROILAND.

[161 ILLINOIS, 30.]

INSURANCE—ACCIDENT—DEATH BY POISON.—Death of an insured person, caused by poison accidentally taken by mistake, is not within an exception in a policy excluding liability if death is caused by "poison in any way taken, administered, absorbed, or inhaled."

INSURANCE—ACCIDENT—WAIVER OF PROOF OF LOSS. A refusal on the part of an insurance company to pay a claim for accident insurance, on the ground that the death was caused by poison, and the loss not covered by the policy, is a waiver of a requirement contained in the policy that prescribed proofs of loss be furnished.

INSURANCE—ACCIDENT — WAIVER OF TIME FOR BRINGING ACTION.—Refusal on the part of an insurance company to allow the beneficiary in an accident policy to inspect its by-laws upon request made at its general office, and a misstatement as to the time within which suit may be brought, constitute a waiver of a by-law limiting the time for bringing the action.

JUDGMENTS—EXCESSIVE—WAIVER OF ERROR.—A judgment assessing damages in excess of the ad damnum of the declaration should not be reversed on appeal, if the excess is merely for interest accruing after the commencement, and objection thereto is first made on appeal. The error in rendering judgment in excess of the amount claimed in the declaration is waived unless specific objection thereto is made in the trial court.

Action by a beneficiary to recover accident insurance on a certificate of membership in a mutual benefit association. Judgment for plaintiff, and defendant appealed.

Smith, Shedd & Underwood, for the appellant.

J. Smith and C. S. Darrow, for the appellee.

³⁶ CARTER, J. The principal question in this case is like the one involved in *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642, ante, p. 355, and it must be controlled by that decision. Instead of using the term "taking poison," which in that case, as used in the policy, we held to mean the voluntary taking of poison, the application in the case at bar, which was made a part of the insurance contract, contained this provision: "I agree that this insurance shall not be held to extend . . . to poison in any way taken, administered, absorbed, or inhaled." The principal contention of appellant is, that although it is shown, and not disputed, that the death of the member was caused by poison accidentally taken—chloral taken by mistake for distilled water—yet there can be no recovery, because the term "poison in any way taken" must be held to include poison taken accidentally, as well as poison taken intentionally. It is not contended that there

is any difference, as a cause of death, between the term "poison taken" and the term "taking poison." Indeed, the by-laws use the one term and the application uses the other. But it is insisted that the qualifying words, "in any way," have relation to the motive of the insured in taking the poison, and embrace his involuntary as well ³⁷ as his voluntary action in that regard. We are of the opinion that the words "in any way" relate to the mode or manner in which the poison is taken, and not to the motive of the insured in taking it. Very nearly this precise question was so decided in *Connecticut Mut. Life Ins. Co. v. Akens*, 150 U. S. 468. It was there held that, in the phrase "self-destruction in any form," the words "in any form" clearly related only to the manner of killing, and that the clause was by no means synonymous in meaning with such clauses as "die by suicide, sane or insane," or "by suicide, felonious or otherwise, sane or insane." In accordance with the ruling in *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642, ante, p. 355, and in *Healey v. Mutual Acc. Assn.*, 133 Ill. 556, 23 Am. St. Rep. 637, we must hold in the case at bar that the death of the member, Froiland, having been caused by accident, is not excluded from the risks covered by the contract of insurance sued on, by reason of the exception above mentioned. Insurance contracts are to be liberally construed, so as not to defeat the indemnity, which, in making the contract, it was the object to secure, unless plainly necessary from the language of the contract.

It is also contended by appellant that there should have been no recovery by appellee, under the issues and proofs, because: 1. Immediate notice of the member's death was not given to appellant as required by the certificate of membership; and 2. The suit was not begun within thirty days after the refusal by appellant to entertain or to pay the claim. It is very doubtful whether the notice required by the certificate to be given immediately upon the happening of the injury applies to cases of death. When construed in connection with the by-laws, it would seem to apply only to injuries not fatal. But however this may be, the notice, if any was required, was waived, as were also the proofs of death and the by-law requiring suit to be brought within thirty days. The member died on February 27th, and, on the twenty-second day of March, appellee and her attorney went to the office of the ³⁸ secretary and general manager of the association, and asked him for forms upon which to make proper proofs of death, but the secretary told them, in substance, that the officers of the association knew of the member's death; that

it would be of no use to make the proofs, for the reason that Froiland's death was caused by poison; that the insurance did not cover such a case, and that the claim would not be paid. It must also be taken as established by the judgments of the circuit and appellate courts that appellee, as a matter of fact, had no knowledge of the provision in the by-laws, requiring suits, if brought at all, to be brought within thirty days after the refusal of the association to entertain or pay the claim, and that for the purpose of ascertaining what, if any, limitation as to time was provided in the by-laws, appellee and her attorney asked appellant's secretary, at the time and place above mentioned, for a copy of its by-laws, and, when this request was refused, then inquired of him how much time appellee had in which to bring suit, and was informed that she had three months. This officer of the association was then in possession of the by-laws, and had printed copies of them, and, whether or not appellee had a right to obtain from the association a copy of such by-laws, she had the right to inspect them and to be informed of their contents. The secretary and manager then knew, from the conversation, that she was ignorant of the by-law requiring suit to be brought within thirty days. Whether, as matter of law, she was charged with knowledge of the by-laws or not, she was in fact ignorant of the one in question, as was then well known to this officer of the association. While there is some conflict as to what was said, it must be taken, on this appeal, as established that she was, in effect, refused permission to inspect the by-laws, and was misled and induced to believe that she had three months in which to bring suit. However unreasonable a by-law requiring suit to be begun within thirty days from the time of the ^{3d} refusal by the company to pay might appear to be, we do not deem it necessary to pass upon that question; but that this by-law was waived by the wrongful acts of appellant's secretary and manager we have no doubt. It is a familiar rule that refusal to pay a claim on the ground that the loss is not one covered by the policy is a waiver of the requirement, usually contained in the policy, that the prescribed proofs of the loss be furnished to the company, and that in such case suit may be maintained without furnishing such proofs. Upon the same principle, we see no reason why the finding for the plaintiff of the issue made on the second replication setting up the facts above stated did not, in effect, amount to a finding that the by-law in question was waived by the association: See *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220; 23 Am. St. Rep. 610, and cases there cited. When the issue on this rep-

lication is considered, we do not think the court erred in refusing to hold as law in the decision of the case the proposition submitted by appellant that appellee was charged with notice of, and was bound by, the by-laws, and that it was immaterial whether she had actual knowledge of them or not.

Counsel for appellant contend that the court erred in not sustaining their demurrers, first, to the declaration, and next, to the replication. If any error was committed in this regard, it was waived by pleading over. The record shows that issues were joined on the pleadings to which demurrers had been overruled.

It is also assigned for error, and insisted on here, that the damages assessed exceed the ad damnum of the declaration, and that the judgment should be reversed for that reason. It seems that the excess of the judgment over the damages claimed in the declaration was the interest allowed which accrued after the commencement of the suit. At the conclusion of the trial, the court found the issues for the plaintiff, and assessed her damages at five thousand three hundred and fifty-four dollars, which was three hundred and fifty-four dollars in excess of the amount claimed in the ⁴⁰ declaration. The defendant entered its motions for a new trial and in arrest of judgment, which motions, as entered, were overruled by the court and exceptions taken by the defendant. Exceptions were also taken to the findings of the court and to the judgment. The specific objection was not made, nor was the court's attention called to the fact that the damages assessed exceeded the ad damnum of the declaration. Had this been done, the court would, no doubt, have limited the judgment to the amount claimed, or would have allowed the plaintiff to amend her declaration. It is undoubtedly true that it was error to render judgment in excess of the amount claimed in the declaration. It has been uniformly so held by this court. But the error was a formal and technical one, that should have been pointed out to the court by the defendant below when making its objections and taking its exceptions to the action of the court. This was not done and the error was therefore waived. This view is in substantial accord with the decision of this court in *Utter v. Jaffray*, 114 Ill. 470, where, although no motion for a new trial or in arrest of judgment was made and no exceptions were taken to the judgment, it was said that, had any such action been taken, "stating that the finding of the damages was in excess of the ad damnum in the amended declaration, the error could have been, and no doubt would have been, corrected at

once, under the statute, on such terms as the court might have deemed equitable and just." The inference to be drawn from the language used in that case is, that such an error will be waived unless the specific objection be made in the trial court: See, also, *Bowden v. Bowden*, 75 Ill. 111.

The judgment of the appellate court is affirmed.

INSURANCE—PROOFS OF LOSS—WAIVER OF, BY DENIAL OF LIABILITY.—A condition in a policy of insurance, that in case of loss the insured must forthwith give written notice thereof to the insurer, is waived by the latter, when, with full knowledge of the loss, he denies all liability under the policy without waiting for such written notice: *Savage v. Phoenix Ins. Co.*, 12 Mont. 458; 33 Am. St. Rep. 591, and note. See, to the same effect, *Faust v. American etc. Ins. Co.*, 91 Wis. 158; 51 Am. St. Rep. 876.

ACCIDENT INSURANCE—EFFECT OF TAKING POISON.—Accident insurance policies generally provide that the insurer shall not be liable for the death or injury of the insured, unless such death or injury shall have been caused by external, violent, and accidental means, and that the policy shall not be extended so as to cover death or injury arising from the taking of poison. It is universally conceded that the word "poison," as so used, must be given the interpretation placed upon it as commonly used and defined. It relates solely to the taking of poison, and not to bites of venomous insects, reptiles, or animals, nor to blood poisoning or the like. The important question is, whether the exception applies, and avoids the policy, whether the poison be taken intentionally or unintentionally, and upon this question the authorities are divided. The supreme court of Pennsylvania has said that "it is not necessary that the poison be taken with intent to produce death, in order to defeat a claim flowing from the right of membership. If the poison be innocently taken, and without any knowledge of the injurious effect which it was likely to produce, and did produce, so far as the person taking it is concerned, the effect may be said to be accidental. If we go a step further and admit in such case that the means are accidental, yet it is one of the accidental means expressly excepted from the protective power of the certificate. To hold the association liable for a death caused by taking poison would not only be in conflict with the letter of the agreement, but contrary to the whole purpose for which the association seems to have been formed": *Pollock v. United States Accident Assn.*, 102 Pa. St. 230; 48 Am. Rep. 204. In this case, the insured took "birch oil," a poison, by mistake for "milk of birch," which is harmless, and, death resulting, it was held that there could be no recovery: *Pollock v. United States Accident Assn.*, 102 Pa. St. 230; 48 Am. Rep. 204. This case has been severely criticised as setting up a rule too strict and narrow and as against the principles governing the construction of insurance policies. It has met with criticism in the same court by which it was rendered, and in numerous other cases to be cited hereafter. It has been held that where the insured took poison by mistake instead of his usual medicine, there could be no recovery: *Cole v. Accident Ins. Co.*, 61 L. T. N. S., 227; and the same rule was maintained when the assured by inadvertence took too much opium out of a dose which had been prescribed for him: *Bayless v. Travelers' Ins. Co.*, 14 Blatchf. 143. On the other hand, it has lately been decided, and we think properly decided, that the words "taking poison," as employed in policies of accident insurance, and in view of the rules of construc-

tion applied by the courts to such instruments, mean the voluntary, intentional taking of poison, and do not include cases of accidental poisoning. Hence, the drinking of carbollic acid by mistake for peppermint is not within a clause of an accident insurance policy exempting the insurer from liability for death from taking poison: *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642; ante, p. 355. The death of the insured, caused by accidentally taking and drinking poison by mistake, is a death produced by bodily injuries received through external, violent, and accidental means, within the meaning of a policy of insurance providing indemnity in case of death resulting from such causes, and excluding liability for death by taking poison: *Healey v. Mutual Accident Assn.*, 133 Ill. 556; 23 Am. St. Rep. 637. This ruling was adhered to in *Mutual Accident Assn. v. Tuggle*, 39 Ill. App. 569, where the death of the insured was caused by an overdose of laudanum taken by mistake. And to the same effect is *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317; 39 Am. Rep. 660. Many policies of accident insurance contain a provision exempting the insurer from liability for injury or death resulting from the taking of poison, or inhalation of gas. As the principles governing the liability of the insurer in cases where the insured dies from the inhalation of gas are nearly allied to those governing cases in which he dies from taking poison, they will be briefly noticed here. In one case, the insured, in good health on the day that the policy was issued, went into a well to make repairs to a pump, and in a short time was found in the well, dead from asphyxia resulting from the inhalation of poisonous gas, and it was held that death was caused by external, violent, and accidental means within the meaning of the policy, and that the condition against inhalation of gas contemplated a voluntary and intelligent act by the insured, and not an involuntary and unconscious act, and was inoperative to relieve the company from liability: *Pickett v. Pacific Mut. Life Ins. Co.*, 144 Pa. St. 79; 27 Am. St. Rep. 618. The same rule was announced in *United States Mut. Accident Assn. v. Newman*, 84 Va. 54, where the insured was found dead in bed with a ball of tough froth over his mouth, slightly tinged with blood, and some red splashes on the side of his face and on his breast, the room being full of coal or illuminating gas. In an action on a policy of this nature, it appeared that the insured was found dead in bed. The illuminating gas had in some way been turned on, the room was filled with it, and the death was caused from breathing the air laden with such gas. The court found as a fact that the death was caused by accidental means, and decided that the death was not caused by inhaling gas within the meaning of the policy, that those words applied only to a voluntary and intelligent action on the part of the insured, and that, although there was no visible or external sign of injury upon the body, yet the death was caused by external and violent means within the meaning of the policy: *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758. It has been held that no recovery could be had in such case when it is uncertain whether the death was the result of accident or of suicide: *Richardson v. Travelers' Ins. Co.*, 46 Fed. Rep. 843.

EDEN v. PEOPLE.

[161 ILLINOIS, 296.]

SUNDAY.—THE COMMON LAW does not prohibit ordinary labor on Sunday.

SUNDAY LAWS—CONSTITUTIONAL LAW.—A statute making it unlawful for barbers to do business on Sunday, and applying to them alone, is unconstitutional as depriving them of their property without due process of law.

SUNDAY LAWS—POLICE POWER.—The general welfare or police power of the state does not authorize a statute making it unlawful for one particular class of laborers alone to do business on Sunday.

SUNDAY LAWS—UNJUST DISCRIMINATION.—A statute requiring all persons to refrain from exercising their ordinary callings on Sunday is valid, but a statute which applies only to a particular class is invalid as an unjust discrimination.

Burnham & Baldwin, for the appellant.

M. T. Moloney, attorney general, T. J. Scofield, M. L. Newell, S. P. Shope, T. H. Gault, and O. C. Eigholz, for the appellee.

200 CRAIG, C. J. Plaintiff in error was convicted in the criminal court of Cook county for the violation of an act to prohibit barber shops from being kept open on Sunday, and for a violation of the law he was fined twenty-five dollars. The act was passed at the last session of the legislature, and contained two sections, as follows:

“Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that it shall be ³⁰⁰ unlawful for any person or persons to keep open any barber shop, or carry on the business of shaving, haircutting or tonsorial work, on Sunday, within this state.

“Sec. 2. Any person by himself, agent, or employé, violating the provisions of section 1 of this act, shall, upon conviction thereof, be fined in any sum not exceeding two hundred (\$200) dollars for each and every offense.”

It is contended in the argument that by the act in question that part of the fourteenth amendment to the United States constitution (sec. 1) has been violated which reads as follows: “Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” It is also contended that the act violates section 2 of article 2 of the Illinois constitution of 1870, viz., “no person shall be deprived of life, liberty, or property without due process of law,” and also section 22 of article 4, the general clause of which reads, “in all

other cases where a general law can be made applicable, no special law shall be enacted." It is conceded in the argument that if the legislature had enacted a law prohibiting all business on Sunday, its validity could not be questioned—that such a law would violate none of the constitutional provisions relied upon.

The common law of England, as adopted in this state as a part of our jurisprudence, does not prohibit the citizen from pursuing his ordinary labor on Sunday, nor is a contract entered into between two parties in this state void because executed on Sunday: *Rex v. Brotherton*, 1 Strange, 702; *Drury v. Defontaine*, 1 Taunt. 131; *Sayles v. Smith*, 12 Wend. 57; 27 Am. Dec. 117; *Richmond v. Moore*, 107 Ill. 429; 47 Am. Rep. 445. On the other hand, at common law, Sunday has always been regarded dies non juridicus—a day upon which courts could not transact other than necessary or ministerial business. In England, however, the law which permitted the transaction of business and the pursuit of one's ordinary labor was changed by statute (29 Car. II.), which ³⁰¹ provides that "no tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly business or work on the Lord's day," works of necessity and charity being excepted. This statute has been substantially adopted by the legislatures of many of the states in the Union. This state has not, however, followed the other states in the adoption of the English statute, but we have legislated on this subject for ourselves in a manner thought to be for the best interest of our people. That legislation will be found in paragraph 261 of our Criminal Code, as follows: "Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by any amusement or diversion, on Sunday, shall be fined not exceeding twenty-five dollars. This section shall not be construed to prevent watermen and railroad companies from landing their passengers, or watermen from loading and unloading their cargoes, or ferrymen from carrying over the water travelers and persons moving their families, on the first day of the week, nor to prevent the due exercise of the rights of conscience by whomever thinks proper to keep any other day as a Sabbath." The preceding paragraph (260) provides: "Sunday shall include the time from midnight to midnight."

There is a wide and well-marked distinction between the English statute and ours. The English statute prohibits labor and business on Sunday, while our statute merely prohibits labor and amusement which disturbs the peace and good order of society. In *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445, in speak-

ing of the difference between the two statutes, it is said: "A mere glance at that and our statute will show that they are materially different. That prohibits labor and business; ours only prohibits labor or amusement that disturbs the peace and good order of society. The offense by that statute is the performance of labor or business, and by ours it is the disturbance of the peace and good order of society." ³⁰² The British statute is much more comprehensive in its purposes and language than ours. Ours only prohibits labor that disturbs the peace and good order of society, not naming business, whilst the British statute renders the mere act of labor or business penal."

Under the law of this state as it existed prior to the passage of the act in question, each and every citizen of the state was left perfectly free to labor and transact business on Sunday or refrain from labor and business, as he might choose, so long as he did not disturb the peace and good order of society. By the act in question, an attempt has been made by the legislature to inaugurate a radical change in the law as to a class of the laboring element of the state—the barbers. The statute, as has been seen, declares "that it shall be unlawful for any person or persons to keep open any barber shop, or carry on the business of shaving, haircutting or tonsorial work, on Sunday." That act is plain, and its meaning is obvious. The owner of a place where is carried on the barber business is prohibited from doing any business whatever during one day in the week. He may have in his employ a dozen men, and yet during one day in seven he is deprived of their labor and also deprived of his own labor. The income derived from his place, and his own labor and the labor of his employés, are his property, but the legislature has by the act taken that property from him. The journeyman barber who works by the day or the week, or for a share of the amount he may receive from customers for his services, is by the law denied the right of laboring one day in the week. He may rely solely upon his labor for the support of himself and family; his labor may be the only property that he possesses, and yet this law takes that property away from him. His labor is his capital, and that capital is all the property he owns. Can a law which takes that from the laborer be sustained?

³⁰³ The constitution of the United States says the state shall not deprive any person of property without due process of law, and our state constitution declares the same thing. What is understood by the term "due process of law" is not an open question. "Due process of law" is synonymous with "law of the

land," and "the law of the land" is "general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals": *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869. Is the act in question a law binding upon all the members of the community? A glance at its provisions affords a negative answer. The act affects one class of laborers, and one class alone. The merchant and his clerks, the restaurant keeper with his employes, the clothing house proprietor, the blacksmith, the livery stable keeper, the owners of street-car lines, and people engaged in every other branch of business, are each and all allowed to open their respective places of business on Sunday and transact their ordinary business if they desire, but the barber, and he alone, is required to close his place of business. The barber is thus deprived of property without due process of law, in direct violation of the constitutions of the United States and of this state.

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, the validity of an act of the legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner arose, and it was held not competent for the legislature to single out owners and operators of coal mines and provide that they should bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make, and that such legislation cannot be sustained as an exercise of the police power.

In *Frorer v. People*, 141 Ill. 171, where the validity of an act of the legislature arose which prohibited persons ³⁰⁴ engaged in mining or manufacturing from keeping stores for furnishing supplies, tools, clothing, provisions, or groceries to their employes while so engaged in mining or manufacturing, the law was held to be in conflict with the constitution. In the decision of the case it is, among other things, said: "The privilege or liberty to engage in or control the business of keeping and selling clothing, provisions, groceries, tools, etc., to employes, is one of profit—of presumptive value; and thus, by the effect of these sections, what the employers in other industries may do for their pecuniary gain with impunity, and have the law to protect and enforce, the miner and manufacturer, under precisely the same circumstances and conditions, are prohibited from doing for their pecuniary gain. The same act, in substance and in principle, if done by the one is lawful, but if done by the other is not only

unlawful, but a misdemeanor. . . . The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract."

In *Ramsey v. People*, 142 Ill. 380, the case last cited was quoted with approval, and it was held that the act of 1881, which requires the owners and operators of coal mines, when the miner is paid on the basis of the amount of coal mined and delivered by him, to weigh the coal on pit cars before it is screened, and to pay on such weights, is in violation of section 2 of article 2 of the state constitution, as depriving a class of persons of the liberty and property right of making contracts without due process of law.

In *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, the question of the validity of an act of the legislature arose which required certain specified corporations to pay their employes ³⁰⁵ their wages weekly. It was held that as the act was applicable only to certain corporations, and did not operate upon all corporations for pecuniary profit, and individuals, it was unconstitutional, as depriving the corporations affected thereby of the right of liberty and property, without due process of law. In speaking of the term "liberty," as used in the constitution, it is there said: "There can be no liberty protected by government that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject only to the restraints necessary to secure the same right to all others. The fundamental principle upon which liberty is based in free and enlightened government is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare."

In *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, the question arose in regard to the validity of a statute which provided that no female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week, and it was held that the right to labor or employ

labor, and make contracts in respect thereto, upon such terms as may be agreed upon, is both a liberty and a property right, and is included in the guaranty of section 2 of article 2 of the constitution, and that the act prohibiting the employment of females in any factory or workshop for more than eight hours a day is unconstitutional, as being partial and discriminating in its character. In the decision of the case it is said: "Labor is property, and the laborer has the same right to sell his labor and to contract with reference ³⁰⁶ thereto as has any other property owner. In this country, the legislature has no power to prevent persons who are sui juris from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer."

If the legislature has no power to prohibit, by law, a woman from being employed in a factory or workshop more than eight hours in any one day or forty-eight hours in a week, upon what principle, it may be asked, has the legislature the right to prohibit a barber from laboring and receiving the fruits of his labor during any number of hours he may desire to work during the week? If a woman may be allowed to determine the number of hours she may work in a week, why not allow a barber the same right? Moreover, if the merchant, the grocer, the butcher, the druggist, and those engaged in other trades and callings are allowed to open their places of business and carry on their respective avocations during seven days of the week, upon what principle can it be held that a person who may be engaged in the business of barbering may not do the same thing? Why should a discrimination be made against that calling, and that alone?

But it is said the law may be sustained under the police power of the state. In Tiedeman on Limitation of Police Powers, section 85, the author says: "The state, in the exercise of its police power, is, as a general proposition, authorized to subject all occupations to a reasonable regulation, where such regulation is required for the protection of the public interest or for the public welfare. It is also conceded that there is a limit to the exercise of this power, and that it is not an unlimited, arbitrary power, which would enable the legislature to prohibit a business the prosecution of which inflicts no damage upon others." The author also lays down the rule that it is within the discretion of the legislature to institute such regulations when a proper case arises. But ³⁰⁷ it is a judicial question whether the trade or calling is of such a nature as to justify police regulation.

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, in speaking of the police powers of the state as applicable to the case then before the court, it is said: "Their requirements have no tendency to insure the personal safety of the miner, or to protect his property or the property of others. They do not meet Dwarris' definition of police regulations. They do not have reference to the comfort, the safety, or the welfare of society: Potter's Dwarris on Statutes, 458. In *Austin v. Murray*, 16 Pick. 121, it was said: 'The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such is not the object and purpose of the regulation': See, also, *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694, and cases referred to in *Matter of Application of Jacobs*, 98 N. Y. 109"; 50 Am. Rep. 636.

In Cooley's Constitutional Limitations, section 484, in speaking in reference to a regulation made for one class of citizens, it is said: "Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment shall not have capacity to make contracts or receive conveyances, . . . or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict."

It will not and cannot be claimed that the law in question was passed as a sanitary measure, or that it has any relation whatever to the health of society. As has been heretofore seen, as a general rule a police regulation has reference to the health, comfort, safety, and welfare of society. How, it may be asked, is the health, comfort, ³⁰⁸ safety, or welfare of society to be injuriously affected by keeping open a barber shop on Sunday? It is a matter of common observation that the barber business, as carried on in this state, is both quiet and orderly. Indeed, it is shown by the evidence incorporated in the record that the barber business, as conducted, is quiet and orderly—much more so than many other departments of business. In view of the nature of the business and the manner in which it is carried on, it is difficult to perceive how the rights of any person can be affected, or how the comfort or welfare of society can be disturbed. If the act were one calculated to promote the health,

comfort, safety, and welfare of society, then it might be regarded as an exercise of the police power of the state. In *Toledo etc. Ry. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611, it was held that if the law prohibits that which is harmless in itself, or requires that to be done which does not tend to promote the health, comfort, safety, or welfare of society, it will in such case be an unauthorized exercise of power, and it will be the duty of the courts to declare such legislation void. In *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, in speaking of the police power of the state, the court said: "The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the constitution, and must have some relation to the ends sought to be accomplished—that is to say, to the comfort, welfare, or safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end. It cannot invade the rights of person and property under the guise of a mere police regulation, when it is not such in fact; and where such an act takes away the property of a citizen or interferes with his personal liberty, it is the province of the courts to determine whether ^{so} it is really an appropriate measure for the promotion of the comfort, safety, and welfare of society."

We do not, therefore, think the law was authorized by the police power of the state. If the public welfare of the state demands that all business and all labor of every description, except works of necessity and charity, should cease on Sunday, the first day of the week, and that day should be kept as a day of rest, the legislature has the power to enact a law requiring all persons to refrain from their ordinary callings on that day: *Cooley's Constitutional Limitations*, 725. All will then be placed on a perfect equality, and no one can complain of an unjust discrimination. But when the legislature undertakes to single out one class of labor harmless in itself, and condemn that and that alone, it transcends its legitimate powers, and its action cannot be sustained.

The judgment will be reversed.

Mr. Justice Wilkin, dissenting.

SUNDAY.—AT COMMON LAW, acts performed on Sunday were valid unless expressly prohibited: *Amis v. Kyle*, 2 Yerg. 31; 24 Am.

Dec. 463; *Kepner v. Keefer*, 6 Watts, 231; 31 Am. Dec. 460, and note; *Adams v. Hamell*, 2 Doug. 73; 43 Am. Dec. 455, and note. See, also, the note to *Roberts v. Barnes*, 48 Am. St. Rep. 647.

SUNDAY—CONSTITUTIONAL LAW.—A statute making it unlawful for barbers to carry on their business on Sunday, and excepting from its operation such persons engaged in such business as conscientiously believe the seventh day of the week should be observed as Sunday, and actually refrain from secular business on that day, is not unconstitutional as class legislation, nor as depriving any person of life, liberty, or property without due process of law: *People v. Bellet*, 99 Mich. 151; 41 Am. St. Rep. 589. A Sunday law making it a misdemeanor "for any person engaged in the business of baking, to engage or permit others in his employ to engage in the business of baking for the purpose of sale, between the hours of 6 o'clock P. M. on Saturday and 6 o'clock P. M. on Monday is a special law, and as such unconstitutional: *Ex parte Westerfield*, 55 Cal. 550; 36 Am. Rep. 47. See on this subject the note to *Lieberman v. State*, 18 Am. St. Rep. 795, and the extended note to *City Council v. Benjamin*, 49 Am. Dec. 616.

The precise question involved in the principal case was presented to the court of appeals of New York in *People v. Haynor*, 149 N. Y. 195, in which a majority of the court sustained the constitutionality of the act, Judges Gray and Bartlett dissenting: See post, p. 000.

PENTZEL v. SQUIRE.

[161 ILLINOIS, 246.]

NOTICE—PUBLICATION OF—PUBLIC NEWSPAPER.—A statute requiring that execution sales of real estate shall be advertised in a public newspaper is complied with by publication in a weekly law journal containing both legal and general news of importance to the public, and having a large circulation among both laymen and lawyers.

NOTICE—PUBLICATION—SUFFICIENCY OF CERTIFICATE.—A certificate of publication of notice of a judicial sale in a newspaper published by a corporation, if made by its agent expressly authorized by it to make such certificates with the corporate seal attached, is sufficient, although such agent is not its president or other officer.

W. J. Watts, for the appellant.

C. A. Squire and Young, Makell & Bradley, for the appellee.

246 **MAGRUDER, J.** This is a motion by appellant in the circuit court of Cook county to set aside a sheriff's sale of land, made under an execution issued upon a judgment rendered against appellant and in favor of appellee. The grounds upon which it is moved to set aside the sale are, that the *Chicago Law Journal Weekly*, in which the notice of the sale was published, is not a public newspaper within the meaning of the statute, and that the certificate of the publication of the notice is not such a

certificate of notice as the law requires. The court below, after hearing evidence in support of and against the motion, found the ³⁴⁷ facts against the appellant upon both of the grounds named in the motion, and refused to hold the law to be with the defendant, either as to the character of the journal in question or as to the sufficiency of the certificate of publication. The motion was thereupon denied, and an appeal was taken.

1. The first question is, whether the Chicago Law Journal Weekly is a public newspaper within the meaning of the statute.

Section 14, chapter 77, of the Revised Statutes of Illinois provides: "No real estate shall be sold by virtue of any execution aforesaid, except at public vendue, between the hours of nine in the morning and the setting of the sun on the same day, nor unless the time (specifying the particular hour of said day at which said sale shall commence) and the place of holding such sale shall have been previously advertised three successive weeks, once in each week, in a public newspaper printed and published in the county where said sale shall be made."

Section 5, chapter 100, of the Revised Statutes of Illinois enacts that "when any notice is required by law or contract to be published in a newspaper (unless otherwise expressly provided in the contract), it shall be intended to be in a secular newspaper of general circulation, published in the city, town, or county, or some paper especially authorized by law to publish legal notices in the city, town, or county."

The testimony of Fred L. Morrison, hereinafter named, was to the effect that said Chicago Law Journal Weekly is a secular newspaper of general circulation, printed and published in the city of Chicago, county of Cook, state of Illinois; that said paper, copies of which are shown to the court, is a newspaper of sixteen pages of twelve and one-half inches in length and ten inches in width, and is published weekly, on Friday of each and every week, and circulates among lawyers and laymen; that besides the reports of decisions of courts of record, of courts ³⁴⁸ of review and of appellate jurisdiction and a digest of cases, it contains news of general nature, of current events and of general importance to the public; that the average weekly circulation of said Chicago Law Journal Weekly is three thousand eight hundred and seventy-five copies.

Upon substantially the same evidence as the above, the several papers named in the following cases, *Kerr v. Hitt*, 75 Ill. 51, *Railton v. Lauder*, 126 Ill. 219, and *Maas v. Hess*, 140 Ill. 576, were held to be secular newspapers of general circulation within

the meaning of said section 5 of chapter 100. Upon the authority of the cases referred to, the Chicago Law Journal Weekly must be regarded as a secular newspaper of general circulation within the meaning of that section. We think, also, that, being a secular newspaper of general circulation within the meaning of section 5, it cannot, in the light of the foregoing testimony, be regarded otherwise than as a public newspaper within the meaning of section 14 of chapter 77.

2. The certificate of publication of the notice of the sale as introduced in evidence is as follows:

"This is to certify, that the notice, a true copy of which is hereto annexed, was published in the Chicago Law Journal Weekly, a secular newspaper of general circulation, published weekly in the city of Chicago, Cook county and state of Illinois, by the Law Journal Print, a corporation existing under the laws of the state of Illinois, three times, for three weeks successively; that the date of the first publication was the 31st day of January, A. D. 1896, and the last publication was the 14th day of February, A. D. 1896.

"In testimony whereof, the Law Journal Print has caused this certificate to be signed by its authorized agent, and the corporate seal thereof to be affixed this 15th day of February, A. D. 1896.

[Seal]

"LAW JOURNAL PRINT,

"Fred L. Morrison, Authorized Agent."

The statute respecting certification of legal notices provides: "That when any notice shall be required by law, or the order of court, or by any contract, to be published in any newspaper, and no other mode of proving ³⁴⁹ the same is provided, the certificate of the publisher, by himself or his authorized agent, with a written or printed copy of such notice annexed, stating the number of times which the same shall have been published, and the dates of the first and last papers containing the same, shall be sufficient evidence of the publication therein set forth": 2 Starr and Curtis' Annotated Statutes, 1674.

The objection is made to the notice that the statute contemplates a certificate made by the publisher or his authorized agent, and that the only person whom a corporation can duly authorize as its agent is the person who keeps, or is supposed to keep, its corporate seal—the secretary of the corporation.

In *Maass v. Hess*, 140 Ill. 577, it was said: "There is no force in the objection that the paper is published by a corporation. Proof of publication may be made by the authorized agent of the publisher, as well as by the publisher. A corporation may

certainly have an authorized agent as well as an individual or copartnership." It was conceded that the Law Journal Print was a corporation duly organized under the laws of Illinois. It was proven from the minutes of the board of directors of that corporation that, on February 3, 1896, said board passed a resolution appointing Fred L. Morrison agent of said Law Journal Print, and authorized him to certify to all the certificates required to be made in the publications of the Chicago Law Journal Weekly.

As a general rule, in the absence of an act of the legislature or provision made by by-laws, a corporation acts through its president, he being the legal head of the body; and in *Bass v. People*, 159 Ill. 207, it was held that a certificate of publication, signed by the president of a corporation publishing a newspaper, was sufficient. In that case, the act performed by the president was presumed to be legally done and binding on the corporation. But we see no reason why a corporation may not, by a resolution of its board of directors, designate a particular ³⁵⁰ person to act as its authorized agent in the performance of a specified duty, such as certifying to notices of publication: *Smith v. Smith*, 62 Ill. 493.

In *Smith v. Smith*, 62 Ill. 493, it was held that a deed, signed by the vice-president of a corporation under the corporate seal, but not countersigned by the secretary, was well executed.

In *Hertig v. People*, 159 Ill. 237, 50 Am. St. Rep. 162, the certificate was signed by the president of the publishing corporation without the corporate seal, and it was there said that it would have been an unnecessary act to seal the certificate with a corporate seal. In the present case, the corporate seal was attached to the certificate, and, as the authorized agent was authorized to sign the certificate, we cannot regard it as invalid because it was not countersigned by the secretary.

Cases are referred to, arising under a statute which provided for an affidavit of the publication of the notice by the printer, or the foreman of the printer, and holding that such an affidavit was insufficient when the affiant did not swear that he was the printer or foreman, etc: *Hill v. Hoover*, 5 Wis. 354; *Iverslie v. Spaulding*, 32 Wis. 394. Here, the certificate states on its face that the publishing corporation has caused it to be signed by its authorized agent, and the corporate seal to be affixed. This statement in the body of the certificate, taken in connection with the signature of Fred L. Morrison as authorized agent, would seem to be sufficient under the doctrine of the cases referred to.

In *Hertig v. People*, 159 Ill. 237, 50 Am. St. Rep. 162, where the certificate was signed by the president of the corporation, it was said that the matters set forth in the certificate were certified to by an individual, and that "the corporation could certify to nothing."

The certificate here does not proceed as follows: "I, Fred L. Morrison, authorized agent of the Law Journal Print, a corporation publishing a newspaper known as ³⁵¹ the Chicago Law Journal Weekly, do hereby certify," etc., after the manner of the certificates set forth in *Bass v. People*, 159 Ill. 207, and *Hertig v. People*, 159 Ill. 237; 50 Am. St. Rep. 162. Yet, as it proceeds, in general terms, "This is to certify," etc., and is signed in such a way that it can be regarded as the certificate of the authorized agent as well as of the corporation, we do not regard it as sufficiently obnoxious to the views expressed in *Hertig v. People*, 159 Ill. 237, 50 Am. St. Rep. 162, to justify us in holding it to be invalid.

The judgment of the circuit court is affirmed.

LEGAL NOTICES—PUBLICATION OF PUBLIC NEWSPAPER.—A journal published weekly, of general circulation, devoted primarily to the interests of the legal profession and the dissemination of legal news, but also containing matters of interest to the general public, such as personal items, notices of passing events, general trade advertisements, and the like, is a newspaper within the meaning of the Michigan statute providing for the publication of legal notices: *Lynch v. Judge of Probate*, 101 Mich. 171; 45 Am. St. Rep. 404. See, also, the extended note to *Lincoln v. Wright*, 62 Am. Dec. 321.

SCHUERMANN v. DWELLING HOUSE INSURANCE CO.

[161 ILLINOIS, 437.]

INSURANCE—VACANCY OF PREMISES—QUESTION FOR JURY.—Whether a building is vacant or unoccupied, within the meaning of an insurance policy, at the time a loss by fire occurs, is a question of fact for determination by the jury.

INSURANCE—VACANCY OF PREMISES.—The meaning of the term "vacant or unoccupied," as used in a policy of insurance, and its construction with other clauses, is a question of law.

TRIAL—QUESTION FOR COURT.—Whether there is any evidence legally tending to prove a fact to authorize its submission to the jury, is to be determined by the court.

VERDICT—WHEN COURT MAY DIRECT.—If the evidence is not sufficient to support a verdict for the plaintiff, or if one, if found, must be set aside, the court may direct a finding for the defendant.

INSURANCE—CONSTRUCTION OF POLICY.—An insurance policy must be liberally construed in favor of the assured, but construction must not make a new contract for the parties.

INSURANCE—VACANCY OF PREMISES—KNOWLEDGE OF INSURED.—The enforcement of a covenant in a policy of insurance, that the premises becoming vacant and unoccupied shall cause a forfeiture, cannot be made to depend upon the knowledge of the insured as to the fact of such vacancy.

INSURANCE—VACANCY OF PREMISES.—A dwelling or tenement house is vacant and unoccupied if the occupant or occupants have moved out, although some trifling articles of furniture of little value are left in one of the rooms; and, if it is destroyed while in such condition, the loss is forfeited under a covenant in a policy of insurance, exempting from liability for loss if the insured premises shall be or become "vacant or unoccupied."

Action upon an insurance policy to recover for the loss of a building by fire. This building was a tenement house, and, at the time of the fire, all of the tenants had moved out under the request of the insured, upon the statement that he desired, and proposed to have, the house repaired. A few articles belonging to one of the former tenants remained in the room formerly occupied by him. The policy of insurance covering the building provided that it should be void, if the building therein described should "be or become vacant or unoccupied or not in use." The plaintiff contended that the building was not vacant, or unoccupied, within the meaning of the policy, and that, even if it was, he had a right under the circumstances to believe that it was occupied, and had no notice of its being vacant, and that it was a question of fact for the jury to determine whether it was vacant within the meaning of the policy. The trial court instructed the jury to find for defendant. Verdict and judgment accordingly. Plaintiff appealed.

J. M. Hamilton, for the appellant.

Harbert & Daley, for the appellee.

439 **PHILLIPS, J.** Whether a building is vacant or unoccupied at the time a loss by fire occurs is a question of fact, for determination by the jury. What is meant by the term "vacant or unoccupied," as used in a policy, and its construction with other clauses, is a question of law: *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; 34 Am. Rep. 106. The question of fact, depending on the preponderance of the evidence, is for the jury. Whether there is any evidence, legally tending to prove a fact, to authorize its submission to the jury, is to be determined by the court: *Bartelott v. International Bank*, 119 Ill. 259. Where the evi-

dence is not sufficient to support a verdict for the plaintiff, or if one, if found, must be set aside, the court may direct the finding: *Simmons v. Chicago etc. R. R. Co.*, 110 Ill. 340.

An insurance policy will be liberally construed in favor of the assured, but construction will not make a new contract for the parties or disregard the evidence as expressed. The covenant in this policy, that the premises becoming vacant and unoccupied would cause a forfeiture and avoidance, can, on no principle of construction, be made to depend upon the plaintiff's knowledge of the fact. In *Moore v. Phoenix Ins. Co.*, 64 N. H. 140, 10 Am. St. Rep. 384, it was held that a dwelling-house in which no one lives, but in which a former occupant left some trifling articles of furniture of little value and of no use elsewhere, was vacant and unoccupied, within the meaning of the terms ⁴⁴⁰ of the policy. To the same effect are *Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77; and *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 676.

There is a strong authority in support of the rule that the meaning of the term "vacant or unoccupied" is that the house is without an occupant—that is, no one living in it: *North American Fire Ins. Co. v. Zaenger*, 63 Ill. 464; *American Ins. Co. v. Padfield*, 78 Ill. 167; *Fitzgerald v. Connecticut Fire Ins. Co.*, 64 Wis. 463; *Alston v. Old North State Ins. Co.*, 80 N. C. 326.

The evidence in this record already shows the premises were vacant and unoccupied, within the meaning of the conditions of the policy, and by the terms of the contract a forfeiture and avoidance resulted from that fact.

It was not error to instruct the jury to find for the defendant, and it was not error in the appellate court to affirm that judgment. The judgment of the appellate court is affirmed.

TRIAL—DIRECTING VERDICT.—If the evidence clearly establishes the right of the plaintiff to recover, and no defense is proven, it is proper for the court to direct a verdict for the plaintiff, but not otherwise: *Moore v. Baker*, 4 Ind. App. 115; 51 Am. St. Rep. 203, and note. If the evidence is of such a character that a trial judge would have a plain duty to perform in setting aside the verdict as unsupported by the evidence, it is his duty and prerogative to interfere before submission to the jury and direct the verdict: *Hite v. Metropolitan etc. Ry. Co.*, 130 Mo. 132; 51 Am. St. Rep. 555, and note.

INSURANCE—CONSTRUCTION OF POLICY.—Conditions in a policy of insurance should be strictly construed against the insurer and liberally in favor of the assured: *Georgia etc. Ins. Co. v. Bartlett*, 91 Va. 305; 50 Am. St. Rep. 332; *Duran v. Standard etc. Ins. Co.*, 63 Vt. 437; 25 Am. St. Rep. 773, and note. Policies of insurance must be liberally construed in favor of the insured, so as not to defeat

without plain necessity his claim to indemnity: *American Acc. Co. v. Reigart*, 94 Ky. 547; 42 Am. St. Rep. 374, and note. Conditions avoiding a policy of fire insurance because the premises become vacant or unoccupied should receive strict construction, and, when ambiguous, be construed most strongly against the insurer: *Moody v. Insurance Co.*, 52 Ohio St. 12; 49 Am. St. Rep. 699.

INSURANCE ON DWELLING—WHAT CONSTITUTES OCCUPANCY.—Occupancy implies actual use of a dwelling-house as such, and an insurer has a right, under a policy employing such word, to the care and supervision of the insured premises involved in such an occupancy: *Limburg v. German Fire Ins. Co.*, 90 Iowa, 709; 48 Am. St. Rep. 468, and note. An insured dwelling must be deemed vacant and unoccupied unless it is used as a place of abode or habitation: *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88; 51 Am. St. Rep. 457, and note. See, also, the extended note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 391.

INSURANCE—VACANCY OF PREMISES—KNOWLEDGE OF PREMISES.—If a policy of insurance provides that if the insured building should become vacant or unoccupied without the consent of the company indorsed on the policy it shall become null and void, a temporary vacancy of the building, though without the knowledge of the owner, terminates the policy, and the subsequent reoccupancy of the building does not revive the policy, unless the forfeiture has been waived: *East Texas etc. Ins. Co. v. Kempner*, 87 Tex. 229; 47 Am. St. Rep. 99.

FULLER v. SHEDD.

[161 ILLINOIS, 462.]

BOUNDARIES—MEANDER LINES.—LAKES, whether great or small, if of such size that, in making the original survey they are meandered, are subject to the same rule as to riparian rights.

BOUNDARIES—MEANDER LINES.—In a grant of land bordering on a river which has been meandered in making the survey, the meander line, in and of itself, is not a boundary line, for the purpose of determining quantity in a fractional part.

BOUNDARIES—MEANDER LINES.—If a narrow strip of land lies between the meander line and the natural boundary, as a stream or river, and its proportions are much smaller than the land granted, it is included in the grant, and the center of the stream is the boundary, unless a different intention is manifested by the terms used.

BOUNDARIES—MEANDER LINES.—If the land outside of the meander line of the grant is so grossly in excess of that sold that it is apparent that there is fraud or mistake in the survey, such excess is not included in the grant and the meander line is the boundary.

BOUNDARIES—LAKES—MEANDER LINES.—A grant of land bounded by the meandered lines of a natural lake conveys only to the water's edge.

BOUNDARIES—MEANDER LINES.—RESURVEY of lands, the greater part of which are covered by water, within the meandered line of a natural lake, without fraud or mistake in the original survey, or material changes in conditions, cannot be made by the land department and the land therein patented to other parties, as against those holding under the original grants.

RIPARIAN RIGHTS AND PROPRIETORSHIP are property rights of value to which are attached rights and privileges conferred

by law of which the owner cannot be deprived by an illegal proceeding.

WATERS OF MEANDERED LAKES and the land thereunder are held by the state in trust for the people, who alike have benefit thereof in fishing, boating, and the like.

BOUNDARIES—LAKES—ACCRETION—RELICION.—If accretions come to riparian proprietors of lands bounded by meandered lakes, they take to the water's edge, and follow the gradual recession of the waters to their edge, but if a large body of land is suddenly and perceptibly formed by relicion, it belongs to the state.

PUBLIC LANDS—JURISDICTION OF STATE AND FEDERAL COURTS.—The right of state courts to determine state law in respect to the owners of lands on meandered lakes under government patents is superior to the right of the federal courts to construe them.

Green, Willits & Robbins, Loesch Brothers, Marston, Angur & Tuttle, S. P. Douthart, and R. B. Kendall, for the appellants.

W. H. Prescott, Lyman & Jackson, H. S. McCartney, Dent & Whitman, and Moran, Kraus & Meyer, for the appellees.

471 **PHILLIPS, J.** The main question presented on the pleadings and facts appearing in this record is, whether the title of the riparian owner on a lake, meandered in the original survey by officers employed by the United States for surveying public lands, extends to the center of the lake or stops at the water's edge. The question is of much consequence and deserving of careful consideration. In states bordering on the great lakes of the north it is of paramount importance, and the adjudications of the courts of such states are not harmonious. Where lakes are of such size that in making the original survey they are meandered, we know of no principle of construction by which one rule should be applied to small lakes and another to large ones: *Bradley v. Rice*, 13 Me. 201; 29 Am. Dec. 501. The impossibility of establishing a reasonable rule that a right should be determined by the extent of a lake would, in the absence of legislation determining that question, lead to conflicting and absurd conclusions, based on no rule regarding the effect of a survey of lands bordering on a lake. The real question must be resolved by determining whether the riparian owner of lands meandered on a lake by the original survey takes to the water's edge as meandered, or takes to the center of the lake.

The body of water marked "Navigable Lake" in the original survey is a lake two or three miles long from east to west and about the same north and south, the greater part being in the state of Indiana. That part in Illinois at the time of the original survey covered about 1300 acres of land. This lake is situated

three or four miles south of Lake Michigan and in the state of Indiana, and has a natural outlet toward the northeast into ⁴⁷³ the latter lake, which outlet is frequently subject to interruption by the formation of a sand-bar upon the shore of Lake Michigan. There was also an outlet at the west side of the lake into Calumet river. The effect of winds and storms on Lake Michigan which would raise its water at the south would also operate to change the level of the water in this small lake and cause it to be higher. Its level was also affected by rains and evaporations. From the northeast corner of the southwest quarter of fractional section 20, township 37 north, range 15 east, of the third principal meridian, there extended in a southerly direction a ridge. From the southeast corner of fractional southeast quarter of section 30 and the southwest corner of fractional section 29 a ridge extended in a northerly direction. The extent to which this ridge projected from the north was about 220 rods, and the extent of the projection from the south was about 160 rods. The width of these ridges varied, at some places being 28 rods wide and at others wider, and they were dry land at ordinary stages of water. At other places they were still narrower. This was the case at the time of the original survey. Along these ridges in their projections from the north and south, trees of different varieties grew, some of which were three feet in circumference. These points, at their extremities, were about 80 or 90 rods apart, and between them, and along the sides of the ridge and around the margin of the lake within its meandered line, reeds and coarse grass grew in the water. In the marshy depressions between these points were two islands, one a mere knoll, the other containing about one or two acres, on which trees and bushes grew. This was substantially the physical condition, in ordinary stages of water, at the time of the 1834 and 1835 survey. The level of the waters of Lake Michigan at a certain stage was adopted as the starting point of levels in Cook county. The extreme rise and fall of that lake is from five feet above datum to one foot below datum. The level ⁴⁷³ of the waters of Wolf lake, when the same reach about the meandered line of the original survey, would be about 2.2 feet above datum. Whilst in the original survey this Wolf lake was by the field notes designated a navigable lake, it was not navigable in fact. Such being the surrounding conditions at the time of the original survey, the changes from that time to the survey of 1874 were not great, such as existed resulting from the slow filling of the lakebed and from other natural causes.

Since the survey of 1874, by reason of the improvement of Calumet river and the wearing out of deeper natural channels from the lake and an increased flow therefrom, and the same natural causes continuing to raise the bed of the lake, there has been a recession of the waters, causing dry land on both sides of the ridge, and around the borders of the lake the recession was such that between the meandered lines and the water there was uncovered, and the greater part of the year was dry land around the lake, a strip 20 to 25 rods wide.

In this condition of the lake, a survey of the lands and lakebed within the meandered line was made in 1874, and the lands thus surveyed offered for sale and sold, and patented by the United States to various parties, and the greater part of said lands so patented by mesne conveyances came to appellants, as alleged in their respective cross-bills. At the time this survey was made, the evidence showed the waters were waded by the chainmen, though differing in depth from a few inches to about five feet, and almost all the land surveyed was then covered by water. The lands in the original survey, as made in 1834 and 1835, bordering on the lake, were meandered, and these fractional tracts so sold were patented by the United States to the purchasers thereof. So far as we have occasion to decide the questions in this record, we need refer to none but the entries of Holbrook, De Witt, Egan, and Stephen A. Douglas. Douglas had entered fractional section 29, 7.37 acres, and De Witt had entered the fractional southwest quarter of section 20, ⁴⁷⁴ 4.53 acres. These lands, by mesne conveyances, became vested in Shedd. Holbrook entered the southeast fractional quarter of section 19, 79.11 acres, the northeast fractional quarter of section 30, 28.71 acres, and the east part of the southeast fractional quarter of section 30, 2.04 acres, and the title to the same passed by descent to Gertrude H. Hardin, who also acquired the title to the west fraction of the southeast fractional quarter of section 30, 25.09 acres, which had been entered by William E. Egan. Shedd filed his petition to have his record title established in the lands so acquired by him, and Mrs. Hardin, by her cross-petition, sought to have record title established to the lands in her cross-petition described, which she had acquired as above stated. The numerous purchasers of lands within the meandered lines under the survey of 1874 having acquired and set up their titles, by cross-petition asked relief in the same manner as to the confirmation of their titles. By the decree of the circuit court of Cook county, all the cross-petitions were dismissed except that

of Mrs. Hardin, and the court established title in Shedd and Hardin, and held they, by riparian rights, acquired title to the bed of the lake and took to its center. By this decree purchasers of not exceeding 153 acres of land from the government acquired title, eo instanti, to the bed of the lake and to more than 1,100 acres of land in addition to that for which they paid.

The chief argument of appellants is, the meander line in this case constitutes the boundary. At common law, the title of a riparian proprietor bounded by a navigable stream extends only to high-water mark, and in streams not navigable the rights of the riparian proprietor extended to the middle thread of the current. But at the common law, arms of the sea and only streams where the tide ebbed and flowed were deemed navigable, and streams above tide-water, though navigable in fact, were not deemed navigable in law. Under this rule of the common law, the principle was applied at an early period ⁴⁷⁵ in the history of the state, and held with reference to streams in and bordering this state, that the riparian proprietor in a grant bounded on or upon the margins of rivers or streams, whether navigable or not, took to the center thread of the stream: *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112. The rule then announced has been adhered to in this state by many adjudged cases since that time. Among others we cite *Houck v. Yates*, 82 Ill. 179, and *Fuller v. Dauphin*, 124 Ill. 542; 7 Am. St. Rep. 388. The same rule is adopted in most of the states, though others hold, with reference to streams navigable in fact, the riparian owner takes only to ordinary high-water mark, and the banks between high and low water mark and the bed of the river belong to the state. As a result of the rule adopted in this and most of the states in reference to streams, it necessarily followed that in a grant of land bordering on a river which was meandered, for the purpose of determining quantity in a fractional tract, the meander line, in and of itself, was held not to be a boundary line: *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112; *Canal Trustees v. Haven*, 5 Gilm. 548; *Houck v. Yates*, 82 Ill. 179; *Fuller v. Dauphin*, 124 Ill. 542; 7 Am. St. Rep. 388; *Walker v. Board of Public Works*, 16 Ohio, 545; *Jones v. Pettibone*, 2 Wis. 308; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403; *Kraut v. Crawford*, 18 Iowa, 549; 87 Am. Dec. 414; *Sherlock v. Bainbridge*, 41 Ind. 35; 18 Am. Rep. 302; *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82; 88 Am. Dec. 59; *Minto v. Delaney*, 7 Or. 337; *Benson v. Morrow*, 61 Mo. 345.

As thus construed, this rule gives the riparian owner acce-

tions and islands forming within his grant, and where, by gradual accretions, the thread of the stream was slowly changed, under the application of the same rule his grant followed the channel and still went to the thread of the stream. This rule of the common law had ingrafted on it this further principle: where the course of a stream forming a boundary is suddenly changed, the relicted soil remains according to the former bounds, and a grant bordered thereon does not follow to the thread of the stream, as in the new channel: Hargrave's ⁴⁷⁶ Tracts De Jure Maris; Angell on Watercourses, sec. 57; Gould on Waters, sec. 159; Spigener v. Cooner, 8 Rich. 301; 64 Am. Dec. 755; Dwinel v. Barnard, 28 Me. 554; 48 Am. Dec. 507; Lynch v. Allen, 4 Dev. & B. 62; 32 Am. Dec. 671. It resulted from this rule of the common law that where a stream was meandered in the original survey, and conveyance made and price paid for the quantity within the meandered lines, the grant conveyed to the thread of the stream, and therefore the boundaries of the lands were not determined by the meander line. Whilst such is the rule in states adopting the rule of the common law, yet there are cases where the meandered line would be of itself the boundary, as where the line run by the government surveyors, by mistake or fraud in surveying the public lands, leaves between such line and the stream or lake a considerable body of land, on which is vegetation, etc., above the ordinary stage of water. In such case, the surveyed land is all that is granted by the United States, and the patentee is not a riparian proprietor, his boundary being fixed by the meandered line.

In *Fulton v. Frandolig*, 63 Tex. 330, a shell reef, varying in width from twenty to sixty yards, ran from the meandered line into the bay for about a mile, and the patentee claimed this shell reef with the accretions, on the ground that the meander line should yield to the course of the bay; but it was held that, as the evidence (derived from the field notes) showed that the surveyor in fact ran across the shell reef for the course and distance, the reef was not included in the grant.

In *Granger v. Swart*, 1 Woolw. 90, the jury were instructed as follows: "The patents and deeds under which the defendant claims do not pass the title to the premises in question, unless, at the date of the entries on which they issue, the Rock river where it is called a river, and Lake Koshkonong where it is called a lake, extended to and bordered upon the meandered line which constitutes the boundary of the lands described in the patents. In other ⁴⁷⁷ words, if, between the meandered line,

which by the government survey was made one of the boundaries of the land sold to Walker, and the bank of Rock river and shore of Lake Koshkonong, there was at that time a body of swamp or waste land or flats, on which timber and grass grew, and horses and cattle could feed and hay be cut, then the patents of Walker did not cover this land, but were confined to the actual limit of said meandered line. On the other hand, if, when the entries were made, the bank of the river and shore of the lake, at an ordinary stage of water, were where this meandered line was represented by the United States survey, and the land in controversy has since been formed by a receding of the water or by accretion to the shore and bank, then it became the land of the defendant or of Walker, as the title might be in one or the other. If the first of these positions be found by you to be true, the defendant has no title to the land; if the second be true, he has title to the addition made by the accretion."

In *Lammers v. Nissen*, 4 Neb. 245, in deciding the case, the court says: "Another inquiry involved in the consideration of the case is as to what is the effect which a meandered line, purporting to have been run along the bank of a stream, may have in regard to land at the time lying between it and the bank of the stream, and remaining unsurveyed. And in respect to this inquiry I think it sufficient to observe, that as to public lands of the United States, conceding the rule to be well settled that a meandered line bordering on the bank of a stream is not to be considered as the boundary of the tract, but simply as defining the sinuosities of the bank of the stream and as a means of ascertaining the quantity of the land in the fraction subject to sale, yet the question whether such line does in fact define the sinuosities of the bank of the stream or not is one which may be determined by evidence aliunde. The mere fact that it is run and is designated upon the plats as a meandered line certainly ⁴⁷⁸ cannot be conclusive in the matter. To establish the doctrine that such meandered line is conclusive would estop the government from disposing of lands left unsurveyed between such line and the bank of the stream. It would prevent the correction of mistakes made by surveyors in such case, and would be in direct conflict with the well settled rule of law defining what is an accretion to land. In *Granger v. Swart*, 1 Woolw. 90, the principle is enunciated, that if, between the meander line by which the government survey was made and the bank of the river, there is, at the time, a body of swamp or waste land or flats, on which timber and grass grew and horses and cattle fed,

then the patents for the land surveyed would not cover this land, but must be confined to the actual limits of the meander line and include no more." The title of defendants, acquired under a junior survey, to the lands lying between the meander line and the actual bank, was therefore held good. In that case, it was represented on the plat, and the surveyor reported to the department of the interior that the meander line ran at the west of the marsh and was along the line of the Missouri river, and the intervening 1,000 acres between the real bank of the river and the meander line was navigable water. The line as made was mistakenly run, and the surveyor omitted this large tract from his survey, and it was subsequently surveyed and sold.

In *Glenn v. Jeffrey*, 75 Iowa, 20, a tract was situated on the east bank of the Missouri river, the facts being similar to those in *Lammers v. Nissen*, 4 Neb. 245, and the trial court instructed the jury: "Under this evidence, you are instructed that the plaintiff failed to show title in himself to the land claimed by the defendant. The plat and field notes introduced herein show that lot 3 was surveyed and platted and located upon the north side of certain water, which was at the time of the survey supposed to be the Missouri river. It is shown by the Adkins survey and other evidence in the case that lot 3 ran, not ⁴⁷⁹ to the Missouri river, but to the waters of a certain bayou, and that beyond this bayou, and between it and the Missouri river, was other land—the land claimed by the defendant. The evidence shows that the land between this bayou and the river was not surveyed. . . . The land in controversy is lot 3 in section 18, township, etc., and the plaintiff introduced evidence showing title in himself from the government. The only controversy is whether the lot, as described, extended to the Missouri river." In commenting on that instruction, it was said by the supreme court: "The evidence warranted the court in giving the instruction it did. There was no controversy as to the facts. It is true that the government plat and field notes described the meander line as being at the Missouri river, and therefore it is claimed that lot 3 extended to the river. In fact, however, instead of running the meander line along the river, it was run along the bayou some distance from the river. The land in question cannot be regarded as accretion, but existed as it now does when the survey was made. The court rightly directed the jury to find for the defendant. The land never was, in fact, surveyed by the government and never sold or conveyed to the plaintiff."

In *Bissell v. Fletcher*, 19 Neb. 726, the plat and patent to

plaintiff showed lot 3 to contain 52.60 acres, and to run north to the Republican river. Defendant claimed lots 6 and 7, which in fact was land between the river and where the plat showed the bank to be. The court says: "The contention of the plaintiff is, that lot 3 extends to the river, and notwithstanding the fact that lot 3 contains all the land the plaintiff purchased and paid for, and the effect of the extension of the line would be to give him about 117 acres of land to which he seems to have no equitable right, still he contends the law declares the land to be his." Upon a rehearing of this case (*Bissell v. Fletcher*, 43 N. W. Rep. 350), the court further said: "There is no proof whatever that the land claimed by the plaintiff is ^{also} an accretion to lot 3. In fact, all of the proof tends to show that it is not. The defendant has purchased his land, as part of the public domain, from the United States, and it would be rank injustice to rob him of his property and give it to the plaintiff, who is already in possession of all of the land that he purchased and the government sold to him."

In *James v. Howell*, 41 Ohio St. 696, the court refused to extend a meander line across a space designated as impassable marsh and water, so as to include two islands, one containing about 36 and the other 18 acres, but confined the boundary to the meander line. The computed acres in the grants did not include either the marsh, water, or islands.

In *Shoemaker v. Hatch*, 13 Nev. 261, the court said: "To determine whether a bar or island is part of the land on either side of a stream, account must be taken, in every case, of a variety of circumstances, such as the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the main line and the main channel. It is a question of fact, to be determined from all the surrounding circumstances, whether the land between the meander line and the shore of the lake or water-course is included in the survey."

In *Martin v. Carlin*, 19 Wis. 454, 88 Am. Dec. 696, there was a mistake in the original survey and meandering of Rock river, so that there was more land than the survey called for by the field notes. It was held, where there is a mistake in the government survey of a fractional lot, so that either the line of a meandered stream or a quarter section line (both of which were called for by the survey as constituting the line) must be abandoned, the quarter section line should be adhered to as the more certain call.

The decision of these cases is based on sound reasoning and on equitable rules as to property rights. To each person is given all he purchased, but not a quantity ⁴⁸¹ that would be inequitable or unjust as against the government. Nor are these cases in conflict with the decisions in this state on that class of questions. In *Middleton v. Pritchard*, 3 Scam. 510, 38 Am. Dec. 112, there was a long slough running between a small island or peninsula and the main land, in which the river (Mississippi) flowed two or three months in the year. The meander line ran along this slough on the main land 20 or 25 feet up from the channel of the slough in high water, the eastern boundary of this slough forming, therefore, the eastern boundary of the river, and the boundary was carried beyond the meander line to this bank of the river. The owner's land thus bordering on the river and going to the center thereof, he was entitled to the island in controversy. In *Canal Trustees v. Haven*, 5 Gilm. 548, the divergence between the meander line and the river line is not disclosed. In *Houck v. Yates*, 82 Ill. 179, the strip of land between the meander line and the natural boundary (Mississippi river) varied in width from one-half of a rod to three rods, and contained in all four or five acres. In *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388, the land in controversy was an island in the Mississippi river of five acres, which was held to pass under a patent of about twenty-three acres on the main land. In this case, there does not appear to have been any divergence between the meander line and the natural boundary of the Mississippi river.

Railroad Co. v. Schurmeir, 7 Wall. 272, is in its facts similar to *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112. The main body of the land contained 9.28 acres. The parcel in dispute was 2.78 acres. The latter was a narrow strip of low land, constituting a bar or island, about 90 feet wide in its extreme width and 160 feet long, extending along the meander line.

From these cases it would follow the construction of the grant would be: where a narrow strip of land lies between the meander line and the natural boundary, as a stream or river, and its proportions are much smaller ⁴⁸² than the land granted, it would be included in the grant, and the center of the stream or river would be the boundary, unless a different intention was manifested by the terms used. Where the land outside the meander line is so grossly in excess of that sold that it is apparent there is fraud or mistake in the survey, the meander line would be the boundary. In *Mitchell v. Smale*, 140 U. S. 406, it was said:

"We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake or be guilty of a palpable fraud, in which case the government would have the right to recall the survey and have it corrected by the courts or in some other way. Cases have happened in which, by mistake, the meander line described by the surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government. Nor do we mean to say that, in granting land bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective states of all swamp and overflowed lands therein, this cannot be done."

From these cases it will be seen, if there is such a mistake by the omission of lands in a survey between the meander line and the water that the proportion to that sold is great, it may be corrected by a resurvey. In the case here before the court, the field notes show the running of the meander line was across the ridge and at both the south and north sides of the lake. There was not such an omission of land from the survey that it is apparent a mistake was made, nor is there in the survey any evidence of fraud in the manner in which it was done. Whether a riparian proprietor on a lake takes the bed of the lake is a question on which the decisions of the different states are conflicting. Whilst the riparian proprietor ⁴⁸³ takes to the center of a stream, the stream will still exist notwithstanding changes by accretions, etc. The same reason for the rule does not exist where land borders on a lake, as by recession of the water the bed of the lake may become dry land and the lake cease to exist. The grant of land on a lake would, on the instant of the grant, be a conveyance to the center of the lake, if the same rule existed as with reference to rivers. The determination of boundary lines to the center of the river is not attendant with any serious difficulty, but the irregular borders of a lake would render the determination of lines in the bed of the lake between riparian proprietors of almost impossible solution. This, as well as the injustice of holding that the purchaser of a small rim of the lake, consisting of but a few acres, would at once become the owner of thousands of acres of a non-navigable lake, has caused many courts to hold the riparian proprietor takes only to the water's edge. As declaring this rule, we cite the following cases among others:

In *State v. Gilmanton*, 9 N. H. 461, the question involved being the boundary of the town, it was said: "The rule for the construction of grants bounding on rivers is, . . . where a grant is made extending to a river, and bounding upon it, the center of the stream is the line of the boundary, if there are no limitations in the grant itself. But in relation to grants on ponds, lakes, or other bodies of standing fresh water, that principle does not apply, but the grant extends only to the water's edge."

In *Mariner v. Schulte*, 13 Wis. 692, the court approved the instruction of the inferior court, which directed that in a grant of land bordering upon a pond the title did not extend beyond the natural shore.

In *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399, the court say: "The rule that the title of the riparian owner upon a natural lake or pond does not extend beyond the natural shore appears to be very generally, almost universally, recognized, and is discussed by Cole, C. J., in ⁴⁸⁴ *Delaplaine v. Chicago etc. Ry. Co.*, 42 Wis. 214; 24 Am. Rep. 386. It is unnecessary to repeat here what is there said, and in which we all concur. Indeed, the position was affirmed in this court as far back as *Mariner v. Schulte*, 13 Wis. 692."

In *Fletcher v. Phelps*, 28 Vt. 257, the court, on the question of boundary, said: "Where land is sold and bounded on the river or stream of water above tide-water, the grant extends to the middle of the channel or thread of the stream. That is the legal effect of the conveyance, and cannot be varied or controlled by parol testimony. . . . A different rule prevails where land is conveyed bounded on large natural ponds or lakes. In such case the grant extends to the water's edge, or if the . . . lake or pond has a definite low-water mark, the grant will extend to low-water mark."

In the case of *Bradley v. Rice*, 13 Me. 201, 29 Am. Dec. 501, the court say: "It is true that where land is bounded on the river or stream where the tide does not ebb and flow, the owner's title, by construction of law, extends to the center or thread of the stream. But Flying pond is not a river or stream. No case has been cited, nor have we found any, where that case of construction has been extended to a pond or lake. Had the land been bounded upon a river or stream, or artificial pond created by expanding a stream by means of a dam, the riparian proprietor would go to the thread of the stream. This is law well settled and understood. But it has not been so settled in regard to

ponds and lakes, nor are we aware that there can be one construction for small ponds and lakes and another for large ones." The same principle is recognized in *Robinson v. White*, 42 Me. 209; *Nelson v. Butterfield*, 21 Me. 220; *Wood v. Kelley*, 30 Me. 47; *Mansur v. Blake*, 62 Me. 38.

In *Kanouse v. Slockbower*, 48 N. J. Eq. 42, the court was called upon to decide whether a devise of land bounded by a margin of the lake carried the devise to the center of the lake, or whether the lakebed passed to the residuary devisees, and the court said: "The law is well settled ⁴⁸⁵ that a grant of land bounded upon or along a river, above tide-water, carries the title of the grantee to the center of the stream, if the title of the grantor extends that far, unless the terms of the grant show that it was the intention of the parties that the grantee's title should not extend to that point. But this doctrine has not . . . been held to apply to grants of land abutting upon fresh-water lakes and ponds."

Angell on Watercourses, section 41, says: "When land is conveyed bounding upon a lake or pond, if it is a natural pond, the grant extends only to the water's edge."

In *Indiana v. Milk*, 11 Fed. Rep. 389, Judge Gresham said, "that while a general grant of land on the river or stream non-navigable extends the line of the grantee to the middle or thread of the current, the grant on a natural pond extends only to the water's edge," and thus stated the difficulties of the contrary rule: "Non-navigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles, without interference or confusion and without serious injustice to anyone. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shoreowners was the thread of the current. The rights of the riparian proprietors in the bed of the stream, and in the stream itself, were thus clearly defined. But when this rule is attempted to be applied to lakes and ponds, practical difficulties are encountered. They have no current, and, being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge so as to define the rights of shoreowners in the beds. Beaver lake is seven and a half miles east and west, and less than five miles north and south. Extending the side and end lines into the lake, there being no current, when would they meet? This rule is applicable, if at all, whether there be one or more riparian proprietors. . . . It would be unfair and unjust to allow a party ⁴⁸⁶ to claim and

hold against his grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and paid for the small surrounding fractional tracts—the mere rim.”

In *Clute v. Fisher*, 65 Mich. 48, the court held that the grantee of land bordering upon a non-navigable lake did not stop at the water's edge, but that he might take so much of the bed of the lake as was required to fill out the section or quarter section of which he owned a fraction, and that his common-law right was limited by the sectional lines of his survey. In that case, such extension of lines absorbed the entire lake, but the court does not clearly indicate what should be done if the body of water was so large that the lines of the granted section or quarter section would not embrace the whole lake bottom.

In *Stoner v. Rice*, 121 Ind. 51, the court held the grant not limited by the water's edge, and *Clute v. Fisher*, 65 Mich. 48, is followed, with the result of absorbing all the lakebed by the extension of sectional lines. The court said: “It is contended that the riparian owner bordering on a non-navigable lake, like a river, takes to the thread or center of the lake. This rule is impracticable when applied to lakes. Suppose the lake to be round, or nearly so, with riparian owners, as there would be, on the north, south, east, and west of it, this rule could not be applied. . . . Where the body of water is a running stream, being a narrow rivulet at its head and growing larger and widening until it enters into another stream still larger, or where it is a long narrow body of water, there is no trouble in applying this doctrine; but where the body of water is surrounded by land, and is almost circular in form, covering a quarter or half section or more of land, with riparian owners on either side, we cannot say that the owners on the east and the west could take to the exclusion of those upon the north and south, nor vice versa. Nor would it do, as it seems to us, to apply a ⁴⁸⁷ doctrine that would require the running of diagonal lines between the various owners, each reaching to the center of the lake.” The court also said that the section lines could not be passed when the lake is so large that the extension of those lines would not absorb it. To the same effect are *Hodges v. Williams*, 95 N. C. 331; 59 Am. Rep. 242; *Waterman v. Johnson*, 13 Pick. 261; *State v. Portsmouth Sav. Bank*, 106 Ind. 435; *West Roxbury v. Stoddard*, 7 Allen, 158; *Noyes v. Collins*, 92 Iowa, 566. Many other cases could be cited.

The question was before this court in reference to a grant of land bounded on Lake Michigan, in *Seaman v. Smith*, 24 Ill. 521, in which it was said: “These great bodies of water having no

currents like rivers and other running streams cannot present the same reasons why the boundary should be extended beyond the water's edge, where it is ordinarily found, that apply to running bodies of water. Where such streams are called for as a boundary, the thread of the current is held to be the line from each side. Such a rule could not, for the want of a current, be adopted in this case. It would not be sanctioned either by analogy to the rule or by reason; and if the outer edge of the water be passed, owing to the approximation of these bodies to a circular shape, it would be found exceedingly difficult, if not impossible, to ascertain where the boundary should be fixed or the shape it should assume."

In *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, it was said: "It is equally well settled that grants of land bounded on streams or rivers above tide-water carry the exclusive right and title of the grantee to the center of the stream, usque ad filem aquae, subject to the easement of navigation in streams navigable in fact, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the stream. . . . But an entirely different rule applies when land is conveyed bounded along or upon a natural lake or pond. In such case the grant extends only to the water's edge."

⁴⁸⁸ These principles, as enumerated in the two cases cited in this state, are based on the principles of the common law, as we understand it and as it has been held by courts of various states.

It is urged, however, that the decisions of the New England states are based on colonial ordinances of 1641 and 1647. The Massachusetts colony, by an ordinance of 1641, provided that great ponds containing more than ten acres of land should be free for fishing and fowling, and by the amendment thereto of 1646 towns were prohibited from granting away great ponds. All the New England states whose opinions hold as we do were not, however, subject to the ordinances of the Massachusetts Bay colony.

The principle that the riparian owner takes to the center of the bed of a non-navigable lake is sustained in *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828, *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393, *Warren v. Chambers*, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23, and *Lamprey v. State*, 52 Minn. 181; 38 Am. St. Rep. 541. Many other cases might be cited sustaining the same view. The same rule is held by the supreme court of the United States in *Hardin v. Jordan*, 140 U. S. 371.

From the fact that so few lakes existed in Great Britain no question of the right of the riparian proprietor to the bed of the lake was there claimed to be presented until 1878, when the case of *Bristow v. Cornican*, L. R. 3 App. Cas. 641, relating to Lough Neagh, in the north of Ireland, was before the house of lords. There the plaintiff sued the defendant in trespass for fishing in the lake, and deraigned title from the crown, by a grant in the time of Charles II, of all fishing in that body of water. It was held the crown had no right to make such grant in such waters, as against the rights of riparian owners or others. This decision of the high authority from which it originates is deserving of the greatest consideration. It is not of that controlling authority as to what is the common law which it would have been if made before the ~~499~~ organization of our government. Nor do we believe this decision can be said to determine riparian rights as taking the bed of the lake. The large fresh water lakes in and bordering this state present conditions wholly unprovided for by the common law of England, and the law of boundary as applied to rivers is inapplicable to such lakes. A principle applied to a large lake is a principle applicable to a smaller one. This principle applies to such as are meandered in the original survey. Where, however, such small lakes are not meandered, but are of a size that they are included within the corners of a survey, then a different condition exists, and they would be included in a grant of the land.

In the case of *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146, a small lake existed, and the riparian proprietor owned on both sides. A trespasser entered on the lake and seined for fish, disregarding the objections of the riparian owner. The riparian proprietor brought an action of trespass, and it was held he could recover. Whether the lake was meandered in the original survey or included within the corners of a subdivision is not shown. Neither does it appear whether it was a lake proper, or a mere widening of a stream with a current therein. If the latter, or a lake not meandered and included within the corners of a survey, then the riparian proprietor took its bed.

These cases cited are the only decisions with reference to boundary or riparian ownership of lakes which have heretofore been before this court, and there is no conflict therein, and no reason exists why we should change the rule therein announced. On the contrary, aside from the principle of stare decisis, we should adhere to that rule. The policy of the state in recent years has been to stock its waters, both streams and lakes, with

fish, as a means of giving cheap and valuable food to her citizens, and with this purpose regular appropriations and expenditures are made. If we depart from the reasonable rule we have established, the small non-navigable lakes would ⁴⁹⁰ become the private waters of riparian owners, pertinent to their lands, with exclusive rights thereon as to boating, fishing, and the like, from which the body of the people would be excluded—a principle inconsistent with and not suited to the condition of our people or called for as a rule of law.

The supreme court of the United States, by a divided court, in *Hardin v. Jordan*, 140 U. S. 371, and *Mitchell v. Smale*, 140 U. S. 406, has sought to apply the same rule to lakes as to streams, and follows *Bristow v. Cormican*, L. R. 3 App. Cas. 641, as announcing such to be the common-law rule, and declined to recognize *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, as the law of Illinois. We yet, notwithstanding the high respect we owe that august tribunal, hold the common law to be as we have heretofore announced it—a view taken in the opinion of the dissenting minority in those two cases and with which the views of many able courts in different states concur.

It now becomes necessary to determine whether the lakebed passed to the state under the swamp land act. Prior to 1850 there were many lakes similar to those in this record referred to, in many of the states, which induced the passage of the swamp land act, with the amendments. The decisions of the various state courts on the construction of that act have not been accordant. In the supreme court of the United States, in *Railroad Co. v. Smith*, 9 Wall. 95, it was held the right of the state to swamp and overflowed lands did not depend on the action of the secretary of the interior in making lists of them, and oral evidence in a court of justice showing lands to be swamp lands could be received, which would exclude them from passing under a grant from which they were excepted. In *French v. Fyan*, 93 U. S. 169, it was held by the second section of that act the power and duty devolved upon the secretary of the interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of ⁴⁹¹ the description granted by the act, and made his office the tribunal whose decision was to control that question. In *Ehrhardt v. Hogaboom*, 115 U. S. 67, parol evidence was held inadmissible to show certain land patented under that act was not swamp land. In *Martin v. Marks*, 97 U. S. 345, it was held it would probably have been necessary, to support a title under that act, to prove the list was

on file with the commissioner. The great weight of authority is, the grant made by that act operated in praesenti. From a consideration of the opinions of that court, it appears that whilst the act operated as a grant in praesenti, it was a question for the decision of the secretary of the interior whether a particular tract was swamp land, and his decision, when once made, was final and conclusive, and it is sufficient if lands have been selected as within the act, and, when so selected, the title relates to the passage of the act. If the secretary has not designated any tract as swamp lands within a state, and neglects and refuses to act, and has not decided to the contrary, then it may be shown by parol, in behalf of the state or one claiming thereunder, as against wrongful claimants, that a particular tract is of the character included within the act. There are no means by which the secretary of the interior may be compelled to act: *French v. Fyan*, 93 U. S. 169; *Gaines v. Thompson*, 7 Wall. 347; *Secretary v. McGarrahan*, 9 Wall. 298; *Litchfield v. Register*, 9 Wall. 575.

After the survey of 1874, the record shows that, at a hearing held under the supervision of the general land-office of the department of the interior about the time of the survey of 1874, the state of Illinois and the county of Cook (the swamp lands in Illinois having been conveyed by the state to the counties by act of June 22, 1852) claimed these lands in controversy as swamp lands, but this claim was rejected and the survey of 1874 approved, upon appeal to the secretary of the interior. Since that determination of the question, these lands so ⁴⁹² surveyed have been taxed for state and county purposes. It appears from the evidence the hearing by the officers of the land department was had on questions of fact. The determinations of these officers are conclusive on the parties to such proceeding, except in a direct proceeding: *Johnson v. Towsley*, 13 Wall. 72; *Warren v. Van Brunt*, 19 Wall. 646; *Shepley v. Cowan*, 91 U. S. 330; *Marquez v. Frisbie*, 101 U. S. 473; *Quinby v. Conlan*, 104 U. S. 420; *Steel v. Smelting Co.*, 106 U. S. 447; *Cragin v. Powell*, 128 U. S. 691. In the latter case, it was also held, when a survey had been made and approved by the government, with plats, maps, field notes, and certificates filed, and such lands so surveyed are sold, the courts have power to protect the private rights of a party who has purchased in good faith from the government against the interferences or appropriations of subsequent corrective resurveys made by the land-office. To the same effect is *Moore v. Robins*, 96 U. S. 530.

From these cases it would follow the county of Cook has no

claim on the lands to be in any manner determined in this case, it not being a party, and not having sought, by a direct proceeding, to determine the correctness of that ruling, and no lists made by the secretary of the land as swamp lands. The question, therefore, as to private rights must be determined by settling the rights of the parties under the patents issued on the two surveys.

The evidence shows the survey of 1874 was made, in the greater part, as a survey of land covered with water, but slight changes existing then from what existed at the time of the original survey. By that survey an attempt was made to take possession of and survey and sell riparian rights in land where no claim was made of fraud or mistake in the original survey of 1834 and 1835. No such right existed in the commissioner of the general land-office. Riparian proprietorship is a property right of value, and to it are attached rights and privileges conferred by law, of which the owner cannot be deprived ^{and} by an illegal proceeding. In this case, such rights must be resolved by the law of Illinois as to land bounded on a meandered lake. In *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, and *Seaman v. Smith*, 24 Ill. 521, we held the riparian owner took to the water's edge. It was a determination of a question of property rights. We applied the same principle to lakes so meandered, regardless of the question whether or not they were navigable. *Seaman v. Smith*, 24 Ill. 521, is in line with the uniform current of decisions as to navigable lakes. *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, as we have seen, is abundantly sustained by authority. We are asked to overrule the latter case and hold the grant to the riparian owner conveys the bed of a non-navigable lake and makes its waters mere private waters. We decline to do so. By such holding, so long as such meandered lakes exist, over their waters, and bed when covered with water, the state exercises control, and holds the same in trust for all the people, who alike have benefit thereof in fishing, boating, and the like.

By the adoption of this principle, which applies alike to all meandered lakes, streams, and rivers, there is no conflict with that applying to the sea, and littoral proprietors and riparian owners alike have all the benefits and rights of such ownership and take accretions to their lands: *Chicago Dock etc. Co. v. Kinzie*, 93 Ill. 415. Whether we apply the term "accretion" to the slow, gradual, imperceptible formation of land on streams or lakes by the action of the current of the one or the recession of the waters or waves of the other, it is pertinent to the land

alike and an accretion thereto. This doctrine of accretion has not, however, been applied to reliction, using the term in its best and strictest sense, for in such case the new land, if considerable and suddenly or perceptibly formed, in the case of lakes or the sea and tidal streams, belongs to the state; and in the case of streams or rivers, as we have already stated, the center of the old channel remains the boundary between the riparian ⁴⁹⁴ owners. The survey of 1874 was unauthorized, and no title by patents issued thereunder conveyed the bed of the lake. Neither did the grant of the fractional tracts, as made under the survey of 1834 and 1835, convey the bed of the lake, but gave riparian rights. Where accretions come to such riparian proprietors, they shall take to the water's edge, and follow the recession of waters to their edge. Their lines and bounds are thus determined and are certain. This rule recognizes the riparian proprietor's rights to the fullest extent. The value of his riparian rights are preserved to him. If, as in many such lakes, there is much depth of water on one side and very shallow on the other, and in process of time recession of waters on the shallow side passes beyond the lake's center, the owner on that side still goes to the water's edge, and the proprietor on the other side should not come in between the lake and such proprietor after the waters have receded beyond the center. Where there is depth of water the lake still exists, and one proprietor is not deprived of the benefit of his riparian rights.

It is urged with much vigor that the question of the effect of patents to lands issued by the United States is peculiarly within the province of her courts for construction. It is of a higher importance that the law of this state shall, so far as it is local to the state and its citizens, and to its and their interests, be determined and controlled by the courts of the state. When the law of Illinois shall be declared and recognized, when it is within the province of her courts to determine it, a recognition of it would enable this state to control such bodies of water within her borders for the benefit of the people, and preserve to the riparian proprietors their rights as such owners.

On the question of limitation, sought to be asserted under color of title, we will not attempt to analyze and discuss the mass of conflicting evidence appearing in this record. We concur with the learned chancellor in the ⁴⁹⁵ view taken by him of actual possession. In no case was it of that character that complied with the requirements of the law. There was such interruption of the running of the statute that no title become settled.

In many of the tax deeds set up in the cross-petitions the defects in notice, absence of judgment and precepts, etc., caused no title to be conveyed. The rights acquired by the South Chicago and Southern Railroad Company, being from those claiming under the survey of 1874, must fail with those claiming thereunder.

J. Ensign Fuller seeks to set up tax title by four tax deeds: (a) One of these deeds is said to have been to D. G. Hamilton, September 6, 1875, under sale April 6, 1873, of the west half of the northwest quarter of the southeast quarter of section 19; (b) The next tax deed so set up is also said to have been to Hamilton, dated March 5, 1877, of the undivided twenty acres in the northeast quarter of the southeast quarter of section 19; (c) The third tax deed set up by Fuller is one of May 31, 1877, to P. D. Hamilton, which again is for the west half of the northwest quarter of the southeast quarter of section 19; (d) The fourth tax deed set up by said Fuller in his answer is one of July 23, 1880, to Hamilton, of the northeast quarter of the southeast quarter of section 19. Nothing is offered to support deeds a and c—neither judgment nor precept. Deed b was for special assessment of the South Park commissioners, and neither a judgment nor notice to owners is shown. Deed d was based on a notice of application for a deed describing the lands in section 9 instead of 19. The cross-bill of Fuller also avers ownership of lots 2 and 3 of the southeast quarter of section 19, and the southeast fractional quarter of the east fraction of the southwest fractional quarter of the section. The last three tracts, as well as some of those to which it is sought to assert tax title, are described under the survey of 1874. The answer of F. F. and John I. Bennett, filed September 12, 1889, asserts ⁴⁹⁶ a claim, one-half by John I. Bennett and one-fourth by Fred F. Bennett, to fractional northeast quarter of section 30, by virtue of a sale for the fourth installment of South Park assessment to R. W. Bridge, such sale having been made November 9, 1876.

The insufficiency of the tax deed first given under this sale results because it bears date August 1, 1879, and recites the sale was made on November 9, 1879, and the answer shows an attempt by the county clerk to give a new deed, dated March 8, 1882, recorded March 13, 1882. This attempt to correct the error in the first deed would be ineffective. The sale became void under section 225, chapter 120, of the Revised Statutes, because a proper deed was not taken out within one year after the time for redemption expired: *Chappell v. Spire*, 106 Ill. 472; *Altes*

v. Hinkler, 36 Ill. 265; 85 Am. Dec. 406; Burnt Records Act, sec. 23. In addition to this, the description of land sold and as assessed is indefinite and uncertain. The claim of tax title as to fractional section 29, 7.37 acres, under tax deed issued to R. W. Bridge, dated August, 1877, No. 335, based on sale of December 3, 1874, for the second installment South Park assessment, and as to southwest fractional half section 20, 4.53 acres, under tax deed dated August 1, 1879, No. K 568, running to the South Park commissioners, based on a sale of November 9, 1876, for the fourth installment South Park assessment, cannot be sustained, as the judgments on which the sales were based and deeds issued included excessive costs: *Combs v. Goff*, 127 Ill. 431.

The tax title sought to be set up in the various cross-petitions not being valid, it was not error to dismiss all the cross-petitions on that question. Neither was there continuous and exclusive possession under such deeds as color of title. The answers putting in issue the right of Shedd and Hardin to the bed of the lake, it follows the decree of the circuit court finding they, by mesne conveyances, became the owners of the lakebed, was erroneous.

⁴⁹⁷ The decree is in part affirmed and in part reversed, and the cause remanded for further proceedings in conformity with this opinion. Appellants Charles E. Rand, Franklin A. Cleaveland, Elizabeth Thomas, and the South Chicago and Southern Railroad Company are each ordered to pay one-eighteenth of the costs of this court. Appellants J. Ensign Fuller, Conrad N. Jordan, John I. Bennett, and Frank I. Bennett are jointly ordered to pay two-ninths of the costs of this court. Charles B. Shedd and Gertrude H. Hardin are each ordered to pay five-eightieths of the costs of this court.

RIPARIAN RIGHTS—RIGHTS OF OWNER.—Riparian rights are an appurtenance to the land running with it as a corporeal hereditament. They may be segregated by grant or condemnation or extinguished by prescription, but cannot be defeated by simple appropriation: *Alta Land etc. Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217, and note. See, also, the note to *Jones v. Adams*, 19 Nev. 103; 3 Am. St. Rep. 797.

BOUNDARIES—MEANDER LINE AS.—A meander line is not a boundary, the water whose body is meandered being the true boundary, whether the meander line actually coincides with the shore or not: *Lamprey v. State*, 52 Minn. 181; 38 Am. St. Rep. 541. See, also, the extended note to *Allen v. Weber*, 27 Am. St. Rep. 59.

RIPARIAN RIGHTS OF OWNERS OF LAND BORDERING ON LAKES.—By the common law, the same rules as to riparian rights which apply to streams apply also to lakes. Hence, if a meandered lake is nonnavigable in fact, the patentee of land bordering thereon takes to the middle of the lake, while if the lake is navigable in fact,

its waters and bed belong to the state in its sovereign capacity, and the riparian patentee takes the fee only to the water's edge: *Lamprey v. State*, 52 Minn. 181; 38 Am. St. Rep. 541, and note. See further on this subject the extended note to *Miller v. Mendenhall*, 19 Am. St. Rep. 230.

BOUNDARIES.—THE MEANDERINGS OF A STREAM, by a surveyor and the giving of the courses and distances of such meanderings in a conveyance does not prevent the title of the grantee from extending to the thread of the stream: *Freeman v. Bellegarde*, 108 Cal. 179; 49 Am. St. Rep. 76, and note.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

MILBURN v. PHILLIPS.

[148 INDIANA, 98.]

JUDICIAL SALES—SUBROGATION.—If one holding a sheriff's deed redeems land from a prior lien, claiming the right to do so as owner, and such deed is afterward adjudged to be invalid on account of some defect in the proceedings taken by the sheriff, the person so redeeming is entitled to be subrogated to the lien which he has thus discharged.

Palmer & Palmer, for the appellant.

W. R. Moore, for the appellees.

23 JORDAN, J. Appellees sued to set aside a satisfaction of a certain judgment, and for subrogation. A trial resulted in a decree in their favor, from which appellant appeals.

The complaint alleges, and the evidence sustains, substantially the following facts: On May 3, 1889, appellee Phydella Phillips and 24 one Marion Phillips recovered a judgment against the appellant, Joseph E. Milburn, in the Clinton circuit court, for five hundred and forty-nine dollars and twenty-five cents. At the date of the rendition of said judgment, appellant was the owner of certain described real estate, situated in Clinton county. An execution was issued on this judgment, and said land was sold by the sheriff of that county to appellees, in satisfaction thereof, for the sum of five hundred and thirty-four dollars, which they paid, and there being no redemption from said sale, within the time allowed by law, a sheriff's deed was executed to them for the land. Subsequently to the execution of this deed,

an action was instituted by one Robert C. Milburn, against appellees, in which, also, appellant was a party to the cross-complaint therein to set aside this deed, in which action said deed was by the lower court adjudged to be valid. An appeal was prosecuted to this court by Milburn, which resulted in a holding that the deed was invalid, by reason of the sheriff's failure to have the rents and profits of the land sold appraised, and the judgment was reversed: *Milburn v. Phillips*, 136 Ind. 680. Prior to the judgment obtained by Phydella Phillips against appellant, one William N. Cliff recovered a judgment in the Clinton circuit court against appellant and Robert C. Milburn for one hundred and thirty-six dollars, which became and was a senior lien upon the land in question. The realty was sold under this judgment by the sheriff to Cliff, who assigned his certificate of purchase to one Ball, and within the year allowed for redemption, to wit, on April 9, 1892, and while the appeal above mentioned was pending undecided in the supreme court, appellees claiming to be the owners of the land by virtue of their sheriff's deed, paid to the clerk of the court the sum of two hundred and thirty-six dollars and sixty-two cents in full of the redemption of said land under the sale thereof to Cliff, which sum was paid by the clerk ^{as} to Ball, the holder of the sheriff's certificate, and accepted by him as the amount in full upon redemption.

Appellees prayed in their complaint to be subrogated in equity to the rights of a redeeming creditor under the sale of the land to Cliff, and that the satisfaction of the Phillips judgment, under the sale made to them by the sheriff, be vacated, and that the court order the sale of said real estate to satisfy the amount now due on said judgment, as well as that due on the sum paid by them upon the redemption mentioned, and for all other and proper relief. Upon the trial, the court adjudged and decreed this relief, in favor of appellees.

Inasmuch as the appellees' title to the land under the sale by the sheriff to them proved to be invalid by reason of his omission in his proceedings to sell, as mentioned, they were clearly entitled, under section 777 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 765), to have the satisfaction of the judgment entered by virtue of the money so paid by them under the sale by that officer vacated, and to be subrogated to the rights of the judgment creditor. But appellant further contends that as to the money paid by appellees in redeeming the land from the sale upon the Cliff judgment, they ought not to be subrogated, for the reason, as his counsel urge, they redeemed as owners of the

land, and as it was subsequently decided by this court that the sale under which they purchased was invalid, they were placed in the attitude of mere volunteers, and, under the facts, in no respect have they the right to be subrogated to the rights of a redeeming creditor. There is no force in this contention. Appellees cannot be said to be mere volunteers in the act of redemption in question. When they exercised this right, they were the holders of a sheriff's deed for the land. The validity of this conveyance, ^{as} it is true, had been questioned, but it had been confirmed by the judgment of the circuit court. They, to say the least, had a colorable title to the real estate in controversy; and, believing themselves to be the owners thereof, they, in good faith, assumed to redeem the property from a sale on a senior judgment in order to prevent it from being swept from under them, which would have been the result had they allowed the period of redemption to have expired. Ball, the holder of the certificate of purchase under the Cliff judgment, and the only person who could have interposed an objection to the redemption by them, recognized their right to redeem, by accepting the the money paid by them to the clerk: *Hervey v. Krost*, 116 Ind. 268. As Ball had surrendered his right to a deed under his certificate by accepting the money, and as the sale to appellees proved to be invalid, the land remained under the ownership of appellant, and the payment of the money in this manner, as can be readily seen, would result to the latter's ultimate benefit. Certainly, under the circumstances, appellant cannot successfully be heard to assert a denial of appellee's right to subrogation.

Again, upon another view of the case, as the sale under which they purchased was invalid, and they received nothing thereunder, therefore it did not result in a satisfaction of the judgment, and appellee Phydella Phillips, as a junior judgment creditor, under the circumstances, would have been entitled to redeem from the sale upon the senior lien. But passing this phase of the case without further consideration, and regarding only the questions presented under the theory of the cause, we must and do recognize the principle that neither the law nor equity, in its application to the facts and circumstances in a particular case, will yield to the "shades or shadows" that may therein arise, but will ^{or} look alone to the substance of the questions involved. As heretofore said, the money was paid by these appellees in the redemption of the land, which they, in good faith, supposed they owned, and, in order to relieve it from the sale in controversy, was applied and inured to discharge an obligation for which ap-

pellant, under the circumstances, was primarily liable. Therefore, applying the broad principle which underlies the doctrine of subrogation, it is manifest, we think, in view of the facts in the case, that appellees were entitled to the relief demanded. Under such circumstances, equity generally treats the encumbrance as still subsisting so long as necessary to protect the rights of the party paying it off, and this right cannot be affected by the fact that appellees' title proved to be invalid, when the payment was made in the good faith belief that they were the owners of the land: 24 Am. & Eng. Ency. of Law, 253, 259. But aside from this, as the redemption in question was to some extent connected with, and exercised by, appellees under what proved to be an invalid sheriff's conveyance, we are of the opinion that the relief demanded also comes within, and may be granted under, section 777 of the Revised Statutes of 1894. This section is remedial and salutary in its provisions, and under a long and well recognized rule, ought to receive a liberal construction. The following decisions lend support to the principles which we have herein affirmed: *Seller v. Lingerman*, 24 Ind. 264; *Sidener v. Pavey*, 77 Ind. 241; *Weiss v. Guerineau*, 109 Ind. 438; *Short v. Sears*, 93 Ind. 505; *Bodkin v. Merit*, 102 Ind. 293; *Johnson v. Barrett*, 117 Ind. 551; 10 Am. St. Rep. 83; *Cockrum v. West*, 122 Ind. 372; *Erwin v. Acker*, 126 Ind. 133; *Scobey v. Kinningham*, 131 Ind. 552; *Fowler v. Maus*, 141 Ind. 47.

Counsel for appellant criticise and complain of a ⁹⁸ number of rulings of the trial court, but these are not open to the objections urged against them; and as it appears from the record that the cause has been fairly tried and determined, and a substantially correct result reached, the judgment must be affirmed.

This court, in the former appeal upon the other branch of the case to which we have referred, said: "The equities in the case appear to be with the appellee . . . and we regret that we are compelled to disturb the judgment." In the case at bar, all the equities are likewise with the appellees, and the appeal is devoid of merit.

The judgment is affirmed.

JUDICIAL SALES—SUBROGATION.—If a bona fide purchaser at a void judicial sale pays his bid, and the money is applied to the payment of the mortgage debt, he is, to that extent entitled to be subrogated to the rights of the mortgagee: *Bailey v. Bailey*, 41 S. O. 887; 44 Am. St. Rep. 718, and note. This subject is fully treated in the monographic notes to *Perry v. Adams*, 2 Am. St. Rep. 328, and *Scott v. Dunn*, 80 Am. Dec. 177-182.

COLUMBIAN ATHLETIC CLUB v. STATE.

[148 INDIANA, 98.]

EQUITY JURISDICTION—NEW CONTINGENCIES.—A court of equity should adapt its practice as far as possible to the existing state of society, and apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and should not, from too strict an adherence to the forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy.

AN INJUNCTION MAY ISSUE TO RESTRAIN A CORPORATION when it is abusing powers given for public purposes, or committing a breach of trust, or acting adversely to public policy.

EQUITY, CRIME, ENJOINING COMMISSION OF.—An injunction will not be denied because the act sought to be enjoined is a crime, if it is also such an act that the complainant is entitled to preventive relief against it. Thus, the use of property so as to create a nuisance may be enjoined, though the maintaining of the nuisance is punishable as a crime.

INJUNCTION TO PREVENT PRIZE FIGHTS.—In a proceeding against a corporation for violating its franchise by giving exhibitions of prize fighting an injunction may issue to prevent the giving of such exhibitions.

A RECEIVER OF THE PROPERTY OF A CORPORATION may be appointed pending proceedings for its dissolution where the possession of the property by the court is essential to prevent a continuance of its use for an unlawful purpose, such, for instance, as giving an exhibition of prize fighting.

J. B. Peterson and E. D. Crumpacker, for the appellant.

B. K. Elliott, W. F. Elliott, J. E. McCullough, J. Kopelke, H. N. Spaan, and W. C. McMahan, for the appellee.

¶ HOWARD, C. J. On the second day of September, 1893, the appellee, by her relator, who is the prosecuting attorney, filed in the clerk's office of the court below her verified complaint or information, alleging, amongst other things, that the appellant was a corporation, duly organized and then existing under the laws of the state of Indiana; that the said appellant, assuming to act as such corporation, was engaged in violating the laws of the state, and had misused its corporate powers and franchises; that under the claim of corporate right, and in its character as a corporation, the appellant had willfully violated the statute of the state, prohibiting prize fighting, giving the details of such violation; that the appellant claimed the right, as a corporate franchise, to conduct prize fights, insisting that the statute, under which it was organized, gave to it such right; that, by reason of such wrongful claim, it had induced persons to believe that it had a franchise under the laws of the state to engage in

such business of prize fighting, and so had greatly abused its corporate privileges and usurped authority which it did not possess; that it had fitted up and maintained its premises in the county of Lake for the sole purpose of engaging in prize fighting; that it advertised such business in the most public manner, and thus induced thousands of persons to come upon its said premises, in order to witness men engaged in fighting one another for prizes to be awarded to the victors; that the appellant, as such corporation, had further abused and misused its corporate franchises and violated the statutes, by bringing into the state certain persons to perform the duties of sheriffs and other peace officers, ¹⁰⁰ and by causing such imported persons, so feloniously assuming to act as peace officers, to beat, bruise, and wound persons assembled on appellant's said premises; that many persons were, in consequence, grievously wounded, and that even death had been thereby caused; that appellant, in violation of another statute, had conspired with divers persons, to appellee unknown, to commit and procure the commission of an offense in the night-time, to-wit, prize fighting, upon said premises; that appellant, in its said corporate capacity, had caused, created, and was then maintaining a public nuisance on its said premises, in that it had thereon prepared and constructed buildings and other structures, for the sole purpose of procuring men to fight therein for prizes, giving details of fights that had already taken place, stating also the riotous proceedings that followed, and that appellant avows its purpose to continue such prize fighting; that appellant fortified and strengthened its buildings, so as the better to enable it to carry on its said illegal business, as well as to render it the more difficult for sheriffs and other peace officers to enter and arrest those engaged in the violation of the laws, pursuant, also, to the purpose and design of the appellant to permanently use and maintain its premises for the sole purpose of conducting prize fights on its said premises; that, under claim of corporate right and privilege, appellant would, if not enjoined, continue its usurpation of corporate functions, and its abuse of its corporate franchises, thereby causing tumults and riots, so that human life would be endangered, and the local officers of the county be unable to suppress the consequent violence; that the incorporators, as well as all those thus engaged in violation of the laws, were nonresidents of the state of Indiana; that appellant had conspired with certain persons named, and with others whose names ¹⁰¹ were unknown, with the purpose, in the event that the court should issue such restraining order, to ren-

der the same nugatory, by having the prize fights conducted by such other persons; that unless a receiver should also be appointed, the appellant would falsely and fraudulently assign its rights and property to said co-conspirators, or other third parties, so that prize fighting and other unlawful acts might still be conducted, notwithstanding such order of the court.

The prayer was for a dissolution of the incorporation as having forfeited its franchises, and that it be ousted therefrom; that an injunction be issued, and that a receiver be appointed to take charge of the property, until the further order of the court. The restraining order was issued by the judge in vacation, and was directed especially against a fight advertised for the fourth day of September, being two days after the issue of the order; and the receiver was appointed for the property of appellant in Lake county, being the premises in question.

The appointment of the receiver is assigned as error; and it is contended by counsel for appellant that the court erred both in the issuing of its restraining order, and also in the appointment of the receiver, for the reason that equity will not aid in the punishment or in the prevention of crime.

"One sufficient reason, among the many," say counsel, "for denying the jurisdiction of equity in this class of cases is, that the law regards the crimes charged as those of the individual perpetrators, and not of the corporation, and the penal laws are adequate to redress wrongs against society by punishing the offenders. Corporations, as such, have no capacity to commit the kind of crimes charged in the information."

In answer to this may be given what a great English judge, Vice-Chancellor Shadwell, said, when appealed to for a receiver in a case where a corporation had violated an injunction: "The directors of the company, their agents and servants, cannot, on this motion, be committed to prison; but what can be done shall by me be done to repress this daring invasion of public and private rights—an invasion maintained, moreover, in open defiance of all law, authority, and order. Let a sequestration issue": *Attorney General v. Great Northern Ry. Co.*, 4 De Gex & S. 75, as cited in 2 Redfield on Railways, 6th ed., 419.

In Judge Redfield's work on Railways, volume 2, page 364, the author says: "Injunctions in courts of equity, to restrain railways from exceeding the powers of their charters, or committing irreparable injury to other persons, natural or artificial, have been common for a long time in England and in this country."

Extraordinary emergencies in many cases call for extraordinary

remedies. In chapter 29 of the work from which we have quoted, Judge Redfield, both in the text and in the notes, gives numerous instances of the interposition of equity to prevent threatened wrongs on the part of corporations.

The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham: "That it is the duty of the courts of equity (and the same is true of all courts and of all institutions) to 'adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy.'" This rule, the author concludes, is certainly ¹⁰⁸ worthy of one of the ablest, wisest, and best judges that ever administered the chancery law of England or America.

In the well considered case of Attorney General v. Chicago etc. Ry. Co., 35 Wis. 425, by Chief Justice Ryan, that eminent jurist quotes with approval from Brice's *Ultra Vires*, on page 526, as follows:

"Under many circumstances, the court of chancery has, on public grounds, jurisdiction to prevent corporations acting in various ways, or contrary to the intent for which they have been created. The public, however, must be represented in all applications relating to such matters, and this is done by the intervention of the attorney general. No single person, whether a member of the corporation . . . or not, is able on his own account, and of his own motion, to call upon the court to interfere for his special protection. The wrong he complains of is not confined to himself; no right or privilege peculiar to himself is violated; the wrongs inflicted and the rights invaded affect the public, and the public, consequently, must be a party to the proceedings. The occasions upon which the court will exercise jurisdiction to restrain the doing of acts of this kind, seem to fall into the three following heads: . . . '1. When a corporation is abusing powers given for public purposes; 2. Or is committing a breach of trust; 3. Or is acting adversely to public policy.'"

Under the third head, "When any corporation is doing acts detrimental to the public welfare, or hostile to public policy," the author quotes from Attorney General v. Great Northern Ry. Co., 4 De Gex & S. 75, where Kindersley, V. C., said: "Whenever the interests of the public are damnified by a company, established for any particular purpose by an act of parliament, act-

ing illegally and in contravention of the powers conferred upon it, I conceive ¹⁰⁴ it is the function of the attorney general to protect the interests of the public by an information; and that, when in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the attorney general, in cases of injury to public interests from such a cause, to file an information for an injunction."

In the same case, the learned chief justice, in criticising *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502, says: "The court holds the jurisdiction in cases of private nuisance, and of public nuisance inflicting particular injury, at the suit of an individual, and questions it at the suit of the state. It is not easy to comprehend why the remedy should avail against the less evil, and not against the greater; why equity should interpose to restrain what affects one person only, and refuse its protection against what affects all persons; in the case of a public nuisance, restrain it at the suit of one whom it especially aggrieves, and refuse to do so for the public whom it equally aggrieves."

Counsel for appellant say that "an act is frequently of such a character as to involve not only a breach of criminal law, but also a transgression of civil duty, and in such cases redress may be had not only by the state in the form of a criminal prosecution, but the one who suffers a civil injury may have his action for damages. For instance, if one steal a horse, he is subject to prosecution under the criminal laws of the state, and at the same time, notwithstanding that liability, the individual who suffers the loss has a right to prosecute an action against the offender for damages; and, in connection with such action, conditions may be such that the court would enjoin the defendant from disposing of his property ¹⁰⁵ until judgment could be obtained, and even go further and appoint a receiver for the purpose of preserving the property in order that the judgment might be satisfied. But no one will contend that the state could enjoin the offender from stealing other horses."

Counsel admit very much here. It is not, however, the stealing of other horses that is in question. It is quite enough to attend to the horse and to the crime under consideration. The court might certainly enjoin the using of the horse for such purpose as might affect the rights of the complaining party; as for instance, might enjoin the sale or transfer of the property to others. So here, while it is perhaps true that the commission

of crime, strictly speaking, cannot be enjoined, yet the transfer of property for fraudulent purposes, or to evade the processes of the court, or to prevent the execution of its decrees, may be enjoined. If this corporation might transfer its rights, franchises, and property to another company or to individuals during the pendency of this action, and so continue the perpetration of the acts complained of in the very face of the court, it would be but a mockery of justice to have instituted the action in the first place. This is a proceeding against property, as well as against the corporation. The property itself is criminal, and can be used only for criminal purposes. If there be any virtue in the quo warranto proceeding, it must result, not only in the dissolution of the corporation, but also in the discontinuance of the use of its property for the evil purposes to which it had been prostituted.

In case the offender were an individual and the property were personal, there could be no question that it could not be lawfully held by the criminal. Shall it be said that what the state may do in the case of one of its ¹⁰⁰ citizens it is powerless to do in the case of a corporate creature, the product of its own statutes?

In *State v. Lewis*, 134 Ind. 250, this court upheld a statute making it a misdemeanor for anyone to have in his possession any gill net or seine, except as permitted by the statute; and numerous decisions sustaining like statutes were cited.

In those cases, the mere possession of articles otherwise harmless was rendered unlawful for the reason that they might be used in the commission of acts made criminal by the statute. But where the articles found in possession of one arrested for crime are themselves the instruments of such crime, and made only to be used in violation of the law, it has always been held that the criminal could not lawfully own or possess them. The right to seize and hold such instruments of crime is no more doubtful than the right to arrest the criminal himself. Accordingly, the gambler's outfit, the burglar's tools, the counterfeiter's dies, are seized wherever and whenever found. There can be no lawful possession or use of such things by anyone save the officers of the law.

Shall the courts be helpless in like cases where the criminal is a corporation and where the property used as the instrument of crime is real and not personal?

In *Smith v. McDowell*, 148 Ill. 51, which was a case where it was sought to vacate a part of a public street for the benefit of a private person, the court held that such attempted vacation and use of the street would constitute a public nuisance, and that the

public was entitled to the speediest and most effective remedy to prevent the threatened invasion of its rights, and therefore that such nuisance might be forbidden by injunction at the suit of the proper officer: Citing Wood ¹⁰⁷ on Nuisances, secs. 777, 786; Dillon on Municipal Corporations, 520; 3 Pomeroy's Equity Jurisprudence, 1359, and other authorities.

Even where a private citizen brings an action to prevent a public wrong, from which he would suffer an injury peculiar to himself, and not sustained by the public in general, an injunction may be awarded to prevent the commission of the threatened crime; and the objection will not be heard that the equity powers of the court cannot be employed to aid in enforcing the criminal laws of the state by thus preventing crime about to be committed: *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 Am. St. Rep. 433. "No authority," said the court in that case, "has been cited, and we know of none, supporting the position of appellants that the appellee is not entitled to an injunction because the accumulation of nitro-glycerine within the corporate limits of a town or city is a crime."

But counsel say that in these cases equity was interposed for the protection of property rights, and not for the prevention of crime. It may be remarked that property rights are in question in the case before us also. Notwithstanding the criminal use to which the property of appellant has heretofore been put, it should nevertheless be preserved for such final and just disposition as may be decreed by the court. Moreover, since the incorporators are all nonresidents, and since they own no property but this in the state, the state is interested in its preservation, at least to the extent of the expenses of this suit.

Besides, though generally true, it is not absolutely so, that an injunction can only issue to preserve mere property rights. "There are many adjudged cases," as said in *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, "which expressly hold that the fact that a nuisance is a crime, and punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction": ¹⁰⁸ See, also, *Tiedeman on Equity*, secs. 483, 484, 581; 3 N. W. Law Rev. 219.

In *State v. Saunders*, 66 N. H. 39, the supreme court of New Hampshire, in a very elaborate and well considered case, decided that "an injunction against the unlawful use of buildings as a nuisance is not beyond the jurisdiction of equity on the ground that it is in the nature of a punishment of a criminal offense." It will be observed that this decision is exactly in point, the

court below having issued its injunction against the unlawful use of appellant's buildings. In both cases the state sued by its proper officer, and property rights are no more in question in one case than in the other.

In *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182, the court said: "While it is unquestionably true that the keeping of the saloon in question is a criminal offense, and its operation involves the commission of many criminal offenses, yet we cannot think that these facts can possibly take away any of the jurisdiction which courts of equity might otherwise exercise."

In *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, it was said: "One maintaining a nuisance may not only be punished in a criminal proceeding, but a civil action at law . . . and an action in equity to restrain the nuisance may be prosecuted against him. . . . The defendant, in order to succeed in the defense that the proceeding by injunction is an attempt to enforce a criminal law by civil process, demands, in effect, that the courts must establish the principle that, because the nuisance complained of is a crime, it is entitled to favor and protection in a court of equity."

The main contention of appellant is thus well answered by the supreme court of Iowa. There could be no doubt that under section 1145 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1131) an information might be filed against corporations ¹⁰⁹ such as this, where they "do or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law." Nor could there be any doubt that under section 1236 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1222), a receiver might be appointed when the corporation "has forfeited its corporate rights," or when, "in the discretion of the court, or the judge thereof, in vacation, it may be necessary to secure ample justice to the parties."

As soon, however, as it appears that the acts shown in the information are criminal, the conclusion is at once reached that the criminality of the transaction throws a shield over the culprit, so that equity may not reach it. As in the case of other criminals, justice and equity are the very last things it seeks for.

Counsel for appellee well observe in this connection that: "It would be monstrous to adjudge that because acts constituting the abuse of corporate privileges are crimes, therefore the corporation may persist in doing them. This would be to encourage corporations to perpetrate the gravest abuses, since, under such

a rule, the graver the abuse, the less the power of the civil branch of our law. It comes with an ill grace from a corporation to aver that because the abuse of its corporate privileges consists in committing crime, civil remedies are unavailing. It would outrage common sense unspeakably to give ear to a corporation defending itself against a civil proceeding, by asserting its own infamy, and insisting that redress can only be had under the laws punishing crimes."

A like conclusion was reached in *Massachusetts*, in the case of *Carleton v. Rugg*, 149 Mass. 550, 14 Am. St. Rep. 446, the language of the court being: "The fact that keeping a nuisance is a crime does not deprive a court of ¹¹⁰ equity of the power to abate the nuisance": See, also, *Morawetz on Private Corporations*, sec. 1043.

As to whether the premises of appellant constitute a public nuisance, we may very fittingly borrow the following definition from *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182, that: "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance." The definition fits this prize fighting establishment most perfectly; and, under the foregoing authorities, we have no doubt that equity may interpose to restrain its further operation, even though the acts charged in the information are criminal.

And if equity may so interpose, certainly it may make its interposition effective. As shown by the information, the injunction, if issued, would not of itself have been sufficient to restrain the nuisance without the aid of the receivership. But equitable remedies must be complete. The arm of equity is not shortened, but will reach out to secure full right in the premises. The receivership being, therefore, necessary, in order to secure the full effect of the injunction, equity will not refrain from the appointment of a receiver for such purpose. The receivership in this case is not necessarily for the sequestration and sale of the property, but only to take charge of the same, until the further order of the court in aid of the injunction.

The circumstance set forth in the information, that appellant pretends to have conducted its nefarious business under provisions of the voluntary association statutes of the state, scarcely merits consideration. The constitution puts its special bans on lotteries, duels, and all infamous crimes; while, at the same time, it provides for the moral and intellectual improvement of the people. A statute which should attempt to authorize prize fight-

ing would, most certainly, be opposed to the ¹¹¹ spirit of the constitution; and, indeed, to that of the law itself, long since defined to be "a rule of civil conduct, prescribed by the supreme power of a state, commanding what is right, and prohibiting what is wrong." The legislature had no intention to enact any such statute.

For the reason, therefore, that the information shows the premises of appellant to be a public nuisance, and also for the reason that it is likewise shown that appellant has misused and abused its corporate franchises and privileges, the court did not err in issuing the restraining order, and in appointing a receiver, the appointment of a receiver being necessary to render the restraining order effective.

The judgment is affirmed.

From the opinion of the majority Judge Hackney dissented, saying: "While it would be a pleasure to me to concur in any opinion that had for its purpose to stay the commission of the numerous offenses against the criminal and civil laws of the state charged in the complaint against the appellant, I regret that I cannot concur in the conclusion that the equitable remedy of a receivership can be invoked for that purpose. I do not question the conclusion that the writ of injunction was properly issued; that question, however, is not before us, but, if a proper remedy, it was certainly effectual to stay the employment of the state's corporate franchises in the commission of crime. If the scope of the writ were too narrow to reach those who might operate in spite of its terms, a wider scope could be given it, if power existed at all to issue the writ. It is certainly enough to say that equity will go so far as to hold the criminal while the law punishes him. My doubts have arisen as to the proposition that a receiver may be appointed, a remedy only granted by equity in clear cases where the rights and interests of the parties must suffer by its denial. The office of a receiver, so far as my knowledge and observation have gone, has always been to preserve the property to be received, held, or disposed of, for the benefit of an owner, creditor, lienor, lessee, or other person interested, and not simply to restrain the owner from transferring it or using it; such holding of the property is but another method of enjoining. The theory of the appellee is, when reduced to its logical results, that equity, by its remedy of receivership will confiscate property used for criminal purposes. Indeed, many of the citations of counsel and of the majority opinion are to the effect that such taking is as in cases of confiscation of the implements of crime. I think it may be safely said that no case can be found where confiscation was under equitable authority, but in every instance it has been authorized by statute.

"Nor do I believe that the Revised Statutes of 1894, section 1236, enlarges the powers of equity in this respect. The implication must accompany this statutory provision that the receiver is necessary to preserve the property for some person having an interest in it. I

cannot resist the conclusion that the true office of a receiver does not include the mere holding of property to stay the commission of crime."

EQUITY JURISDICTION—NEW CONDITIONS.—Courts of equity will apply their jurisdiction to new questions as they arise, while keeping within the rules and principles on which their remedial jurisdiction is founded: *Dougherty v. Creary*, 30 Cal. 290; 89 Am. Dec. 116. The mere novelty of a question does not justify an inference of want of jurisdiction in a court of equity: *Lining v. Geddes*, 1 McCord Ch. 304; 18 Am. Dec. 606; *Piper v. Hoard*, 107 N. Y. 73; 1 Am. St. Rep. 789.

EQUITY.—ENJOINING CRIMES AND CRIMINAL PROSECUTIONS is the subject of the extended note to *Creighton v. Dahmer*, 85 Am. St. Rep. 670-681.

EQUITY WILL INTERFERE WHERE A CORPORATION exceeds, abuses, or misapplies its powers: *Scudder v. Trenton etc. Falls Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756. A court of equity will restrain corporations from grossly abusing their powers to the injury of individuals: *Mayor v. Groshon*, 30 Md. 436; 96 Am. Dec. 591, and note. Corporations will be restrained by injunction from proceeding without authority to the injury of others: *Western Maryland R. R. v. Owings*, 15 Md. 199; 74 Am. Dec. 563, and note.

ROBINSON v. DICKEY.

[143 INDIANA, 205.]

APPELLATE PROCEDURE—HARMLESS ERROR.—If a case is tried and determined upon one paragraph or count of a complaint, a judgment will not be reversed because of an error in overruling a demurrer to another paragraph or count.

A COTENANT OUT OF POSSESSION OF PERSONAL PROPERTY has no remedy at law against his cotenant in possession, unless the latter's dealing with the property amounts to a conversion.

EACH COTENANT IS EQUALLY ENTITLED TO THE POSSESSION OF PERSONAL PROPERTY, and if the possession of one excludes the other, this does not amount to a conversion.

PARTITION OF PERSONALTY.—Equity has exclusive jurisdiction of suits for the partition of personal property, although the defendant denies the complainant's title.

PARTITION OF PERSONALTY.—It is not necessary that a complaint seeking partition of personal property should allege that the plaintiff had demanded distribution or division or that defendant is insolvent.

APPELLATE PROCEDURE.—What purports to be a bill of exceptions though filed with the clerk cannot be considered unless signed by the judge.

IN A SUIT FOR THE PARTITION OF PERSONALTY A RECEIVER may be appointed to take charge of it, and if it be found indivisible, to sell it and divide the proceeds among the persons entitled thereto.

AM. ST. REP., VOL. LII — 27

A. W. Reynolds and A. K. Sills, for the appellant.

Sellers & Uhl, for the appellee.

²⁰⁵ MONKS, J. This was a suit by appellee against appellant for partition of personal property. A receiver was appointed to take charge of the property on application of appellee. The complaint was in three paragraphs. A demurrer was sustained to the first and ²⁰⁶ overruled to the second and third paragraphs. Appellant filed an answer in general denial. There was a trial by the court and finding for appellee, and that said personal property was indivisible, and over a motion for a new trial judgment was rendered in favor of appellee, and that said personal property be sold by the receiver and the proceeds divided, etc.

The errors assigned call in question the action of the court in overruling the demurrer to the second and third paragraphs of complaint and in overruling the motion for a new trial. It is admitted by the parties that the case was tried, and finding made, and judgment rendered, on the second paragraph of complaint. It is therefore not necessary for us to consider the sufficiency of the third paragraph of complaint, for the reason that, if the court erred in overruling the demurrer thereto, such action of the court was harmless.

The material allegations of the second paragraph of complaint are that on the second day of January, 1895, the plaintiff and defendant entered into an agreement for the purchase and sale by them of the following described real estate in Jasper county, in the state of Indiana, to wit, the south half and the west half of the northwest quarter of section 14, and the north three-fourths of section 23, all in township 31, range 6, and in such undertaking it was mutually agreed and promised by and between them that whatever should be realized on the sale thereof by them, over and above the cost of said land and the expenses of said purchase and sale, should be equally divided between them; that in pursuance of said agreement, they did purchase said lands for seven thousand and forty dollars, and did immediately thereafter, to wit, on January 15, 1895, make sale of the same and receive and realize therefor over and above the said cost thereof and the expense of said purchase and sale, eight hundred dollars ²⁰⁷ in money and a stock of clothing, gent's furnishing goods, and hats and caps of the value of ten thousand seven hundred dollars, the same being the stock of merchandise.

And it was agreed by and between them that said money and

stock of goods should, on receipt of same by them, be divided; that said stock of merchandise was and is divisible without injury thereto, and each moiety thereof was adequate to stock a retail store, for which purpose plaintiff desired and had prepared to use his half; that the defendant took and retained possession of all thereof, and refused, and still refuses, to divide the same, but excluded the plaintiff from the possession and use of his entire share; that plaintiff is entitled to possession thereof, and to have said stock of goods divided; that defendant wrongfully and without right is endeavoring to take all of said goods out of the county of White and state of Indiana, and sell and otherwise dispose of the same. Prayer for a division of said stock and the appointment of a receiver.

It is earnestly insisted by appellant that "this paragraph of complaint is insufficient, for the reason that there is no allegation that appellee requested appellant to make distribution or division; that there is no averment that appellee was insolvent; and for the reason that one joint owner of personal property is not liable to be sued by the other for taking possession thereof, unless his dealing with the same is such as amounts to a conversion, and, if so, appellee has an adequate remedy at law.

The paragraph in question by its allegations shows that appellant and appellee were cotenants of the stock of merchandise in controversy; that it was agreed between them that the money and stock of goods should, on the receipt of the same by them, be divided between them, and one-half thereof turned over to appellee and ²⁰⁸ the remainder of the same to appellant; that appellant took and held possession of all of said merchandise, and refused to divide the same, or deliver to the appellee his share thereof, or permit him to take the same, but excluded appellee from the possession and use of his entire share of said stock of goods, and denied appellee's right and title to any of said goods.

We think this paragraph of the complaint sufficient to withstand the demurrer. A cotenant of personal property out of possession has no remedy at law against the tenant in possession, unless his dealing with the same has been such as to amount to a conversion of the property by him.

Each of the cotenants is equally entitled to the possession of such property, and if the possession of one excludes the other, this does not amount to a conversion. There is no liability at law unless the cotenant has been guilty of an actual or practical conversion or an actual or practical destruction of the common

property: *Mills v. Malott*, 43 Ind. 248 (251); *Bowen v. Roach*, 78 Ind. 361; *Schenck v. Long*, 67 Ind. 579 (581, 582); *Lowman v. Sheets*, 124 Ind. 416 (425); *Dain v. Cowing*, 22 Me. 347; 39 Am. Dec. 585; *Oviatt v. Sage*, 7 Conn. 95; *Frans v. Young*, 24 Iowa, 376; *Conover v. Earl*, 26 Iowa, 167; *Russell v. Allen*, 13 N. Y. 173; *Tripp v. Riley*, 15 Barb. 333; *Wilson v. Reed*, 3 Johns. 175; *Nowlen v. Colt*, 6 Hill, 461; 41 Am. Dec. 756; *Gilbert v. Dickerson*, 7 Wend. 449; 22 Am. Dec. 592; *White v. Osborn*, 21 Wend. 72; *Hyde v. Stone*, 9 Cow. 230; 18 Am. Dec. 501, and note 503; *Freeman on Partition*, secs. 287, 298, 426.

It is well settled by the authorities that equity has exclusive jurisdiction of suits for the partition of personal property, even though the defendant denies plaintiff's title: *Godfrey v. White*, 60 Mich. 443; 1 Am. St. Rep. 537; *Marshall* ²⁰⁰ *v. Crow*, 29 Ala. 278; *Smith v. Smith*, 4 Rand. 95 (102); *Conover v. Earl*, 26 Iowa, 167; *Tinney v. Stebbins*, 28 Barb. 290; *Tripp v. Riley*, 15 Barb. 333; *Fobes v. Shattuck*, 22 Barb. 568; *Swain v. Knapp*, 32 Minn. 429 (431); *Crapster v. Griffith*, 2 Bland, 5; *Low v. Holmes*, 17 N. J. Eq. 148; *Spaulding v. Warner*, 59 Vt. 646; *Irwin v. King*, 6 Ired. 219; *Weeks v. Weeks*, 5 Ired. Eq. 111; 47 Am. Dec. 358; *Edwards v. Bennett*, 10 Ired. 361; *Smith v. Dunn*, 27 Ala. 315; *Freeman on Partition*, sec. 426; 17 Am. & Eng. Ency. of Law, 681; 5 Wait's Actions and Defenses, sec. 4, p. 89; 6 Lawson's Remedies and Practice, sec. 2735.

A law-writer of eminent ability, speaking of the question under consideration, said that "the necessity of some remedy by which partition of this species of property could be compelled was much greater than in the case of real estate; for real estate was susceptible of a common possession and enjoyment, and, in case of a total exclusion of either cotenant, he had his remedy at law by an action of ejectment. The entire absence of any remedy at law induced courts of chancery to take jurisdiction of actions for partition of personal property. At what time or under what circumstances this jurisdiction was first assumed we are unable to state; but that it existed and was exercised by the courts of chancery both in England and in the United States is undisputed": *Freeman on Cotenancy and Partition*, sec. 426.

In *Tinney v. Stebbins*, 28 Barb. 290, the court said: "A court of equity is competent to give relief in such cases, by decreeing a partition of the property, or a sale thereof where partition is impracticable, and a division of the proceeds. The powers of a court ²¹⁰ of equity were conferred, and exist, to meet just such cases, where no adequate remedy exists at law."

It follows that the court did not err in overruling the demurrer to the second paragraph of complaint.

It is claimed by appellee that the evidence is not properly in the record, for the reason that no bill of exceptions containing the same was ever filed in the court below, and that therefore no question is presented by the motion for a new trial.

It is settled law in this state, under section 641 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 629), that unless a bill of exceptions is first signed by the judge and then filed with the clerk, it does not become a part of the record: *Ayres v. Armstrong*, 142 Ind. 263, and cases cited; *Drake v. State* (Ind. Sup., Oct. 29, 1895), 41 N. E. Rep. 799, and cases cited; *Board etc. v. Hemphill* (Ind. App., Nov. 6, 1895), 41 N. E. Rep. 965; *Jamison v. State*, 13 Ind. App. 295.

The record in this case shows that what purports to be a bill of exceptions was filed in the office of the clerk July 3, 1895, but was not signed by the judge until July 6, 1895. When it was filed it was not signed by the judge, and was not, therefore, a bill of exceptions, and did not thereby become a part of the record: *Ayres v. Armstrong*, 142 Ind. 263; *Drake v. State*, 41 N. E. Rep. 799; *Board v. Hemphill*, 41 N. E. Rep. 965; *Jamison v. State*, 13 Ind. App. 295; *Guirl v. Gillett*, 124 Ind. 501.

It is clear, therefore, that what purports to be a bill of exceptions is not a part of the record. For this reason no question presented by the motion for a new trial can be considered, as the same depends upon the evidence for its determination.

There is no available error in the record.

Judgment affirmed.

COTENANCY—RIGHT OF COTENANT IN POSSESSION OF PERSONALTY.—One of several owners of personal property in actual possession thereof may maintain it against the others; his possession is deemed in law to be the possession of all the owners, and there is no specific remedy by which he can be compelled to deliver the possession to the others: *Southworth v. Smith*, 27 Conn. 355; 71 Am. Dec. 72. See, also, the note to *Young v. Adams*, 58 Am. Dec. 659.

COTENANCY—CONVERSION.—The doctrine that there can be no conversion between cotenants applies to things which in their nature are so far indivisible that the share of one cannot be distinguished from that of another: *Fiquet v. Allison*, 12 Mich. 328; 86 Am. Dec. 54, and note. Trover, as a general rule, will not lie in favor of one tenant in common against his cotenant; the possession of one is in law the possession of both: *Hall v. Page*, 4 Ga. 428; 48 Am. Dec. 235, and note; *Farr v. Smith*, 9 Wend. 338; 24 Am. Dec. 162; *Kilgore v. Wood*, 56 Me. 150; 98 Am. Dec. 440, and note. One tenant in common may maintain trover for his interest against his fellow who misuses the common property by appropriating it to uses for which it was not designed, and refuses to apply it to the purposes for which

It was held by both: *Agnew v. Johnson*, 17 Pa. St. 373; 55 Am. Dec. 565, and note; to the same effect, see *Delaney v. Root*, 99 Mass. 546; 97 Am. Dec. 52, and note.

PARTITION OF PERSONALTY—JURISDICTION OF EQUITY.—Courts of equity have exclusive jurisdiction of suits for partition of personal property, even though the complainant's title is denied by the defendant: *Godfrey v. White*, 80 Mich. 443; 1 Am. St. Rep. 537, and note.

STEVENS v. REYNOLDS.

[143 INDIANA, 467.]

TENANTS IN COMMON, WHO ARE.—Persons owning undivided interests in real property are tenants in common, though their titles were acquired by separate conveyances and at different times.

EACH COTENANT IS BOUND TO PRESERVE THE ESTATE IN GOOD FAITH for the equal benefit of all. Neither can acquire an outstanding title and thereby oust his cotenants, or do any act to injuriously affect their interests in the property when the relation between them is one of trust and confidence.

A COTENANT BY THE PURCHASE OF AN OUTSTANDING TITLE acquires only the right to compel contribution to the expenses thereof, if he and his fellow tenants hold joint possession or otherwise occupy relations presumed to be of trust and confidence.

A COTENANT WISHING TO SHARE IN THE BENEFIT OF AN OUTSTANDING TITLE acquired by one of his fellow tenants must, within a reasonable time, elect to contribute to the expense of his acquisition. His refusal to so contribute may be either express or necessarily implied from his conduct.

COTENANT'S PURCHASE OF OUTSTANDING TITLE.—WHAT IS A REASONABLE TIME within which a cotenant must manifest his election to share in the purchase of an outstanding title by his fellow tenant must be determined by the peculiar circumstances of the case. Whatever delay has taken place must be consistent with perfect fair dealing and in nowise attributable to an effort to seek the advantage, while shirking the responsibilities, of the new acquisition.

JUDGMENT, COLLATERAL ATTACK.—Defects of an affidavit for the publication of a summons, or its falsity, cannot subject the judgment to a collateral attack.

A JUDGMENT IS CONCLUSIVE AS AN ESTOPPEL, THOUGH IT IS SUBJECT TO BE OPENED on an application to let in a defense, so long as it stands unopened.

G. C. Moore, for the appellants.

S. C. Stimson, R. B. Stimson, H. A. Condit, and A. M. Higgins, for the appellee.

⁴⁶⁸ **McCABE, J.** The appellee sued the appellants in the superior court of Vigo county for partition of, and to quiet title to, certain real estate in the complaint described as situate in said county, consisting of an eighty acre tract of land. The

venue was changed to the Clay circuit court. The superior court sustained a demurrer to the first, and overruled a demurrer to the second, paragraph of the complaint. And the circuit court sustained a demurrer to the second paragraph of the separate answer of appellant Margaret A. Stevens. A special finding of the facts having been made on proper request, the court stated its conclusions of law thereon, overruled appellants' motion for a new trial, and rendered judgment, quieting appellee's title in and to one undivided half of said real estate after the court had defaulted the defendant Crawford, and ordered partition. There was no error in sustaining the demurrer to the second paragraph of the separate answer of appellant Margaret A. Stevens, because it was nothing more than a special denial of certain specific facts stated in the complaint, without which the plaintiff could not recover, her first paragraph of answer being a general denial of all the facts stated in the complaint. There was no need of two denials of the same facts.

The same question arises on the exception to the conclusions of law as arose on the demurrer to the complaint. Therefore, we will consider only the conclusions of law upon the facts found.

409 The special finding and conclusions of law are as follows:

"On August 26, 1876, Sarah McGrew acquired title to the southeast quarter of the northwest quarter, and northeast quarter of the southwest quarter of section 17, township 13 north, range 7 west, in Vigo county, Indiana. On February 25, 1880, said lands were sold as the property of Sarah McGrew to Josiah Locke, by the auditor and treasurer of said county, at private sale, for \$79.27, as the taxes, penalty, and costs of the years 1876, 1877, 1878, and 1879, all previous taxes on said lands having been paid.

"On January 29, 1881, in pursuance of a decree of the circuit court of said county of Vigo against said Sarah McGrew, the sheriff of said county executed a deed conveying said lands to James M. Parkes, who died intestate seised of the same, leaving his wife, Mary J. Parkes, surviving as his widow.

"On July 11, 1882, tax deeds for said lands were executed by the auditor of said county to Josiah Locke, in pursuance of said tax sale.

"On September 18, 1882, the circuit court of Putnam county, Indiana, in which the settlement of the estate of said James M. Parkes was pending, caused its commissioner, on the petition of the administrator of said estate, to execute a deed for the undivided two-thirds of said lands to the plaintiff James M. Reyn-

olds, and the defendant John L. Stevens, to procure funds to pay the debts of the said estate which was insolvent; and on the same day said widow, Mary J. Parkes, executed a deed conveying to said James M. Reynolds and John L. Stevens the other undivided one-third of said lands, which deeds were duly acknowledged and recorded in the office of the recorder of said county of Vigo, April 9, 1884, by which conveyances said James M. Reynolds ⁴⁷⁰ and John L. Stevens became each the owner of an undivided half of said lands as tenants in common.

"On March 29, 1884, said John L. Stevens, and the defendant Margaret A. Stevens, his wife, conveyed their undivided half of said lands to their son in law Frank H. Eaton, by warranty deed, which was acknowledged and recorded in the office of said recorder, April 9, 1884.

"On April 21, 1884, said Eaton and his wife, by their warranty deed, conveyed said undivided half of said lands to said Margaret A. Stevens, which deed was acknowledged and recorded in the office of said recorder, December 10, 1885, by which deed the said Margaret A. Stevens became the owner of an undivided half interest in said lands as a tenant in common with said James M. Reynolds.

"On July 3, 1884, said Josiah Locke filed his complaint in the superior court of said county of Vigo, to quiet his title by virtue of said tax deed, making parties defendant thereto said James M. Reynolds, John L. Stevens, Frank H. Eaton, and others, not including said Margaret A. Stevens.

"On March 2, 1885, said Locke and his wife conveyed said lands by quitclaim deed to Stoughton J. Fletcher and Francis M. Churchman, which deed was acknowledged and recorded in the office of said recorder April 11, 1885.

"On June 4, 1885, on suggestion of the death of said Josiah Locke, said Fletcher and Churchman were substituted as plaintiffs in said action; and the defendants, not having appeared, were defaulted, and thereupon a judgment was rendered against them quieting the title of said Fletcher and Churchman. The said James M. Reynolds, John L. Stevens, and Frank H. Eaton were notified of the pendency of said action to quiet title, as ⁴⁷¹ nonresident defendants, by publication, and not otherwise, and said James M. Reynolds had no actual knowledge or notice of such proceedings until after the rendition of said judgment, nor until in the spring of 1891. Notice by publication was ordered on motion and affidavit that after diligent inquiry the residence of said defendants was unknown, but without any proof on non-

residence. At the time of said proceedings, said James M. Reynolds resided in Tippecanoe county, Indiana, John L. Stevens resided in Putnam county, Indiana, and Frank H. Eaton resided in Clay county, Indiana, and their respective places of residence were shown in their title deeds then on record as aforesaid. Said Reynolds has ever since continued to reside in said Tippecanoe county, in the city of Lafayette; said John L. Stevens and Margaret A. Stevens removed to Terre Haute in Vigo county, in December, 1884, and resided there three years.

"At the time James M. Reynolds and John L. Stevens acquired title to said lands as aforesaid, September 18, 1882, John R. Brown was in possession of the same as the tenant of said James M. Parkes for a cash rental of \$75 a year, which had been paid for the year 1882. Said Brown attorned to said Reynolds and Stevens and agreed to pay \$75 rent for the year 1883, and \$100 a year thereafter. Said Reynolds thereupon left the management of said common property to said cotenant John L. Stevens, who was also in custody of their title deeds, and said Reynolds, knowing nothing of said tax encumbrance, and relying upon his cotenant to collect and apply the rents for their mutual interest, learned nothing of said proceedings to quiet title, nor of said conveyance to Frank H. Eaton and Margaret A. Stevens, nor of the facts hereinafter stated until 1891.

472 "In November, 1886, said Margaret A. Stevens, without the knowledge of said James M. Reynolds, for the purpose of securing to herself the title to the entire interest in said lands, and designing thereby to oust her said cotenant, by John E. Stevens, her son and agent, entered into negotiations with said Fletcher and Churchman for the redemption of said lands from the encumbrance of said tax sales, tax deeds, and decree quieting title; said agent falsely represented himself as the agent of said James M. Reynolds and other defendants in said proceeding to quiet title, and induced said Fletcher and Churchman to consent to such redemption in consideration of the payment of \$304, the estimated sum of the taxes, interest, penalty, and costs then accrued upon said tax sales, and including nothing additional thereto except taxes paid on said land by said Fletcher and Churchman subsequent to said decree. Said lands were at the time worth \$5,000, and were held by said Fletcher and Churchman at \$8,000; but they were induced to permit such redemption, upon the representation that the notice to said defendants was insufficient, that the affidavit upon which the court ordered

publication was false in that diligent inquiry was not made to learn their place of residence.

"Upon said consideration and inducement, said Fletcher and Churchman, on March 3, 1887, by the direction of said John E. Stevens, executed their release and quitclaim for the whole of said lands to said Margaret A. Stevens, which deed was recorded in the office of said recorder, March 8, 1887, since which date the said Margaret A. Stevens has claimed the exclusive ownership of said lands.

"On July 14, 1890, said Margaret A. Stevens and said John L. Stevens, her husband, executed their mortgage upon the entirety of said lands to the defendant ⁴⁷³ Charles M. Crawford to secure the payment of three promissory notes for \$933.33 each, executed by said Margaret A. Stevens, December 16, 1887, to Benjamin B. Briggs, payable in one, two, and three years after date, in consideration of which mortgage the payment of said notes was extended to one, two, and three years from June 16, 1890.

"Said John L. Stevens collected all the rents of said lands up to May 21, 1884, and appropriated the same to his own use. On May 21, 1884, when his undivided half interest was conveyed to said Margaret, and John L. Stevens collected rents of said John R. Brown previous to the commencement of this action, the sum of \$265 in cash and the sum of \$—— in labor, in mining coal, as hereinafter stated, and \$—— in labor, in improving said land, and Margaret A. Stevens collected rents of said Brown to the amount of \$25. In March, 1889, said John R. Brown ceased to occupy said lands, and during the remainder of said year the land was not rented. During the year 1890, a portion of said lands was rented by said John L. Stevens to Robert Munkhouse for \$60, of which \$10.35 was paid to said John L. in cash, and the remainder in labor in betterment of the land."

During the years 1891 and 1892 the land was not rented. The land was rented by said John L. Stevens for the year 1893 to James Downs, who is still in possession, and has paid the full rent in advance to said John L. Stevens, \$10 in cash, and some cows for the remainder. The rental value of the land up to March, 1889, was \$100 a year; since which, by reason of deterioration of the premises, it has only been worth a rental of \$75 a year. In addition to the sums paid to John L. Stevens, as aforesaid, said John R. Brown, in ⁴⁷⁴ 1888, paid to Margaret A. Stevens in person \$25 cash on rent of said land.

In September, 1888, said John L. Stevens entered upon said lands, opened a coal mine and operated the same until the latter part of February, 1889, during which time he mined and marketed 6,000 tons of coal, which was at that time worth a royalty of five cents per ton, in the mining of which coal John R. Brown worked out a part of his said rents, as aforesaid.

On February 5, 1891, said James M. Reynolds paid \$39 taxes on said lands, and in the spring of 1891 first learned, by a stranger, of the said tax sales and of said conveyances to said Margaret A. Stevens, and wrote for information to said John L. Stevens, which letter was intercepted by said Margaret A. Stevens, with the intent to keep concealed from said Reynolds the facts in the case, and thereby to prevent him from taking any steps toward securing a share in the possession, rents, and profits of said lands. Said Margaret A. Stevens has paid taxes on said lands as follows: April 18, 1887; \$7.22; November 7, 1887, \$6.23; April 18, 1892, \$22.40; November 7, 1892, \$18.89. Said James M. Reynolds has received no part of the rents and profits of said lands.

Upon the foregoing facts, the court states the following conclusions of law: "1. That the plaintiff James M. Reynolds, and the defendant Margaret A. Stevens, are equal tenants in common of said lands, and the plaintiff is entitled to partition of said land and an accounting; 2. That in such an accounting the defendant should be allowed, on account of redemption of said lands, \$125 and \$10 attorney's fee, with six per cent interest on said sums from March 3, 1887; she should also be allowed one-half of the taxes paid by her on said land, ⁴⁷⁵ with six per cent interest on each item from time of payment; 3. That defendant should be charged with one-half of rent collected by her or one-half of \$25, and interest on same at six per cent from 1888, and with one-half of \$39 taxes paid by plaintiff in 1891, and interest on same at six per cent from February 5, 1891; that the balance due on said accounting in favor of defendant is \$215.24, and that said defendant should have judgment for the same against the plaintiff, and that the same be a charge upon the interest of plaintiff in said land."

These conclusions are not as definite and specific as could be desired. There are several propositions sought to be maintained by the appellee as law, either of which, if sound and applicable to the facts found, would support and justify the conclusions of law stated. It is first contended that the purchase by Margaret A. Stevens from Fletcher and Churchman inured to

the equal benefit of the appellee, Reynolds, subject only to his liability to contribute his pro rata share of the expense of making the purchase or redemption, as it is called; because it is claimed that appellant Margaret A. Stevens, and appellee, James M. Reynolds, were tenants in common in their ownership of the land. And in the second place it is contended that the decree quieting the title in Fletcher and Churchman is not binding and conclusive on the defendants therein, among whom was the appellee, Reynolds, because the decree was rendered without other notice than publication, and five years had not elapsed from the rendition of the decree until the deed was made by Fletcher and Churchman to Mrs. Stevens, the decree having been rendered June 4, 1885, and the deed made March 3, 1887. Consequently, it is contended that the defendants in that decree had yet legal standing in court and were not ⁴⁷⁰ concluded by reason of the fact that they could have had the decree set aside, and a new trial granted as of right, and have made as full a defense as if they had appeared and answered before default, under sections 609, 610 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 600, 601), providing for opening a default taken without other notice than by publication in a newspaper.

And it is thirdly contended that the purchase by appellant Mrs. Stevens from Fletcher and Churchman was, in legal effect, a redemption from them and their tax title. We have no means of knowing which one of these propositions it was that the trial court adopted as the basis for its conclusions of law, or that it did not adopt them all. There can be no question that the conveyance by the commissioner of the Putnam circuit court, to appellee, James M. Reynolds, and John L. Stevens, to make assets to pay the debts of the estate of James M. Parkes, deceased, and his widow, at the same time conveying her undivided third of said real estate to the same grantees, made said Reynolds and John L. Stevens tenants in common in the land. The conveyance afterward by said Stevens and his wife to their son in law, Eaton, and the conveyance by said Eaton and his wife to appellant Margaret A. Stevens, made her a tenant in common with appellee, James M. Reynolds, in the land: Rev. Stats. 1894, secs. 3341, 3342; Rev. Stats. 1881, secs. 2922, 2923; Fountain County etc. Co. v. Beckleheimer, 102 Ind. 85; 52 Am. Rep. 645; Jennings v. Moon, 135 Ind. 168.

The principal contention of appellee's counsel in support of the conclusions of law is best expressed in the language borrowed by this court and cited by appellee's counsel in *McPheet-*

ers v. Wright, 124 Ind. 560, at page 572, from 11 American and English Encyclopedia of Law, page 1082: "The general rule is, that a cotenant's purchase of an ⁴⁷⁷ outstanding title inures to the benefit of all, whether the several interests of the different tenants accrue under the same instrument, under different instruments, or by acts of law, and in some states this rule seems to apply, however the tenancy may have been formed, whatever the relation the cotenants with each other may have been, and from whatever source the outstanding title may have been acquired. . . . But in other states this rule applies only when tenants stand in some confidential relation in regard to one another's interest, so that it would be inequitable to permit one to acquire a title solely for his own benefit, in which case he will be treated as a trustee for the share of his cotenants, but persons acquiring unconnected interests in the same subjects are not, it appears, bound to any greater protection of another's interests than would be required of strangers.'" The general rule seems to be that one tenant in common cannot deny the validity of the common source of title while he himself claims or remains in possession thereunder; nor will he be permitted, while remaining in such possession, to defend by proving a paramount title or interest in some third person, where the title or interest of such tenants accrues under the same instrument or act of the parties or of the law; neither can deny the validity of the instrument or act, and each is bound to preserve the estate in good faith for the equal benefit of all: *Millis v. Roof*, 121 Ind. 360; *Elston v. Piggott*, 94 Ind. 14. Neither of such tenants can acquire an outstanding lien or title and thereby oust his cotenants, or do any other act to prejudice or injuriously affect their interest in the common property, because the relation between them is one of trust and confidence; the only right such a purchase or acquirement confers on the cotenant securing it is to compel contribution to the expense thereof: *Elston* ^{4.8} v. *Piggott*, 94 Ind. 14; *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678; *Carpenter v. Carpenter*, 131 N. Y. 101; 27 Am. St. Rep. 569; *Ramberg v. Wahlstrom*, 140 Ill. 182; 33 Am. St. Rep. 227; *McPheeters v. Wright*, 124 Ind. 560. But it may be doubted whether the case now before us falls within the rule above stated. The appellant Margaret A. Stevens did not acquire the interest that made her a tenant in common with Reynolds either by the same deed by, or at the same time at, which Reynolds acquired his interest. An eminent author, Freeman on Cotenancy and Partition, section 155, says: "As the

rule forbidding the acquisition of adverse titles by a cotenant, from being asserted against his companions, is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint tenants, tenants by entirety, and coparceners always held by and under the same title. Their union of interest and of title is so complete, that beyond all doubt such a relation of trust and confidence unavoidably results therefrom that neither will be permitted to act in hostility to the interests of the other in reference to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations ⁴⁷⁹ to one another. But an examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises": Citing *Roberts v. Thorn*, 25 Tex. 728 (736); 78 Am. Dec. 552; *Frentz v. Klotsch*, 28 Wis. 312 (317); *Wright v. Sperry*, 21 Wis. 336; *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497; *Matthews v. Bliss*, 22 Pick. 48; *Rippetoe v. Dwyer*, 49 Tex. 498; *King v. Rowan*, 10 Heisk. 675.

And this court asserted the same doctrine in *Elston v. Piggott*, 94 Ind. 14. In that case Elston had purchased Piggott's farm at the sale of Piggott's assignee in bankruptcy, the bankrupt having a wife at the time. That sale made Elston the owner of the undivided two-thirds of the land and Piggott's wife the owner of the other third as tenants in common. A mortgage executed by Piggott and wife on the same land which had been sold on foreclosure sale on said mortgage, and Elston, after his purchase at the assignee's sale, purchased the certificate of the foreclosure sale, and, at the expiration of the year, got a sheriff's

deed thereon, and then sued Piggott and wife for possession. It was contended on behalf of Mrs. Piggott that, as the relation of tenants in common in the land existed between her and Elston when he bought the certificate of the foreclosure sale, it gave Elston no title as against her, but inured to her benefit, and that Elston required nothing only a right to enforce contribution against her. It was there said by Elliott, J., speaking for the court, that "the question ⁴⁸⁰ which is next encountered may be thus stated: Does the fact that the appellant, at the time he acquired the certificate of sale issued on the decree of foreclosure rendered on the mortgage executed by Albert Piggott, the husband, and Martha J. Piggott, the wife, held a conveyance for two-thirds of the land from the assignee in bankruptcy of Albert, the husband, executed after the sale on the decree, preclude him, the appellant, from asserting against Martha J., the wife, the title founded upon the deed executed upon the foreclosure sale?

"Appellee's counsel contend that the appellant is precluded from asserting title under the foreclosure sale, because he was, as they affirm, a tenant in common with Martha J. Piggott, and could not, therefore, buy in an outstanding lien and build a title on it. The general rule unquestionably is, that one tenant in common cannot, by purchasing an outstanding lien, acquire a title which will evict his cotenant. This rule, however, is subject to many exceptions and obtains only where the relation of tenants in common exists in strictness, and where the relation is such as to require mutual trust and confidence. It is impossible to perceive how one who buys at a sale made by an assignee in bankruptcy of the husband's interest becomes charged, in such a case as that embraced in our general question, with duties of trust and confidence to the wife of the bankrupt. The title is not a common one; the interests are not reciprocal, and there is no fiduciary relationship created. The title is secured by virtue of a judicial sale, and not by the same instrument, nor from the same source as that from which the wife's claim is derived. There is, we repeat, nothing in such a case to create relations of trust and confidence, and, therefore, the reason of the rule applicable to ordinary cases fails, and the time-honored doctrine is, that where the reason ⁴⁸¹ of the rule ceases, so does the rule itself. An examination of the cases will show that we are right in stating that the reason of the rule is, that the relationship is one imposing trust and confidence and requiring the tenants not to assume positions of hostility. Mr.

Freeman says," and then is quoted the section of Freeman on Cotenancy and Partition which we have already quoted above, citing the authorities there cited. And the conclusion of this court in that case was, that the title of Elston, founded on his purchase of the outstanding lien against the land held by him and Mrs. Piggott as tenants in common, was good against her, and sufficient to oust her from possession.

Here the interest of Margaret A. Stevens accrued at a different time and under a different instrument from that at and under which the title of James M. Reynolds accrued: See *Vasquez v. Ewing*, 24 Mo. 31; 66 Am. Dec. 694; *Coleman v. Coleman*, 3 Dana, 398; 28 Am. Dec. 86.

But assuming without deciding that the tenancy here was of such a character as to create the relation of trust and confidence between Mrs. Stevens and Reynolds, precluding either from doing any act in hostility to the interests of the other, yet, there are some other questions which must be determined favorably to the appellee before that principle can avail him in this case. The evident theory upon which the complaint proceeds is that Mrs. Stevens' purchase from Fletcher and Churchman was voidable as against appellee, on account of the relation of cotenancy between them, and on account of the alleged defect in the notice to the defendants in the decree quieting the title in Fletcher and Churchman, and not on account of any fraud practiced by Mrs. Stevens in inducing them to convey to her. 482 There is no allegation in the complaint that the plaintiff desired to share in the benefits of that purchase, or that he had ever offered to share in the burdens thereof; nor is there any offer in the complaint to pay his share of the purchase money, or that it may be charged to him in the accounting for rents. The first time that anything appears in the record recognizing the plaintiff's liability to contribute to the payment of the purchase money for the conveyance by Fletcher and Churchman to the defendant Mrs. Stevens is found in the conclusions of law. But the plaintiff excepted to them as well as the defendant. The plaintiff's exceptions, however, do not disclose that he excepted because Mrs. Stevens' purchase was not declared void as against the plaintiff. But the theory of the complaint to that effect was further evidenced by the plaintiff seeking in the complaint to quiet his title as against a mortgage executed by Mrs. Stevens, with her husband, on the land after her purchase from Fletcher and Churchman to secure a debt of \$2,800 to the defendant Crawford.

Though the complaint did not charge Crawford with any knowledge of any of the facts whatever, yet the decree, following the theory of the complaint, that Mrs. Stevens' purchase was void, quieted the plaintiff's title against the defendant Crawford's mortgage.

Mr. Freeman, from whom we have quoted above on the point now in hand, in section 156, says: "The purchase made by a cotenant . . . is not void, nor does the interest so acquired by him, or any part of it, by operation of law, vest in his cotenants. They may not wish to share in the benefits of his purchase; for, in their judgment, the title purchased by him may not be paramount to that before held in common. The law gives them a privilege which they may assert. This privilege consists in the right to obtain a conveyance of the ~~488~~ title bought in, upon their paying their share of the price at which it was bought. The privilege may be waived by an express refusal to reimburse the cotenant for his outlay, or by such a course of action as necessarily implies such a refusal. The right of a cotenant to share in the benefit of a purchase of an outstanding claim is always dependent on his having, within a reasonable time, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim. A most natural and material inquiry then is, what is a reasonable time? To this inquiry no positive answer can be given. In this, as in all other questions in regard to reasonable time, no doubt each case must necessarily be determined upon its own peculiar circumstances. The cotenant asking a court of equity to award him the benefit of a purchase must show reasonable diligence in making his election. Whatever delay he may have occasioned must be entirely consistent with perfect fair dealing on his part, and in nowise attributable to an effort to retain the advantages while he shirks the responsibilities of the new acquisition."

An additional reason why the complaint in this case proceeded upon the theory that Mrs. Stevens' purchase was void, because of the relation of cotenancy and defective notice to Reynolds, is found in the fact that the complaint did not ask to have a conveyance made to him upon the plaintiff paying his share of the price; and the further fact that it is not alleged that the plaintiff elected within a reasonable time, or that he ever elected to bear his portion of the expense and share in the benefits of the purchase. Nor was there any finding of these facts, and, if there had been, they would have been outside of the issues, and without force for that reason. Neither is there any conclusion of law

that the appellee was entitled to such a conveyance; and ⁴⁸⁴ if there had been it would have been erroneous for want of the fact found to rest upon. Therefore, the conclusions of law stated can only rest upon the assumption that Mrs. Stevens' purchase was void in law, on account of the relation of cotenancy or want of notice to the defendants in the decree quieting Fletcher and Churchman's title. That is erroneous, even though the facts found should be held to establish that character of cotenancy between the parties that carries with it the relation of trust and confidence which precludes either from acting in hostility to the interests of the other, unless Fletcher and Churchman's decree was void for want of notice to the defendants therein.

There is no claim in appellee's brief that it was void or invalid for that reason, or for the reason that the publication notice of that proceeding was procured on an affidavit that, after diligent inquiry, the residence of the defendants was unknown, though they all resided in this state. The statute authorized such a notice on such an affidavit: Rev. Stats. 1894, sec. 320; Rev. Stats. 1881, sec. 318. Defects in the affidavit, or its falsity, will not subject the judgment to collateral attack: *Dowell v. Lahr*, 97 Ind. 146; *Quarl v. Abbett*, 102 Ind. 233; 52 Am. Rep. 662; *Essig v. Lower*, 120 Ind. 239; *Goodell v. Starr*, 127 Ind. 198. Nor did the fact that the judgment was liable to be opened up on application to let in a defense impair its conclusive force, so long as it stood unopened: Rev. Stats. 1894, sec. 609; Rev. Stats. 1881, sec. 600.

We need not and do not decide what effect the fraud of Mrs. Stevens, as stated in the special finding, had on her deed from Fletcher and Churchman, because the facts concerning such fraud stated in the special finding are outside of the issues, and for that reason must be disregarded: *Neutz v. Jackson Hill Coal etc. Co.*, 139 Ind. 411, and authorities there cited; *Brown* ⁴⁸⁵ *v. Will*, 103 Ind. 71; *Thomas v. Dale*, 86 Ind. 435; *Cicero v. Clifford*, 53 Ind. 191; *Boardman v. Griffin*, 52 Ind. 101.

The circuit court erred in its conclusions of law.

The judgment is reversed and the cause remanded, with instructions to grant leave to reform the issues if the appellee shall desire to amend his complaint.

COTENANCY—WHAT CONSTITUTES.—If two or more persons are entitled to land in such manner that they have an undivided possession, but several freeholds, they are tenants in common: *Metcalf v. Miller*, 96 Mich. 459; 35 Am. St. Rep. 617.

COTENANCY—PURCHASE OF OUTSTANDING TITLE BY ONE COTENANT.—One tenant in common is not permitted in equity to acquire an interest in the property hostile to that of the others, and therefore a purchase by one tenant in common of an encumbrance on the joint estate, or an outstanding title to it, is held, at the election of the other tenants in common within a reasonable time, to inure to the equal benefit of all upon their contributing their proportion to the consideration actually paid: *Ramberg v. Wahlstrom*, 140 Ill. 182; 33 Am. St. Rep. 227, and note, with the cases collected.

COTENANCY—PURCHASE OF OUTSTANDING TITLE—CONTRIBUTION.—The purchase of an outstanding title will inure to the benefit of all the cotenants, but they will be compelled to contribute their respective ratios to the consideration paid: Note to *Ramberg v. Wahlstrom*, 33 Am. St. Rep. 220. A cotenant is entitled to be reimbursed for moneys expended in extinguishing liens upon the common property: *Stewart v. Stewart*, 90 Wis. 516; 48 Am. St. Rep. 940.

JUDGMENTS—CONSTRUCTIVE SERVICE—COLLATERAL ATTACK.—A judgment rendered by a court of competent jurisdiction upon citation by publication, is not open to collateral attack on the ground that the affidavit for publication is insufficient: *Hardy v. Beatty*, 84 Tex. 562; 81 Am. St. Rep. 80, and note with the cases collected.

FIRST NATIONAL BANK v. DOVETAIL BODY AND GEAR COMPANY.

[143 INDIANA, 560.]

CORPORATIONS—TRUST FUND.—As between a corporation and its creditors it does not hold its property in trust, or subject to a lien in favor of the creditors, in any other sense than does an individual debtor.

CORPORATIONS, PREFERENCES BY.—A corporation, though insolvent, if still in possession of its property, may prefer one creditor to another.

CORPORATIONS—PREFERENCES BY.—A mortgage executed by an insolvent corporation in pursuance of an agreement to execute it is valid, and cannot be set aside as a preference, though given for money borrowed to satisfy a debt for which the president and secretary were jointly liable with the corporation.

G. W. Paul and M. W. Bruner, for the appellant.

W. T. Brush and E. C. Snyder, for the appellees.

⁵⁵⁰ **MONKS, J.** This was an action by appellant against appellees, to set aside and vacate a judgment and lien in favor of appellee Snyder against his coappellee.

⁵⁵¹ The court, by request of the parties, made a special finding of the facts and stated its conclusions of law thereon in favor of appellees.

It appears from the special finding that the appellee Snyder

is, and has been since its organization, a stockholder in his appellee, the Dovetail Body and Gear Company, a corporation organized under the laws of this state, and engaged in the business of manufacturing and selling buggy bodies in the city of Crawfordsville, Indiana; that on the fifteenth day of September, 1892, said corporation was indebted to appellant in the sum of seven thousand dollars, which was then overdue; that appellant also had and owned an obligation for six thousand dollars, executed by Peter C. Summerville and John C. Barnhill, who were the president and secretary of said corporation, for money borrowed by them for the use and benefit of said corporation; that said corporation was then in embarrassed financial circumstances and unable to meet any part of its overdue obligations, all of which facts were well known to appellee Snyder; that on the said fifteenth day of September, 1892, the board of directors of said corporation authorized its president and secretary to borrow two thousand dollars, to be applied as a payment on the debt to appellant, upon which said Summerville and Barnhill were individually liable; that pursuant to said action of the board of directors, said corporation did, on said day, borrow of Snyder, appellee, the sum of two thousand dollars, upon the express agreement that he should be permitted to take a judgment thereon and acquire a lien upon the property of said corporation over other claims against said corporation; that the note of said corporation was executed to said appellee Snyder for said sum payable one day after date, and the proceeds of said loan applied on the debt due appellant, upon which said Summerville and Barnhill⁵⁵² were individually liable; that when said loan was made by appellee Snyder, he knew the purpose for which said money was borrowed by said corporation; that on the sixteenth day of September, 1892, appellee Snyder began suit in the Montgomery circuit court upon said note and to recover for attorney's fees alleged to be due him from said corporation; that on the nineteenth day of the same month, the board of directors of said corporation authorized the president to appear to said action and consent that judgment might go thereon against the corporation for the amount claimed to be due in said complaint, and that on the twentieth day of said month, pursuant to said authority, the corporation appeared, by its president, to said action, and consented that judgment should be rendered therein for the sum claimed to be due in the complaint, and thereupon judgment was rendered by the court for the sum of two thousand five hundred and ninety-two dollars and twenty-two cents, five hundred

dollars of which judgment was for services rendered by appellee Snyder for said corporation as attorney; that the object and purpose of said board of directors in authorizing the president of said corporation to appear and consent to the judgment in favor of Snyder, appellee, and of the president in so appearing and consenting to said judgment, and of said Snyder in taking said judgment, was to enable him, said Snyder, to obtain a lien on the property of said corporation and thus prefer him over the other creditors thereof; that an execution was duly issued on said judgment and levied on the property of said corporation on September 23, 1892, and that after said execution was so levied, one P. S. Kennedy was, on the application of appellant, appointed receiver of the assets of the corporation and was duly qualified and entered upon the discharge of his duties as such, and has continued to act as such ever since.

The court stated in its conclusions of law that the ⁵⁵³ judgment so rendered was a valid judgment against the corporation and all its creditors, and that the same was a valid lien on the property of the corporation in the hands of the receiver; to which conclusions of law appellant excepted, and thereupon judgment was rendered in favor of appellees.

The only error assigned by appellant is, that the court erred in its conclusions of law. Counsel for appellant earnestly insist that the court erred in its conclusions of law, that the rule of law is, "that the property and assets of an insolvent corporation is a trust fund for all the creditors, and that the officers of the corporation are trustees for all the creditors, and they cannot deal with the trust property for their own benefit; that the creditors of the corporation had an equal lien on all the assets for the payment of its debts."

The expression that "the property of a corporation constitutes a 'trust fund' for its creditors" only means that when the corporation is insolvent, and a court of equity has taken possession of its assets for administration, such assets must be appropriated to the payment of its debts before distribution to its stockholders, but, as between the corporation itself and its creditors, the corporation does not hold its property in trust or subject to a lien in favor of the creditors in any other sense than does an individual debtor: *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371, 385, and cases cited; *Sanford etc. Tool Co. v. Howe*, 157 U. S. 312; *Fogg v. Blair*, 133 U. S. 534, 541; *Richardson v. Green*, 133 U. S. 30, 44; *Peters v. Bain*, 133 U. S. 670, 691; *Graham v. Railroad Co.*, 102 U. S. 148; *Wabash etc. Ry. Co. v. Ham*, 114 U. S. 587,

594; *Smith etc. Purifier Co. v. McGroarty*, 136 U. S. 237, 241; *Henderson v. Indiana Trust Co.*, 143 Ind. 561; note to *Conover v. Hull*, ⁵⁵⁴ 45 Am. St. Rep. 826-835; *Brown v. Grand Rapids etc. Furniture Co.*, 58 Fed. Rep. 286; 7 Co. Ct. App. 225; 16 U. S. App. 225; 2 N. W. Law Rev. 167; 3 N. W. Law Rev. 115, 206; *In re Wincham Shipbuilding Co.*, L. R. 9 Ch. Div. 322.

In *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371, 385, Mr. Justice Brewer, speaking of the meaning of the words "trust fund" as used with reference to the assets of insolvent corporations, said: "The same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is, therefore, sometimes said, not inaptly, to be held in trust for the partnership creditors, or that they have an equitable lien on such property. Yet all that is meant by such expression is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of the proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust.

"A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. . . . As between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor."

It is settled law in this jurisdiction that while partnership ⁵⁵⁵ assets remain under the control of the partners, they have power, though insolvent, to appropriate any portion of it to pay or secure the individual debts of the members of the firm to the exclusion of the partnership creditors: *Johnson v. McClary*, 131 Ind. 105, and cases cited. Such appropriation by the partners of the partnership property to pay or secure the bona fide debts of an individual member of the firm cannot be successfully attacked, either by a creditor or by a receiver of the insolvent partnership: *Johnson v. McClary*, 131 Ind. 105. Where, however, the partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent.

In *Winslow v. Wallace*, 116 Ind. 317, this court said: "It is

settled everywhere that when the assets of a firm, or the individual property of the members of a firm, are brought under the jurisdiction of a court for judicial administration, the equitable rule of distribution will be applied, and the partnership assets will be devoted first to the payment of the firm debts. . . . But where the partnership assets remain under the control of the partners, they have the power to appropriate any portion of it to pay or secure the individual debts of the members of the firm." The doctrine of equitable lien and trust, as held by this court in regard to partnership property, exists at least to the same extent in reference to the property of corporations.

It necessarily follows that until the court, by its officers, takes charge of the property of an insolvent corporation, it has the same power and control over its property that the individual would have over his property under like circumstances.

It is firmly settled in this state that an insolvent debtor has the right and power to prefer certain creditors ⁵⁵⁶ to the exclusion of others: *Dice v. Irvin*, 110 Ind. 561; *Gilbert v. McCorkle*, 110 Ind. 215; *Carnahan v. Schwab*, 127 Ind. 507; *Fuller v. Mehl*, 134 Ind. 60.

In *Gilbert v. McCorkle*, 110 Ind. 215, *Mitchell, J.*, speaking for the court, said: "It must be considered as settled by the decisions of this court that, so long as a debtor retains dominion over his own property, he may make any honest disposition of it he sees fit. He may sell or mortgage the whole, or any part of that which belongs to him, to pay or secure an honest debt. . . . He may prefer one creditor to another, and such preference is neither a fraud in law nor in fact, even though it be known that the debtor is in failing circumstances and contemplates an assignment, and even though such preference has the effect to hinder or delay other creditors in the collection of their claims. In the absence of statutory prohibition, it is neither a legal or moral wrong for a creditor to obtain payment or security for an honest claim, even though he knows that others, equally as deserving, will be thereby deprived of obtaining payment or security for their claims. Nor is it legally or morally wrong for a debtor to pay, or to secure, to one or more of his creditors, that which is their due, even though he thereby disables himself from paying or securing other claims equally meritorious."

We think it is clear, under the authorities, that if the corporation had executed a mortgage to *Snyder* to secure the two thousand dollars, or if the money had been loaned on the express agreement that the loan should be secured by a mortgage, and

the same was some days afterward executed in compliance with such agreement, such mortgage would have been valid and could have been enforced.

The judgment was rendered in compliance with the ⁵⁵⁷ agreement to that effect, when the loan was made. This was the condition upon which appellee Snyder parted with his money, the same was paid to appellant upon an obligation on which the president and secretary of the corporation were individually liable. He was not a trustee for the creditors in any sense of the word, and the fact that he knew the purpose for which the money was borrowed, even if it were conceded that such use thereof was a breach of trust on the part of the directors, this would not impair the lien of the judgment or affect its validity: *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412; *Jackson v. City Nat. Bank of Goshen*, 125 Ind. 347.

The burden of proof was upon appellant in this case, and when the special finding is silent in respect to any material fact, it will be presumed that such fact was found against appellant: *Parke Co. Coal Co. v. Terre Haute Paper Co.*, 129 Ind. 73; *Thornton's Indiana Practice Code*, sec. 551, note 4.

When an action is brought to set aside preferences made by an insolvent debtor, as fraudulent, the question of fraudulent intent to cheat, hinder, and delay creditors is one of fact and not of law: *Rev. Stats. 1881*, sec. 4924; *Rev. Stats. 1894*, sec. 6649, and cases cited; *Wilson v. Campbell*, 119 Ind. 286; *Phelps v. Smith*, 116 Ind. 387, and cases cited.

The finding does not show that there was any actual fraud on the part of the corporation, its officers, directors, or appellee Snyder. It is true it is stated that the purpose of appearing to the action and permitting judgment to be rendered was to give preference to Snyder in compliance with the agreement under which the loan was made, but it is not found that this was a fraudulent purpose. Fraud is not presumed when an action, as in this case, depends upon the establishment of fraud. It ⁵⁵⁸ being charged in the complaint, the special finding must so state, or the presumption is that it did not exist: *Stix v. Sadler*, 109 Ind. 254, and cases cited.

The court did not err in its conclusions of law.

Judgment affirmed.

IN THE CASE of *Henderson v. Indiana Trust Co.*, 143 Ind. 561, the supreme court of that state again reaffirmed the rule that an insolvent corporation retaining possession and control of its property may prefer any of its creditors who are not stockholders or directors, even though the claim so preferred was secured by the in-

dorsement of the directors and a part of the stockholders, saying: "It follows from the authorities in this state, until the court by its officers takes charge of the property of an insolvent corporation, it has the same power and control over its property as an individual would have over his property under like circumstances."

CORPORATIONS—INSOLVENT — PREFERENCES.—Though a corporation has become insolvent, and its liability greatly exceeds its assets, if it continues to be a going concern and conducts its business in the ordinary way, its assets are not a trust fund for equal distribution among its creditors, so that it has not power to make preferences or preferential payments to some such: *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634; 49 Am. St. Rep. 943, and note. See the extended note to *Conover v. Hull*, 45 Am. St. Rep. 826-835, on preferences by insolvent corporations.

CORPORATIONS—PROPERTY OF AS TRUST FUND.—In those states where an insolvent corporation may make preferences among its creditors by assignment, the rule that the property of the corporation is a trust fund in the hands of its directors as a specific lien or direct trust does not prevail: *Worthen v. Griffith*, 59 Ark. 562; 43 Am. St. Rep. 50. The entire property of a corporation constitutes a trust fund for the benefit of its creditors without preference only when the affairs of the corporation have reached the point that its managers find themselves obliged to deal with its assets in view of a suspension by reason of its insolvency: *Sabin v. Columbia Fuel Co.*, 25 Or. 15; 42 Am. St. Rep. 756, and note. Equity regards the property of a corporation as a fund held in trust for its stockholders while it is solvent, and for the payment of its debts when it becomes insolvent: *Atlas Nat. Bank v. More*, 162 Ill. 528; 48 Am. St. Rep. 274, and note.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

LAKE ERIE & WESTERN RAILROAD Co. v. CLARK.

[7 INDIANA APPEALS, 145.]

RAILROADS—LIABILITY FOR NEGLIGENCELY SETTING FIRE.—If a railroad company negligently permits combustible material to accumulate on its track and right of way, and setting fire thereto, negligently permits the fire to escape to adjoining lands and destroy property of another, the company is liable in damages, whether it started the fire negligently or not.

APPELLATE PRACTICE.—OVERRULING OF A MOTION to make a complaint more specific cannot be considered on appeal as an assignment of error unless it is brought into the record by bill of exceptions.

APPELLATE PRACTICE.—TRANSCRIPT OF EVIDENCE certified to by the shorthand reporter, but not incorporated into a bill of exceptions, nor signed by the trial judge, does not authorize a review on appeal of questions depending thereon.

M. A. O. Packard, O. M. Packard, F. S. Foote, and W. E. Hackedorn, for the appellant.

S. Parker, for the appellee.

¹⁵⁵ **GAVIN, C. J.** The appellee sued appellant to recover damages resulting from a fire started by appellant in grass and weeds negligently permitted to accumulate upon its right of way, which was by appellant negligently ¹⁵⁶ permitted to escape to appellee's land, all occurring without any contributory negligence upon the part of appellee.

It is urged that the complaint is bad for want of averments that the fire was caused by some negligent act or defective machinery of appellant. Such averments are unnecessary.

If appellants set fire to the dry grass and other combustible

materials which it had negligently suffered to accumulate on its track and right of way, and without fault on appellee's part, negligently permitted such fire to escape to his lands and burn and destroy his property, appellant would be liable to appellee for his damages, whether such fire was started negligently or otherwise: *Pittsburgh etc. Ry. Co. v. Jones*, 86 Ind. 496; 44 Am. Rep. 334; *Indiana etc. Ry. Co. v. Overman*, 110 Ind. 538; *Louisville etc. Ry. Co. v. Hart*, 119 Ind. 273.

Complaint is made of the action of the court in overruling a motion to make the complaint more specific.

In order to so present any question upon this ruling as to enable us to consider it, the motion should have been brought into the record by a bill of exceptions. This has not been done, and without this the motion is not properly authenticated as a part of the record: *Elliott's Appellate Procedure*, sec. 814.

The overruling of the motion for a new trial is also assigned as error. The causes urged in favor of a new trial are that the damages assessed are excessive, and that the verdict is not sustained by the evidence.

A transcript of evidence certified by the shorthand reporter is attached to the transcript, but it is not incorporated into any bill of exceptions, nor is there anything in the record which purports to be a bill of exceptions signed by the judge. This is absolutely necessary in order ¹⁵⁷ to present for review the questions attempted to be raised. Without its authentication by the judge, the stenographer's report of the evidence is entirely without force: *Elliott's Appellate Procedure*, sec. 821; *Louisville etc. Ry. Co. v. Kane*, 120 Ind. 140.

Judgment affirmed.

NEGLIGENCE—SETTING OUT FIRES.—One who negligently sets out, or negligently manages, a fire set on his property is liable to his immediate neighbor for damage caused to him by the spread of the fire onto such neighbor's property. The gist of the action is negligence. If that exists either in setting or caring for the fire, and injury to another happens therefrom, liability attaches. It is immaterial whether such negligence is gross or only ordinary: *Brummit v. Furness*, 1 Ind. App. 401; 50 Am. St. Rep. 215, and note. This question is the subject of the monographic note to *McNally v. Colwell*, 30 Am. St. Rep. 501-507, and is also discussed in the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 823.

CHICAGO & ERIE RAILROAD COMPANY v. FIELD.

[7 INDIANA APPEALS, 172.]

RAILROADS—PASSENGERS—PERSON RIDING ON PLATFORM.—A person who takes passage on the platform of a passenger coach on a railroad train, and there continues his journey without entering the cars, in violation of the rules and regulations of the company, does not become a passenger, although his fare is demanded by, and paid to, the brakeman on the train, who is not authorized to demand or receive fares.

CARRIERS.—A PASSENGER IS A PERSON whom a common carrier has contracted to carry from one place to another, and has in the course of the performance of that contract received under his care either upon the means of conveyance or at the point of departure of that means of conveyance. The relation of carrier and passenger does not arise until the traveler puts himself in charge of the carrier for the purpose of being conveyed to his destination.

RAILROADS—PASSENGERS, WHO ARE NOT.—It is not within the power of any conductor, brakeman, or other employé of a railroad company to entitle any person to ride upon a vehicle not intended for the conveyance of passengers, and if such person does so even upon invitation of such employé, and even though such person and others have customarily so ridden, the person thus traveling does not thereby become a passenger.

RAILROADS—RULES AND REGULATIONS.—Railroad companies not only have the right, but it is their duty, to run their trains in accordance with established rules and regulations, and passengers must exercise reasonable diligence to comply therewith, if reasonable.

COMMON CARRIERS OF PASSENGERS are not required to notify every person who may board their train that he must enter the passenger coach in order to become a passenger. It is the duty of the latter to inquire, upon entering the train, where the coach is in which he may be carried to a certain point, and it then becomes the duty of the carrier's servants to inform him; but if he fails to make such inquiry, and in violation of the company's rules enters a vehicle not set apart for passengers, he becomes a trespasser.

RAILROADS—AUTHORITY TO COLLECT FARES.—It is not within the scope of authority of the brakeman on a railroad train to collect fares, nor to waive the established rules and regulations made for running the trains, nor has any person riding on the train the right to suppose that such employé can bind the company by such an arrangement.

O. Gresham and J. W. Youche, for the appellant.

R. Gregory, for the appellee.

173 REINHARD, J. The appellee instituted this action against the appellant, a common carrier of passengers, for failing to carry him, as per contract, from Auburn Park, Illinois, to Hammond, Indiana.

Upon issues joined, there was a trial by jury, resulting in a verdict and judgment in favor of the appellee. Among the errors assigned and discussed by appellant's counsel are those of

the overruling of its motion for a judgment in its favor upon the special verdict of the jury, and the sustaining of the appellee's motion for judgment in his favor upon such verdict.

It appears from the facts found in the special verdict that on the thirteenth day of September, 1891, the appellant corporation was operating a railroad between Chicago, Illinois, and Hammond, Indiana. On that day, at about 8 o'clock P. M., the appellee was at Auburn Park, ¹⁷⁴ Illinois, and desired to go to Hammond, Indiana. The appellant's train, No. 12, being then on its way from Chicago to Hammond, stopped at Auburn Park, but for what purpose is not disclosed. The appellee boarded an express car on said train, and stood upon the front platform thereof, in company with two companions, said car being the first one in the rear of the locomotive and in front of the passenger coaches, and continued to ride thereon until the happening of the alleged grievance. After the train had started on its way, one of the trainmen of the appellant, wearing the uniform of the company, having the word "Erie" marked upon each side of his collar, and the word "Trainman" above the visor of his cap, presented himself to said parties and demanded of them where they were going, and their fare. The appellee replied that he was going to Hammond, and handed the trainman fifty cents, which the latter accepted and placed in his pocket, and shortly afterward left said platform. The regular fare from Auburn Park to Hammond was forty cents. When the train reached "State Line," the conductor came forward, and, discovering said persons on the platform, ordered them to leave the train, making threats of violence against them, and using abusive and profane language. The appellee left the train and walked to Hammond, a distance of one mile, under some difficulty.

The jury found that by the printed rules of said company passengers are not allowed to ride on the platforms of express cars; and that upon the outside of the doors of each and every passenger car on said train a metallic strip was fastened, upon which was written, "Passengers are not allowed to stand on the platform while the cars are in motion." The appellee did not have any actual knowledge of these regulations, nor did he know the position or authority of said trainman to whom he paid said ¹⁷⁵ fifty cents, and who, in point of fact, was a brakeman upon said train. The conductor also wore a uniform similar to that of the brakeman, differing only in the distinguishing marks of the respective positions held by the said conductor and brakeman.

To determine whether or not the appellee was wrongfully

ejected from the train, it is necessary to ascertain, first, whether the appellee sustained to the appellant the relation of passenger. The liability of the appellant is contractual, and if, therefore, there was no legally enforceable contract between said parties, constituting them carrier and passenger, respectively, the appellee cannot recover. If, however, there was such contract, express or implied, a liability against appellant arises by virtue of the public duty raised by the law.

"A passenger is a person whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care either upon the means of conveyance or at the point of departure of that means of conveyance": 2 Am. & Eng. Ency. of Law, 742.

There is no liability on the part of the appellant unless at some point upon the route the appellee was accepted as a passenger. It is not found in the special verdict that Auburn Park, where the appellee entered the train, was a place where the appellant's train was scheduled to stop to receive passengers, or that he had then paid his fare, or that he had entered at the invitation of the appellant.

A failure to find upon some fact or issue involved is equivalent to a finding against the party holding the affirmative upon such fact or issue: *Henderson v. Dickey*, 76 Ind. 264; *Johnson v. Putnam*, 95 Ind. 57; *Parmater v. State*, 102 Ind. 90; *Glantz v. South Bend*, 106 Ind. 305; *Louisville etc. Ry. Co. v. Hart*, 119 Ind. 273.

It is affirmatively shown, upon the other hand, that the appellee entered one of the appellant's vehicles not set apart for passengers, without invitation and against the express rules and regulations of the company, and remained upon the same until he was ejected.

The relation of carrier and passenger does not arise until the traveler "puts himself in charge of the carrier for the purpose of being conveyed to his destination": *Buswell on Personal Injuries*, sec. 114.

It cannot be said that this has been done, when the traveler takes a position on the train other than that set apart for the use of passengers. It is clear to us, therefore, that the appellee was not a passenger on appellant's train when he boarded the platform of the express car. Did he become such afterward? If so, it must be because, by the conduct of appellant's servant, the brakeman, the appellant is estopped to deny that the appellee occupied such position on the train.

It is not within the power of any conductor, trainman, or other employé of a railroad to permit any person to ride upon a vehicle not intended for the conveyance of passengers; and if such person does so, even upon invitation of such employé, and even though such person and others have customarily so ridden, the person thus traveling does not thereby become a passenger: *Files v. Boston etc. R. R. Co.*, 149 Mass. 204; 14 Am. St. Rep. 411.

Railroad companies not only have the right, but it is their duty to run their trains in accordance with established rules and regulations, and passengers must exercise reasonable diligence to acquaint themselves with the same, and, where such regulations are reasonable, it is the duty of passengers to comply with them: *Pittsburgh etc. Ry. Co. v. Lightcap*, 7 Ind. App. 249.

¹⁷⁷ We do not wish to be understood as holding that persons desiring to travel upon railroad trains must inform themselves of every rule and regulation of the company, in order to secure protection, but what we do decide is that they are not entitled to such protection when they act in open violation of the most common and best known of such regulations, among which is the one forbidding persons to ride upon platforms of cars.

Common carriers of passengers are not required to notify every individual who may board their train that he must enter the passenger coach in order to become a passenger. It is the duty of the latter to inquire, upon entering the train, where the coach is in which he may be carried to a certain point, and it then becomes the duty of the carrier's servants to inform him. If he acts upon the information, the company thereby accepts him as a passenger, and he is entitled thereafter to all the privileges and immunities as such. But if, upon the other hand, he fails to make such inquiry, and, in violation of the company's rules, enters a vehicle not set apart for passengers, he becomes a trespasser.

It was not within the scope or authority of the brakeman to collect fare, and, even if it had been, such brakeman would have no right to waive the established rules and regulations made for the running of the trains, and the appellee had no right to suppose that such employé could bind the company by such an arrangement: *Ohio etc. Ry. Co. v. Hatton*, 60 Ind. 12; *Pittsburgh etc. Ry. Co. v. Nuzum*, 60 Ind. 533.

Appellee, therefore, acquired no rights as a passenger by the payment of money to the brakeman. Had he been in the passenger coach at the time he made such payment, a different

question would be presented. As it was, he was a trespasser when he entered, and remained ¹⁷⁸ such throughout, and, when the conductor discovered him upon the platform, he had a right to eject him from the train. The appellee not being a passenger, the appellant owed him no duty of carriage, and he has, therefore, no cause of action.

It is contended, however, that the special findings show that appellee was ejected with unnecessary violence, and under aggravating circumstances.

It is a sufficient answer to this to say that the complaint is not drafted upon that theory. The gist of the complaint is the violation of the contract to carry. All other averments, as to aggravating circumstances, etc., are mere incidents to the failure to carry. If the principal fact was established, the jury might consider the incidents in measuring the damages. It is one thing, however, for the company to fail in the performance of its obligation to carry, and quite another for the servants of the company to eject a trespasser with unnecessary force and violence or under circumstances that render the ejection itself a trespass. In either case there may be a right of action against the company, but the injured party cannot count upon one and recover upon the other: *Chicago etc. R. R. Co. v. Bills*, 118 Ind. 221. Our conclusion is, that the appellant was entitled to judgment.

Other questions presented by the appellant need not, therefore, be determined.

Judgment reversed, with instructions to the court below to sustain appellant's motion for judgment in its favor upon the special verdict.

INTHECASE of Pittsburgh etc. Ry Co. v. Lightcap, 7 Ind. App. 249, the above-named defendant sued the railroad company for damages, and recovered a judgment in the trial court. He bought a round-trip ticket, which entitled him to a passage both ways between two stations on the line of way of the railroad, and having made the trip one way between said stations, he boarded a passenger train running between said stations to make the return trip. His fare was demanded, and he presented the return coupon, which was still good. The conductor refused to receive the coupon, and demanded regular fare, which the said defendant paid to prevent being expelled from the train. He then brought this action to recover damages, but failed to allege in his complaint that the train on which he was compelled to pay fare was scheduled to stop at the station of his destination, although he did allege that all trains were required by law to stop there. A demurrer to the complaint was overruled in the trial court, and the appellate court, in reversing the judgment of the trial court, held that the complaint was insufficient for failure to allege that such station of destination was a station at which said train was scheduled to stop, and that, unless this was a fact, the railroad

company was not compelled to receive the coupon, and had a right to demand fare to the first station at which such train was scheduled to stop beyond where the fare was demanded, and also, that the fact that the person holding the coupon alighted from the train when it stopped at the station to which his coupon entitled him to ride on a train scheduled to stop there did not affect the rights of the railroad company. The appellate court also announced the following general rule:

"Doubtless, a railroad company not only has the right, but it is its duty, to operate its trains in accordance with established rules and regulations, and upon these it is not bound to infringe in order to accommodate a single passenger. On the other hand, it is the duty of one about to become a passenger to use reasonable diligence in acquainting himself with the rules and regulations of the company respecting the time when, the place where, and the circumstances under which a train upon which he desires to travel may go or stop according to the company's rules and regulations; and if, by neglecting to do so, he makes a mistake, he can have no remedy, if he be carried past his destination or ejected before getting there: *Pittsburgh etc. Ry. Co. v. Nuzum*, 50 Ind. 141; 19 Am. Rep. 703; *Ohio etc. Ry. Co. v. Applewhite*, 52 Ind. 540; *Ohio etc. Ry. Co. v. Hatton*, 60 Ind. 12; *Chicago etc. R. R. Co. v. Bills*, 104 Ind. 18; 118 Ind. 221."

CARRIERS—PASSENGERS—WHO ARE.—A passenger, in a legal sense, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor: *Bricker v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 10 Am. St. Rep. 585, and note. One whom a railway corporation was under no statutory or common-law obligation to carry in the manner in which he was carried at the time of an accident is not entitled to enforce against such corporation the obligation and liability of a common carrier: *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525; 32 Am. St. Rep. 482.

RAILROADS—LIABILITY FOR INJURY TO PERSON NOT RIDING IN PROPER VEHICLE.—When a passenger voluntarily violates a rule of the company, and brings injury upon himself which he would not otherwise have received by going from a passenger car into an express car or other place not intended for passengers, he cannot invoke in defense to his contributory negligence the failure of the conductor to enforce the rule: *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17, and note. One who takes an exposed position on a train not designed for the use of passengers, assumes the special risks of that position whether he takes it by license, noninterference, or special permission of the conductor: *Files v. Boston etc. R. R. Co.*, 149 Mass. 204; 14 Am. St. Rep. 411, and note. Where a passenger rides in the saloon car of a freight train contrary to the rules of the company, but without objection from the conductor, who collected first-class fare from him, it was held that he could not recover for injuries received through the negligence of the railroad company: *Dunn v. Grand Trunk Ry.*, 58 Me. 187; 4 Am. Rep. 267. But see *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510. See, also, the extended notes to *Darwin v. Charlotte etc. R. R. Co.*, 55 Am. Rep. 42-44, and *Nolan v. Brooklyn etc. R. R. Co.*, 41 Am. Rep. 347-349, in which the question of the liability of railroads for injuries received by passengers while riding on platforms is also discussed.

RAILROADS—DUTY TO MAKE AND ENFORCE RULES FOR THE PROTECTION OF PASSENGERS.—A railroad company has a right to make and enforce rules and regulations in regard to the admission of passengers to its trains, provided such rules are reasonable

and do not subject the passenger to unnecessary inconvenience and annoyance: Northern etc. Ry. Co. v. O'Conner, 76 Md. 207; 35 Am. St. Rep. 422; Memphis etc. R. R. Co. v. Benson, 85 Tenn. 627; 4 Am. St. Rep. 776, and note. This question is thoroughly discussed in the extended notes to Commonwealth v. Power, 41 Am. Dec. 471-488, and Oheney v. Boston etc. R. R. Co., 45 Am. Dec. 192-199.

MERIDIAN NATIONAL BANK v. FIRST NATIONAL BANK.

[7 INDIANA APPEALS, 322.]

BANKS AND BANKING—CERTIFICATION OF CHECK—EFFECT.—The certification of a check in the hands of the payee, the body of which is unaltered, releases the drawer from further liability, and creates a direct liability from the bank to the payee, while as between the bank and the drawer, it operates as a payment to that extent on his account, and although prior to its being certified the check may be countermanded by the drawer, yet after its certification it has passed beyond his control, and he no longer has power to countermand its payment.

BANKS AND BANKING—CHECKS—CERTIFICATION OF ASSUMED NAME OF PAYEE.—The certification of a check by the bank upon which it is drawn and its subsequent indorsement by the man to whom it was actually issued and by whom the drawer intended the money should be received is effectual to pass the title to the check to another bank paying the amount of it in good faith to the drawee upon presentment, although the latter acts under an assumed and fictitious name during the whole transaction while not really impersonating any other individual. In such case any loss on the check must fall on the bank certifying it, and through such bank, upon the drawer.

A. C. Harris and L. A. Cox, for the appellant.

R. N. Lamb, R. Hill, B. F. Love, and H. C. Morrison, for the appellee.

323 GAVIN, J. The appellee brought this suit in the Marion superior court, upon a check certified by appellant. The case was tried at special term, and, on special findings of fact and conclusions of law by the court, judgment was rendered in favor of appellant. On appeal to the general term, this judgment was reversed, and from that reversal appeal is taken to this court.

The facts found, so far as material to the questions presented in this court, are as follows:

"1. Heretofore, to wit, on the night of the 3d of September, 1890, William C. Milburn, with another, stole from George W. Ray, near the town of Franklin, Johnson county, Indiana, two head of steers, and drove them to the Indianapolis stock-yards for sale, arriving there early in the morning. At that time

the firm of Stockton, Gillespie & Co., livestock brokers and dealers, had an office at, and were engaged in business in, the Indianapolis stockyards, situate near the city of Indianapolis, Indiana. Mr. Stockton had the transaction, ³²⁴ now to be stated, early in the morning of the 4th of September, 1890.

"Milburn, who was a stranger to Mr. Stockton, requested him to sell the cattle. Stockton called a buyer near by and asked for a bid, which was made at \$3.25 per hundred pounds. Stockton replied that was not enough, and started off on an errand of business, when Milburn said to him (Stockton) to sell the cattle, as that price was as much as he expected to receive, and he was in haste to leave the city on the early train. Without complying with this request, Stockton stepped away for a few minutes on a matter of other business, and returned, when he found Milburn turning the cattle out of a pen in which they had been placed, to be taken to the scales and weighed, which was done.

"Thereupon Stockton gave a memorandum of the weight and price (\$3.25 per hundred pounds) to Milburn, who carried it to Mr. Gillespie in the office; a computation was made, showing that the cattle came to the sum of \$68.15. Gillespie asked Milburn (who was an entire stranger to him) what was his name, when he answered 'W. C. Smith,' and thereupon Gillespie made out the following check:

"No. 1372.

Indianapolis, Sept. 4th, 1890.

"MERIDIAN NATIONAL BANK.

"Pay to the order of W. C. Smith, sixty-eight dollars and fifteen cents (\$68.15).

"'STOCKTON, GILLESPIE & CO.'

"Neither of the members of said firm then had any knowledge, other than as given aforesaid by Milburn, as to what was his proper name. Milburn and his confederate at once left the office. Stockton was suspicious that the cattle had been stolen from the haste manifested in their sale, as above stated, and because an employé ³²⁵ and solicitor of the firm, who had met Milburn and his confederate when they drove the said stock into the yard, told him (Stockton) that Milburn had given to him (said solicitor) as his (Milburn's) name that of 'Davis.' And so he did not ship that day, the said two (2) steers, but kept them until about noon of the day following, to wit, September 5, 1890, when Mr. Ray came to the stockyards and identified the cattle as his own in the presence of Mr. Stockton.

"2. Early in the morning of the 4th of September, 1890, Milburn (who was an entire stranger to the officers of the Meridian

National Bank) presented said check unindorsed, at the said bank, to Mr. Woche, one of the tellers, for payment. Mr. Woche then informed him, as he was a stranger, that he must identify himself, which he said he could not do, as he was not acquainted in the city of Indianapolis. Thereupon it was suggested (but whether by Woche or Milburn, Mr. Woche, who was the only witness, was unable to recollect) that the check should be certified, and then it could be used at Franklin. At the defendant's bank he represented his name to be 'W. C. Smith.' Thereupon the bank aforesaid made a certificate on the face of the said check as follows:

"Certified. \$68.15. Meridian National Bank.

"WOCHER, Teller."

"And the said check was delivered back to Milburn.

"3. During the afternoon of said September 4, 1890, Milburn and some other person, during banking hours, went into the bank of the plaintiff at Shelbyville, Indiana, and presented the said check to the cashier of that bank and asked him to purchase it. The cashier did not know the person presenting it, nor the person with him. He was busily engaged in the business of the bank, and thought the face of the person with Milburn ^{was} familiar, but did not then know, nor did he know at the trial, the name of such person. Looking at the check, he saw that it was certified, but that it was not indorsed, but relying upon the certification, he thereupon asked the holder of the check to indorse it; he and the person with him turned about to a writing counter across the bankingroom, and soon returned with the check indorsed upon the back 'W. C. Smith,' and passed it to the cashier. And thereupon the cashier paid Milburn \$68.15, and in the evening mail inclosed the said check to the bankinghouse of S. A. Fletcher & Co., its Indianapolis correspondent, for collection.

"4. On the 5th of September, and before the presentation of the check to the Meridian Bank for payment, the drawers of the check, having learned that the cattle were stolen, countermanded the payment of the check, and the Meridian Bank, on the 6th of September, refused to pay the same when presented to it through the clearinghouse, through which it had passed on the 5th, and the check was returned to the plaintiff in the action below.

"6. At the time Mr. Woche certified the said check, he charged the same against the account of Stockton, Gillespie &

Co., who then, and for a long time prior thereto, kept their deposits in that bank and had a certified check account.

"8. Milburn had never been known in the community where he had lived by any other name than that of W. C. Milburn."

It seems to be well established that, as a general rule, the certification of a check in the hands of the payee, the body of which is unaltered, releases the drawer from further liability, and creates a direct liability from the bank to the payee, while, as between the bank and the drawer, it operates as a payment to that extent on his account, ³²⁷ and although, prior to its being certified, the check may be countermanded by the drawer, after its certification it has passed beyond his control, and he no longer has power to countermand its payment: Daniel on Negotiable Instruments, secs. 1601-1603; Morse on Banks and Banking, sec. 414; Van Schaack on Bank Checks, 91, 92.

Whether or not the liability of the certifying bank may, under certain circumstances, extend even further, we need not now determine.

It is said, in *Born v. First Nat. Bank*, 123 Ind. 78, 18 Am. St. Rep. 312: "That the drawer of a check is released if the holder, instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. If the holder elects to procure the certification of the check, it becomes, in his hands, substantially a certificate of deposit. By his own hand he makes the bank his debtor, . . . and releases the drawer of the check."

The principal question upon which the rights of the parties in this case depend is whether or not the indorsement of the check by Milburn, under the assumed name of Smith, and without identification, was such an indorsement as was effectual to pass to the appellee the title to the check. If it was, it will then be unnecessary for this court to determine a number of the propositions advanced by counsel on each side.

The position of counsel for the appellant may best be stated in their own language: "In other words, the Shelbyville Bank's contention is, that the acceptance of an unindorsed check implies three things: 1. That the signature of the maker is genuine; 2. That the maker has money to his credit which the bank will retain until the check is presented for payment; 3. That the holder is the payee, and is entitled to receive the money. ³²⁸ While the contention of the Meridian Bank is, that the certification of the check unindorsed does not waive, but is subject to

identification and legal indorsement: Daniel on Negotiable Instruments, sec. 1607 a. And that, as the check was given for stolen cattle, and was not made payable to the real person, William C. Milburn, but to no person, without its knowledge, and for a fraudulent purpose, the indorsement was invalid, and the same in law as if it had been passed over the counter of the Shelbyville Bank, unindorsed, in which case the transferee takes it subject to all equities and defenses."

Under the view which we have taken of this case, it is not required of appellee, in order to sustain the judgment of the court below, that it should maintain the proposition No. 3, as stated by appellant's counsel. Neither is it necessary that we should determine whether or not it would be permissible to the bank, on the ground of want of consideration or fraud as between the payee and the drawer, to defend against a check certified by it after it has passed into the hands of an innocent holder even though unindorsed.

It is settled law that the bona fide assignee, by indorsement, for value, takes such paper freed from any equities existing between the original parties: Daniel on Negotiable Instruments, secs. 1608-1652; Morse on Banks and Banking, sec. 419; Van Shaack on Bank Checks, 63-89.

Under the facts of this case, we think that the indorsement of the check by the man to whom it was actually issued, and by whom the drawer intended that the money should be received, was an effectual indorsement to pass to the Shelbyville Bank the title to the check, and the indorsement was not as to it invalidated by reason of the payee's acting under an assumed and fictitious name, when he was not really impersonating ³²⁹ any other individual. The check was intended for a person, not a name. Names possess neither personality nor existence. They but serve to identify individuals. The check was received by the identical person or individual to whom its drawer intended to deliver it, and was by that person indorsed in the name in which it was issued to him. Even the drawer did not have in mind as the payee any other or different individual whom he erroneously believed the person to whom he delivered the check to be.

That it is the identity of the person, and not of the name, which controls the right to the check, is shown by some of the cases cited by counsel—those of *Graves v. American etc. Bank*, 17 N. Y. 205, and *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85, where a check or draft was drawn and intended to be sent to one man, but, by some mistake, was received by another of the

same name, who transferred it, but his transfer was held to pass no right to the paper, even in the hands of an innocent holder, because, although the names were the same, the person for whom the paper was intended was different.

An action may be maintained upon an instrument, although executed to the party by a name other than his right one, if it was really intended to be executed to him: *Wooster v. Lyons*, 5 Blackf. 60; *Leaphardt v. Sloan*, 5 Blackf. 278; *Rhyan v. Dunningan*, 76 Ind. 178; *Hasselman v. Japanese etc. Co.*, 2 Ind. App. 180.

In support of their proposition that the indorsement of this check was a mere forgery and therefore invalid and ineffectual, counsel rely largely upon the case of *Armstrong v. National Bank*, 46 Ohio St. 512, 15 Am. St. Rep. 655, as affording, to use their own expression, "a full discussion of the point under consideration." There one Grimes fraudulently represented himself to be the agent of one ³³⁰ Brown, a fictitious person, and by false representations obtained from Armstrong a check payable to his supposed principal, Brown. Grimes indorsed the fictitious name "William Brown" on the check, and presented it to the bank, which paid it. It was held, giving to the case the construction most favorable to appellant, that the charge against Armstrong on account of the check should be canceled as a forgery regarding the indorsement.

There is between that case and this one in hand a marked distinction in this, that there Armstrong, the drawer of the check, did not intend to make the check payable to the man to whom she delivered it and who afterward indorsed it, but to another and a different person, whom she supposed to exist, although he really had no existence. There the drawer did not intend, by the name used as that of the payee, to designate the man to whom she delivered the check and who afterward negotiated it. There it was not intended by the drawer of the check that the person to whom she delivered it, and who negotiated it, should receive the proceeds of the check. Here it was plainly intended that the man to whom the drawers delivered the check should be the beneficiary of it.

The case of *Dodge v. National etc. Bank*, 30 Ohio St. 1, upon which the Armstrong case is largely founded, recognizing the principle by which we govern this case, says that the bank paying the check on the forged indorsement "had the right to show, if it could, that the person to whom the check was delivered was, in fact, the person whom the drawer intended to designate by the name of Frederic B. Dodge."

Counsel for appellant have cited no case which comes any nearer to the question in hand than the *Armstrong* ³³¹ case, nor have we been able to find any favorable to them.

Several general statements are taken from the text-books to the effect that to sign the name of a fictitious or nonexistent person is forgery, citing *Byles on Bills*, 333; *Daniel on Negotiable Instruments*, secs. 136, 1345; 1 *Bishop on Criminal Law*, 432; *Chitty on Bills*, 182 (*158).

We do not think that any of these statements are really intended to mean such a case as we have here. On the contrary, it is said in one of the sections of *Daniel* referred to (*Daniel on Negotiable Instruments*, sec. 136): "For this reason, bills and notes payable to fictitious payees are not tolerated, and will never be enforced, save when in the hands of a bona fide holder, who received them without knowledge of their true character."

At section 138, *Daniel* expressly states his view that an innocent holder is entitled to enforce the paper, although a fictitious indorsement may intervene.

In *Chitty on Bills*, 181 (*158), this language is used immediately preceding that relied upon by counsel: "Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as drawer, and therefore a bona fide indorsee may bring evidence to show that the signatures of the supposed drawer to the bill and to the first indorsement are in the same handwriting."

An examination of the cases cited in support of the text where these statements relied on by counsel are made will show that none of them are of the same character as this. In the main, they are cases where the paper was the creation of the party assuming the fictitious name and was then by him indorsed to others, where quite a different rule might well govern from this, in which the paper set afloat is the creation of another by whom it was intended ³³² to accomplish the very results which it did produce, that is, to pay so much money to the man to whom the check was delivered.

It may also be noticed that the cases supporting these text-book citations are mostly old English cases found in *Russell & Ryan's Criminal Cases*, and *Leach's Criminal Cases*, and they do not seem to be followed, to the extent of counsel's application at least, by even the English courts.

In *Regina v. Martin*, 21 Alb. L. J. 91, Cockburn, C. J., quotes with approval from *Dunn's case*, 1 Leach C. C. 68, "that if a

person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being given to himself without any regard to the name or without any relation to a third person."

In *Commonwealth v. Baldwin*, 11 Gray, 197, 71 Am. Dec. 703, it is held that signing a promissory note in the name of a fictitious firm, of which the writer claimed to be a member, was not forgery.

Whether, however, the offense of Milburn in this transaction be termed a technical forgery or not, both sound reasoning, as it appears to us, and the authorities recognize the right of the Shelbyville bank to enforce its title to this check through this indorsement in controversy.

In *Phillips v. Im Thurn*, 114 Eng. Com. L. 694, 18 Com. B., N. S., 694, in an action by the indorsee of a bill against the acceptor, it was held that the acceptor could not defend on the ground that the bill was payable to, and indorsed by, a fictitious payee, of which fact the acceptor had no knowledge.

It was urged there, as here, that the indorsement was a fiction and a nullity, and therefore could not convey title.

Merchants' Loan etc. Co. v. Bank etc., 7 Daly, 137, resembles this case in many of its details. One Stearns, ³³³ representing himself to be F. W. Frothingham, bought a piano of the Steinways, gave in payment a raised check payable to F. W. Frothingham, and received back for the balance of the check above the purchase price Steinway's check payable to himself by this assumed name of Frothingham. This check he procured to be certified, payment being refused for want of identification, and then transferred it to the Merchants' Bank for value. The court held the indorsee obtained a valid title to the check and could enforce it.

The supreme court of Massachusetts, while recognizing the general rule that a forgery may be committed by the use of a fictitious name (*Commonwealth v. Costello*, 120 Mass. 358), recognizes, also, the principle that an indorsement in an assumed name may be effectual to convey title to the check: *Robertson v. Coleman*, 141 Mass. 231; 55 Am. Rep. 471.

In that case a man stole a team, sold it, and received in payment a check payable to Charles Barney, his assumed, but not his real, name. This check he indorsed to an innocent holder, without any real identification. Payment was refused, and the holder brought suit against the drawer. The court says: "The name of a person is the verbal designation by which he is known,

but the visible presence of the person affords surer means of identifying him than his name. The defendants, for a valuable consideration, gave the check to a person who said his name was Charles Barney, . . . and they made it payable to the order of Charles Barney, intending thereby the person to whom they gave the check," etc.

The court further says, it is clear that "the person they dealt with was the person intended by them as the payee of the check, designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check by that name."

³³⁴ This case is approved and followed in *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 57 Am. Rep. 171, the court saying: "So, in this case, Shotwell, for the notes and mortgages received by him, sent the draft to a person who said his name was Daniel Guernsey, and whose name Shotwell believed to be Daniel Guernsey, . . . intending thereby the person to whom he sent the draft. The National Bank of Emporia received this draft for a valuable consideration, in good faith, from the same person whom the bank believed to be Daniel Guernsey, and who indorsed the draft by that name. . . . Shotwell and Lobdell dealt with the false Daniel Guernsey as though he were the real Daniel Guernsey. Such person, it is true, obtained the draft from Shotwell by fraudulent letters and representations, but the national bank is not responsible for the letters and representations of the false Daniel Guernsey. . . . The National Bank of Emporia paid the draft to the person to whom it was sent by Shotwell, and such person received the money from the bank thereon."

These cases go farther than it is necessary for us to go in this case.

In *Bolles on Banks*, section 233, the rule is thus laid down: "A bank is also liable to the bona fide holder of a certified check, though obtained from the drawer by fraud and drawn to the order of a fictitious person, if indorsed to the holder by the person to whom the drawer intended that payment should be made."

The principle which governs in this case is approved in *Metzger v. Franklin Bank*, 119 Ind. 359.

In that case, one Lord owned certain land. Hornaday, falsely pretending to be Lord, opened communication with Metzger and offered to sell him the land. Metzger, believing he was Lord, prepared a deed and caused it to be sent to the Franklin Bank,

with instructions to have it signed by Lord and pay the purchase price. The deed ³³⁵ was executed by the false Lord, returned to Metzger, who accepted it, supposing it to be genuine, and reported back to the bank that it was all right, and the bank paid Hornaday the money. The fraud was afterward discovered by Metzger. The court says: "But did not the appellee transact the business intrusted to it in accordance with the instructions received, and pay the money to the person that the appellant intended should receive it? We are of the opinion that it did."

As is held in *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 57 Am. Rep. 171, we do not deem the failure of the Shelbyville Bank to require identification to be an important factor in this case, for the reason that the money was undoubtedly paid by it to the identical man designated as the payee by the drawer. There being no mistake as to the identity, in fact, it is immaterial whether the identity was properly shown to the bank or not.

Our conclusion then, from all the cases, is that the loss on this check should fall on the bank which certified it, and through it upon its drawers who first set it afloat. As they dealt with the payee of the check as Smith, and had no intention, when executing the check, of delivering it to any person other than the man who actually received it, the Shelbyville Bank was justified in accepting his indorsement, and can hold the certifier of the check for it.

The judgment of the superior court, in general term, is affirmed, with costs.

ON PETITION FOR A REHEARING.

GAVIN, C. J. Counsel for appellant have filed quite an earnest petition for rehearing, in which they assail the proposition of the original opinion that the appellee, if a bona fide assignee by indorsement for value, took the ³³⁶ certified check freed from any equities existing between the original parties. They assert the opinion to be in direct conflict with the case of *Parke v. Roser*, 67 Ind. 500; 33 Am. Rep. 102.

We have examined the case carefully, as we did in the former hearing, and are unable to see the slightest conflict between the holding in this case and the decision in that. There no such question as here presented was under consideration. That case simply holds that the certifying bank does not guarantee the genuineness of the body of the check, following *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305.

This was the only question before that court for its determina-

tion. A careful re-examination of the brief of counsel for appellants shows that they themselves did not controvert their liability, if the appellee was a bona fide holder for value and by indorsement. Their claim was, that there was no legal and valid indorsement, and that therefore the check was subject to equities, relying upon *Freund v. Importers' etc. Bank*, 76 N. Y. 352, and kindred cases.

To show their position upon this subject, we quote from their brief, somewhat in addition to what was set out in the original opinion: "It follows, therefore, that Stockton, Gillespie & Co. could countermand payment at any time of this check, so long as it remained out in the hands of the thief, or any other person taking it with notice. Or to put the proposition from the other side, until the check comes in due course of business to the hands of a bona fide holder for value without notice, neither the maker or the banker can be compelled to pay a check given for stolen cattle, or otherwise invalid."

In support of their claim, appellants quoted also the ³³⁷ following from the case of *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 16 Am. St. Rep. 765.

"It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft or check who obtains title without an indorsement by the payee holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses": Citing very many cases. "The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is, that no one can transfer a better title than he possesses. An exception arises out of the rule of the law merchant as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defenses which would have rendered them unavailable in the hands of a prior holder. . . . The bank did certify that it had the money, would retain it, and apply it in payment, provided the check should be indorsed by the payee. . . . If the check had been transferred to plaintiffs by indorsement, the defendant would have had no defense, not because of

the doctrine of estoppel, but upon principles especially applicable to negotiable instruments."

Our own supreme court, in the case of *Born v. First Nat. Bank*, 123 Ind. 78, 18 Am. St. Rep. 312, referred to in the original opinion, expressly says that the certifying bank becomes bound for the payment of the check it certifies, there being in that case no question involved as to the genuineness ³³⁸ of the check in all its parts. This shows, as in fact do all the cases, that the literal interpretation given by counsel to some of the argumentative language used in the case of *Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102, is not justified.

The decision in the original opinion was intended to be, and we still think was, kept strictly within the facts of this particular case, going no further than was required in order to dispose of the merits of the cause.

After careful consideration, we are still satisfied that the proposition announced, of which complaint is made, is in harmony with the authorities cited and the many cases upon which they are founded.

The petition for rehearing is, therefore, overruled.

BANKS—CERTIFICATION OF CHECK AT REQUEST OF HOLDER—EFFECT.—If the holder of a check causes it to be certified by the drawee the drawer is discharged: *Anderson v. Gill*, 79 Md. 312; 47 Am. St. Rep. 402; *Minot v. Russ*, 156 Mass. 458; 32 Am. St. Rep. 472, and note. See, also, the extended note to *Bickford v. First Nat. Bank*, 89 Am. Dec. 443.

FIRST NATIONAL BANK v. BREMER.

[7 INDIANA APPEALS, 685.]

BANKS AND BANKING—STOLEN CERTIFICATES OF DEPOSIT—RIGHTS OF DEPOSITORS.—A bank is not authorized, as against a customer and depositor, to pay the money due such depositor or creditor on certificates of deposit duly issued by it, which have been stolen and bear the forged indorsement of the payee when he is not guilty of negligence and has notified such bank of the theft, and it pays in reliance solely on the indorsement of other banks that have prior thereto accepted and paid the certificates. The debt owing the payee of such certificates is not discharged by such payment, and the bank of deposit is still liable therefor.

J. and N. P. Claybaugh, for the appellant.

S. O. Bayless, C. G. Guenther, B. Clark, and F. A. Joss, for the appellee.

688 DAVIS, J. This action was brought in the court below by appellee against appellant, to recover judgment on three certificates of deposit, issued by appellant to the appellee, the first, dated July 8, 1888, for one hundred and fifty dollars, the second, dated September 4, 1889, for fifty dollars, and the third, dated May 18, 1889, for sixty dollars.

The complaint contains three paragraphs, each certificate of deposit forming the foundation for the separate paragraphs. The facts set out in each paragraph are substantially the same, stating that appellee deposited with appellant, a duly and legally incorporated bank, the respective sums of money above set out; that on the tenth day of July, 1890, the certificates were, without fault of appellee, stolen, and his name forged by way of indorsement on each of said certificates, by some one to him **689** unknown, and without his knowledge, authority, or consent; that immediately after he ascertained that said certificates had been stolen from him, the appellant was notified by the appellee, by telegraph, that the said certificates had been stolen from him, and requested appellant not to pay the same; that said appellant, without the authority or consent of the appellee, paid the amounts evidenced by said several certificates on said forged indorsements, after said certificates, in the course of banking business, had passed through the Wayne County Savings Bank of Detroit, Michigan, and the First National Bank of Detroit, and that said certificates had never been indorsed by appellee, and that no part of the same had ever been received by or paid to him, and that appellee, before suit, had demanded payment of said several amounts of appellant, and had been refused payment.

The only errors relied on are that the court erred in overruling demurrer to each paragraph of the complaint.

The objections to the complaint, as we understand counsel for appellant, may be summarized as follows: 1. That the complaint does not state that the appellee notified the appellant, or that the appellant had notice from any other source, of the fact that the certificates had been stolen before the payment of the certificates by the appellant. Further, that the complaint does not state the date of the notice to the appellant of the fact that the certificates had been stolen, nor how long it was after the certificates had been stolen that the appellee notified the appellant of the fact; 2. That on the facts stated, the appellant is not liable, for the reason that, as a matter of law, it had the right to rely upon the indorsement of the bank who first cashed the certificates, and the subsequent indorsements of the **687** other

banks, through which the certificates passed, that the signature thereon was genuine; 3. That this action should have been brought against the bank that first cashed the certificates on the forged indorsement, and not against appellant; 4. That the complaint does not show due diligence on the part of the appellee in making demand for payment of the certificates after he became cognizant of the fact that they had been stolen from him.

On careful examination and mature consideration, we have reached the conclusion that each paragraph of the complaint states facts sufficient to constitute a cause of action.

The appellee was a creditor of the appellant bank. The appellant was, under the contract, required to pay to him, or to his order, the several amounts specified, on the surrender of the certificates. On the facts pleaded, and which the demurrer admits to be true, appellee was not in any respect in fault. He was in no manner responsible for the action of appellant in paying the amounts evidenced by the certificates on the forged indorsement to some other bank or person. The loss of the certificates was occasioned by no act of negligence on his part. Immediately, on the discovery of the theft, he gave appellant notice, in the speediest possible manner, of the fact. He did nothing, so far as appears, that he ought not to have done, and he did not fail to do anything that he ought to have done. In making the payments on such forged indorsements, appellant parted with its own money, and not with appellee's money, and the loss thereon was its own, and should not be transferred to appellee, under the circumstances.

If it appeared reasonably probable that but for some negligence on the part of appellee, the appellant could have in some manner protected itself, a different question ^{ess} would be presented. It seems to us clear, on the plainest principles of justice, that, in the absence of any negligence on the part of appellee, the appellant has not, in fact, discharged its indebtedness to him. As we have stated, the appellant was indebted to appellee. The other banks owed him nothing. He does not seem to have had any dealings with either of them. His transactions were with appellant. The appellant was his debtor to the amount of the several deposits. The appellant could not rightfully debit his account with any payments made to other banks or persons, except such as were made by his order or direction. It is true these amounts were not ordinary deposits subject to check, but, so far as the questions involved in this appeal are concerned, there is no difference between the cases: *Janin v. London* etc.

Bank, 92 Cal. 14; 27 Am. St. Rep. 82; 3 Am. & Eng. Ency. of Law, 222.

If the certificates in question had originated, not with the appellant, but had come to the appellant for the first time for its acceptance, and the appellee stood in the position, not of the original payee of the certificates, but the payee, holder, or presenter of a forged paper, and, prior to the payment thereof by the bank, had been guilty of negligence contributing to induce such payment, then, under such circumstances, the rule enunciated in the authorities cited by counsel for appellant could properly be invoked. But here the appellee was not guilty of any negligence contributing to induce the appellant to pay on a forged indorsement. He in no manner, either by active or tacit consent, permitted the papers to leave his possession, or to receive the indorsement of the banks, which the appellant insists it had the right to rely upon. In other words, the relation of the parties and the obligation of appellant to appellee could not be changed ~~ess~~ without some affirmative act or negligent conduct of the appellee.

The appellant has been imposed upon. It paid the certificates of deposit, in the usual course of banking business, in doing which the bank no doubt acted in good faith, in the honest belief that appellee had indorsed the certificates. But how can this act, on the part of appellant, affect the rights of appellee under the circumstances stated in the complaint?

As we have before stated, the contention that such payment should be charged against the deposit account of appellee, is not sustained either by reason or authority. It may be conceded to be true that this is, as insisted by counsel for appellant; an important question affecting every bank doing business, but a bank is not authorized, as against a customer and depositor, to pay the money due such depositor or creditor on certificates of deposit duly issued by it, which have been stolen or bear the forged indorsement of the payee, in reliance solely on the indorsements of other banks that have prior thereto accepted and paid the certificates. What the rights may be as between the respective banks and indorsee in such cases we are not required to consider and determine. It is sufficient to say that the debt owing the payee of the certificates has not been discharged by such payments.

Judgment affirmed, at costs of appellant.

A BANK PAYING A CHECK ON A FORGED INDORSEMENT of the names of the payees is answerable to them for the amount thereof: *Jackson v. Bank*, 92 Tenn. 154; 36 Am. St. Rep. 81, and note.

See, also, the extended note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889.

LAKE ERIE & WESTERN RAILROAD CO. v. GRIFFIN.

[8 INDIANA APPEALS, 47.]

CORPORATIONS—PLEADING EXISTENCE OF.—If an action is brought against a defendant in a name implying a corporation the complaint need not expressly allege that the defendant is a corporation.

RAILROADS—SETTING FIRES—PLEADING NEGLIGENCE.—In an action against a railroad company to recover damages for allowing fire to escape from its right of way, a complaint is sufficient which alleges that the plaintiff was without negligence, and charges in general terms that defendant was guilty of negligence, without alleging the specific acts constituting the negligence.

RAILROADS—SETTING FIRES—INSURANCE AS DEFENSE.—If by the actionable negligence of a railroad company, fire escapes from its right of way to adjoining property which is thereby consumed, the owner can recover his entire loss from the company without regard to the amount of insurance he may have been paid thereon.

W. E. Hackedorn, T. L. Merrick, and I. H. Phares, for the appellant.

D. Fraser and W. H. Isham, for the appellee.

⁴⁸ DAVIS, J. This action was brought by appellee against appellant, to recover damages occasioned by the negligent acts of appellant's agents and employes in setting fire upon its track and right of way, and negligently allowing said fire to escape to appellee's premises, destroying his meadow, hay, and corn.

Appellant answered by general denial, and also by setoff on account of money paid to appellee by an insurance company. A trial by the court resulted in judgment for appellee.

The errors assigned are: 1. That the court erred in overruling appellant's demurrer to the complaint; 2. That the court erred in sustaining appellee's demurrer to the second paragraph of appellant's answer; 3. That the court erred in overruling appellant's motion for a new trial.

The first objection urged to the complaint is, that it fails to charge "that appellant was a railroad corporation owning and operating its railroad at the time the fire was set out." It is alleged in the complaint "that ⁴⁹ the defendant is a railroad corporation doing business in the state of Indiana, and owning and operating a railroad through Benton county, and in and through plaintiff's lands adjacent thereto; that on the twentieth day of December, 1890, the defendant company, in the operation of its trains and locomotives, carelessly and negligently set fire," etc.

The complaint in this respect is sufficient. The objection thereto is not tenable. The averments in relation to the corporate nature of appellant are stronger than necessary. The rule is, that where an action is brought against a defendant in a name implying a corporation, the complaint need not expressly allege that the defendant is a corporation: *Adams Exp. Co. v. Hill*, 43 Ind. 157; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527.

The next objection is, that it does not sufficiently aver that appellant negligently suffered or caused the fire to escape from its right of way to appellee's premises. The allegation on this point is, "that said fire also, by the carelessness and negligence of defendant, was allowed to, and did, spread from defendant's right of way to the plaintiff's meadow, and burned," etc. A complaint is sufficient, in such case, to withstand a demurrer, where it charges negligence in general terms without alleging the specific acts constituting the negligence: *Ohio etc. Ry. Co. v. Craycraft*, 5 Ind. App. 335.

The further objection is made that the complaint fails to aver that the loss resulted without the negligence of the plaintiff. The general allegation is made that the plaintiff was "without any fault, blame, or negligence." This was sufficient: *Chicago etc. R. R. Co. v. Barnes*, 2 Ind. App. 213.

It is next insisted that the court erred in sustaining appellee's demurrer to the second paragraph of answer. ⁵⁰ The rule is well settled that where, by the actionable negligence of a railroad company, fire escapes from its right of way to adjoining property, which is thereby consumed, the owner of such property can recover his entire loss from such company without regard to the amount of insurance he may have been paid thereon: *Cunningham v. Evansville etc. R. R. Co.*, 102 Ind. 478; 52 Am. Rep. 683.

The answer was not good, either as a setoff or defense in bar or mitigation.

The only remaining error that has been discussed by counsel is, that the damages assessed are excessive, "in view of the fact that appellee has already received one hundred and fifty dollars from the insurance company for the same loss." On the authority cited *supra*, we are constrained to hold against appellant on this question.

There is no error in the record.

Judgment affirmed, at costs of appellant.

PLEADING CORPORATE EXISTENCE.—A corporation may sue or be sued in its corporate name without averring the act of incor-

poration: *Exchange Nat. Bank v. Capp*, 32 Neb. 242; 29 Am. St. Rep. 433, and note. A complaint against a corporation must aver the fact of incorporation, or show that it is an artificial being capable of being sued, notwithstanding a statute making it unnecessary to prove its existence, unless the defendant avers in his answer that the plaintiff is not a corporation: *State v. Chicago etc. Ry. Co.*, 4 S. Dak. 261; 46 Am. St. Rep. 783. In an action against a private corporation, it is necessary to allege its corporate character. The words "a corporation," following the name of the defendant in the caption of the complaint, do not dispense with the necessity of averring corporate existence: *Miller v. Pine Min. Co.*, 2 Idaho, 1206; 35 Am. St. Rep. 289, and especially note.

NEGLIGENCE—SETTING OUT FIRE—PLEADING.—In an action against a railway company for setting fire to combustible materials upon its right of way, and permitting such fire to escape to the land of another, to the damage of such other, it is not necessary that the complaint should allege that the fire was negligently started by the company: *Lake Erie etc. R. R. Co. v. Clark*, 7 Ind. App. 155; ante, p. 442.

DAMAGES BY FIRE—SETOFF OF INSURANCE.—Where buildings are burned through the negligence of another, the owner's recovery is not subject to diminution on account of the insurance thereon: *Cunningham v. Evansville etc. R. R. Co.*, 162 Ind. 478; 52 Am. Rep. 683.

SMITH v. DOWNEY.

[8 INDIANA APPEALS, 179.]

CORPORATIONS, FOREIGN—ATTACHMENT OF STOCK OF.—Shares of stock in a foreign corporation created and existing by the laws of another state, and belonging to a nonresident, cannot be attached or garnished in an action in Indiana, although the certificate of stock is held in trust in the latter state.

JUDGMENTS—RES JUDICATA.—A judgment by default rendered in attachment proceedings is not *res judicata* as to a defendant, who, though represented by counsel, filed no answer and made no defense.

REPLEVIN—CERTIFICATE OF STOCK.—IT IS NO DEFENSE to an action of replevin to recover a certificate of stock in a foreign corporation that defendant acquired it in garnishment proceedings in which, although plaintiff in replevin appeared, no issue was joined, and judgment was rendered by default.

A. C. Harris and L. A. Cox, for the appellant.

S. M. Shepard, A. C. Ayres, and A. Q. Jones, for the appellees.

¹⁷⁹ DAVIS, J. In the court below, in an action of replevin, appellees recovered judgment against appellant for the possession of "a certain certificate of stock issued by the Snow-Storm Mining and Milling Company, of Durango, Colorado, an incorporated company existing in and created under the laws of the state of

Colorado, and doing business therein, the said certificate consisting of one hundred and ten thousand shares of said stock."

The principal question presented for our consideration ¹⁸⁰ on this appeal arises on the ruling of the court below in sustaining a demurrer to appellant's answer.

The material facts alleged in the answer are, that appellant, in 1887, instituted an action in the Marion superior court, against James E. Downey, to recover damages for breach of covenants in a deed of warranty for conveyance of real estate; that said Downey was a nonresident of the state, and due notice was given him of the pendency of the action by publication as required by statute; that an affidavit in attachment against Downey, and an affidavit in garnishment against Theodore P. Haughey, a citizen of Marion county, Indiana, were duly filed, alleging that Haughey had in his possession, and under his agency and control, property credits and effects of said James E. Downey which could not be reached by a writ of execution, and that proper writs of attachment and garnishment were issued, and said Haughey was duly served as such garnishee defendant, and that said corporation was also duly served with a writ of garnishment issued on proper affidavit, charging that said company held property rights and credits of said James E. Downey which could not be reached by execution; that said Haughey afterward appeared and filed his answer in said cause, admitting that he had in his possession, at the time of said service, the said property of said Downey, hereinbefore described.

It is also alleged in said answer that said corporation had its office and place of business, and its books and papers, in Indianapolis, in said county, and that its officers and directors were citizens of, and resided in, said county of Marion; that on failure of said James E. Downey and said company to answer, they were each duly called in open court, and made default, and that the cause, being at issue as to Haughey, was submitted to the court for trial, on the fifth day of June, 1888, on said ¹⁸¹ answer of Haughey, and the default of the other defendants, and resulted in judgment in favor of appellant against James E. Downey for five thousand nine hundred and fifty dollars, also sustaining the attachment proceedings and ordering the sale of the shares of stock evidenced by said certificate.

It is also averred in said answer, in general terms, that said James E. Downey "at one time, by counsel, appeared in said suit," but when, how, or for what purpose he so appeared is not stated, and, also, it is in like manner alleged that appellees were

represented in said suit by counsel, who defended said suit as to the attachment and garnishment proceedings, for the purpose of protecting said certificates and stock from being held by said attachment proceedings as the property of James E. Downey, but when, how or through what issue such defense was made or attempted, is not stated.

The answer of Haughey was an admission that he held the certificates of stock now in controversy as the property of James E. Downey, and the other defendants made default.

It is earnestly insisted by counsel for appellant that this answer is good as a plea of *res adjudicata*.

In the first place, notwithstanding the unsatisfactory character of the averments in relation to the connection of appellees with the former suit, and the apparent inconsistencies between such averments, and the other facts which appear in the answer, it might be conceded, if it appeared that any answer had been filed or defense made by, or in the name of, James E. Downey, that appellees would be bound by the result as fully as said Downey might be: *Roby v. Eggers*, 130 Ind. 415.

Yet the difficulty remains, so far as shown in the answer, that no defense was made or attempted by, or in the name of, Downey or any other defendant to the action.

¹⁸² The doctrine of *res judicata*, as to persons who are not parties to the record, can only arise by virtue of some issue joined or contest made in the name of another, and it logically follows that, when there is no such issue joined, there can be no former adjudication. For the same reason, the answer cannot be sustained on the theory that it shows there is a prior action pending between the same parties. The appellees cannot be regarded, under the facts stated therein, as attachment defendants under section 1266 of the Revised Statutes of 1881.

If appellees had been joined as defendants in the former action, or if they had appeared therein by counsel to sustain or contest any issue joined between the parties, a different question would be presented. The facts disclosed in the answer, however, clearly show there was no such issue tendered or contest made.

The statement that James E. Downey "also, at one time, by counsel appeared in said suit," should not be construed as an averment that he appeared to the attachment and garnishment proceedings, but, if such construction was given, it could not, in any event, be so extended as to hold that an answer had been filed or issue joined by him as to the attachment proceedings. For aught that is shown, he may have appeared on the occasion referred to

for the purpose of ascertaining the amount of the claim, or in order to be heard, notwithstanding the default, on the question of the measure of damages.

The general allegations that appellees "in said suit were represented by counsel," and that such counsel "defended said suit as to the attachment and garnishment proceedings for and on behalf of the plaintiffs (appellees) in this action, and with their knowledge and by their authority, for the purpose of protecting the said certificate and stock from being held by said attachment ¹⁸³ proceedings as the property of said James E. Downey," and "because their interests were represented, and the litigation controlled, by them for the purpose aforesaid," cannot overcome the affirmative showing that no issue was joined as to the attachment proceedings, and that no answer was filed therein (except the admission of Haughey, as garnishee defendant, that he held the certificate of stock for, and as the property of, James E. Downey), and that there was no defense or contest in the case, and that there was no appearance to attachment and garnishment proceedings, except by Haughey, and that judgment was rendered, as to other defendants, by default.

If issue had been joined or defense made, either by or in the name of Downey, the question would arise whether such appearance, defense, and judgment would constitute a former adjudication, in the event it should be determined that the court had no jurisdiction over the thing in controversy: Brown on Jurisdiction, sec. 10.

The vital question is, Can the stock of a nonresident in a foreign corporation created and existing by virtue of the laws of another state, be garnished in an action in a court in this state, when the certificate of stock is held here in trust?

On investigation, we find that the great weight of authority is against the proposition.

Mr. Cook, in his excellent work, says: "Shares of stock in a corporation are personal property, whose location is in the state where the corporation is created. It is true that, for the purpose of taxation and some other similar purposes, stock follows the domicile of its owner; but, considered as property separated from its owner, stock is in existence only in the state of the corporation. All attachment statutes provide for the attachment of a nonresident debtor's property in the state, and generally, ¹⁸⁴ under such statutes, the stock owned by a nonresident in a corporation created by the state wherein the suit is brought may be attached, and jurisdiction be thereby acquired to the extent of

the value of the stock attached. But under no circumstances can an attachment be levied on a defendant's shares of stock in an action commenced outside of the state wherein the corporation is incorporated. For purposes of attachment, stock is located where the corporation is incorporated, and nowhere else. The shares owned by a nonresident defendant in the stock of a foreign corporation cannot be reached and levied upon by virtue of an attachment, although officers of the corporation are within the state engaged in carrying on the corporate business. Nor can such an attachment be levied, although the foreign corporation has a branch registry office in the state where the attachment is levied, and although the certificates of stock are also in such state. Certificates of stock are not the stock itself—they are but evidence of the stock; and the stock itself cannot be attached by a levy of the attachment on the certificate. As was well said by the supreme court of Pennsylvania, stock cannot be attached by attaching the certificate, any more than lands situated in another state can be attached by an attachment in Pennsylvania levied on title deeds to such land": Cook on Stocks and Stockholders, 2d ed., sec. 485. See, also, *Plimpton v. Bigelow*, 93 N. Y. 592; *Christmas v. Biddle*, 13 Pa. St. 223; *Winslow v. Fletcher*, 53 Conn. 390; 55 Am. Rep. 122; *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12; 35 Am. St. Rep. 691; *Freeman on Judgments*, sec. 607a; *Drake on Attachment*, sec. 474; *Waples on Attachment*, sec. 245.

It is not necessary in this case to enter upon the discussion of the question as to the power of the legislature to authorize the seizure and sale under judicial process ¹⁸⁵ of certificates of stock in foreign corporations that maintain agents and officers, keep the books, and conduct business in this state.

Sections 913, 1285, 3022, 3023, and 5501 of the Revised Statutes of 1881 do not, in any respect, authorize such proceeding. Section 3023, which provides that agents of foreign corporations, before entering upon the duties of their agency in the state, shall deposit in the clerk's office of the county the power of attorney or authority under or by virtue of which they act as agents, authorizes actions against such corporations in the courts of this state on claims or demands "arising out of any transaction in this state with such agents."

This controversy did not arise out of any transaction with any agent of the corporation.

In Missouri the statute provides that shares of stock in any corporation may be attached in the same manner as the same

may be levied upon under execution, but it was held that such provisions applied to domestic corporations alone: *Armour etc. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12; 35 Am. St. Rep. 691.

Section 723 of the Revised Statutes of 1881 authorizes the levy of an execution on shares of stock, and section 931 provides the manner in which shares of stock in a corporation may be reached through process against the corporation as a garnishee defendant. Such authority, however, under the authorities cited, does not extend to shares of stock in a foreign corporation, although such corporation may have a branch of its principal office in this state where its books and records are kept, the meetings of its directors held, and its principal business transacted: *Plimpton v. Bigelow*, 93 N. Y. 592.

In the case of *Young v. South etc. Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, the principles enunciated in the authorities cited are recognized as correct statements of the law, but it was held that under the policy and legislation in that state, and ¹⁸⁸ the acts of the corporation in question, the situs and status of said corporation was that of a domestic corporation.

In conclusion, we repeat that James E. Downey was a non-resident of the state. The only process against him was by publication. No answer was filed or defense made by him or in his name. The shares of stock which it was sought to attach were issued by a foreign corporation. In the language of Judge Andrews: "It seems impossible to regard the stock of a corporation as being present for the purpose of judicial proceedings, except at one of two places, viz., the place of residence of the owner, or the place of residence of the corporation": *Plimpton v. Bigelow*, 93 N. Y. 592.

Therefore, in view of our opinion that appellees, under the facts disclosed in the answer, stand in the position of strangers to the proceedings in the former action, and that the stock in a foreign corporation, under the authorities, is not subject to attachment in this state, it is not necessary to further consider the other questions of minor importance presented by the record.

Judgment affirmed.

ON PETITION FOR REHEARING.

DAVIS, J. The learned counsel for appellant have filed an able and earnest petition for a rehearing in this case. We concur in much that has been urged upon our consideration by counsel, but the great difficulty in this case is, that on the facts shown in the answer, and to which we have called special atten-

tion in the original opinion, there was no issue joined or defense made to the attachment proceedings either by or in the name of James E. Downey.

The averments, "And defendant further shows that ¹⁸⁷ although the plaintiffs herein, Mrs. Downey and Mrs. Brouse, were not parties of record to said suit and proceeding, yet they, in said suit were represented by counsel, which counsel in said action in said superior court, defended said suit as to the attachment and garnishment proceedings for and on behalf of the plaintiffs in this action, and with their knowledge and by their authority, for the purpose of protecting the said certificate of stock from being held by said attachment proceeding as the property of said James E. Downey, and, by such action, sought to defeat the garnishment and suit in order to prevent the same (said stock) being taken under said attachment, and to keep and hold the said certificate and stock from under said garnishment proceedings," and further, "Their interests were represented and the litigation was controlled by them for the purpose aforesaid, and to, and did, contest said claim of plaintiff in said cases," must be considered and construed in the light of the facts disclosed in said answer in substance and to the effect that no answer was filed or defense made by or in behalf of said James E. Downey, defendant of record therein, but that judgment was rendered as to said attachment proceedings, on default.

Notwithstanding the fact that appellees herein were not parties to said attachment proceedings, yet if they had defended that suit in the name of another to protect their rights, they would have been as much bound by the result of that suit as they would be if they were parties of record: *Roby v. Eggers*, 130 Ind. 415.

But the trouble is, as before stated, that no such issue was joined or defense made by or in the name of any person who was a defendant therein.

The rule, as we understand it, as to persons who are not parties of record, is correctly stated by Judge Vanfleet, as follows: "On the contrary, the doctrine of ¹⁸⁸ *res judicata* cannot arise except by virtue of some issue joined and actually contested on the trial": *Vanfleet's Collateral Attack*, sec. 17.

It is clear, from the allegations contained in the answer, that no such issue was joined and actually contested on the trial of the attachment proceedings.

The infirmity in the answer is not the result of any oversight or lack of skill on the part of the pleader. It is apparent, from

the facts stated, that no amendment or revision of the answer could have brought it within the rule enunciated in *Roby v. Eggers*, 130 Ind. 415.

Whether, if they had been parties to the attachment proceedings, the rule stated in *Markel v. Evans*, 47 Ind 326 (330), would have applied, it is not necessary to decide; but no reason occurs to the writer, at this time, why it could not have been invoked against appellees in this case, under such circumstances.

The petition for rehearing is accordingly overruled.

ATTACHMENT OF STOCK OF FOREIGN CORPORATIONS.—Shares of stock in a corporation are subject to attachment or garnishment only in the state creating the corporation. Corporate stock cannot be attached or subjected to a garnishment process unless authorized by express statute, and when the statute allows it, the authority only extends to corporations existing in the state, and not to stock of those outside the state. Hence it is a well-settled rule that stock of a nonresident in a corporation organized under the laws of one state cannot be attached in another state, the stock not being actually or constructively there, though its business is being carried on there, and its officers are there, and even if the stock of a corporation can, under any circumstances, be reached by garnishment, it cannot where it is the stock of a foreign corporation, owned by a nonresident and is not present in the state: *Plimpton v. Bigelow*, 93 N. Y. 592; *Christmas v. Biddle*, 13 Pa. St. 222; *Ireland v. Globe Milling etc. Co.*, 19 R. I. 000 (opinion rendered by supreme court Sept. 19, 1895); *Moore v. Gennett*, 2 Tenn. Ch. 375; *Reid Ice Cream Co. v. Stephens*, 62 Ill. App. 834. Shares of stock in a corporation created under the laws of one state cannot be subjected to attachment or garnishment by the simple seizure of a certificate of such stock in another state: *Armour etc. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12; 35 Am. St. Rep. 691; *Winslow v. Fletcher*, 53 Conn. 300; 55 Am. Rep. 691. In the case of *Plimpton v. Bigelow*, 93 N. Y. 597, the court said: "We now come more directly to the inquiry upon which the case now under review depends, viz., whether shares of a nonresident defendant in the stock of a foreign corporation, can be deemed to be within this state by reason of the fact that the president or other officers of the corporation are here engaged in carrying on the corporate business. We do not overlook the fact that we are construing a section of the code, the language of which is sufficiently general to include foreign corporations, but they are not expressly named, and for the purpose of determining whether foreign corporations were intended to be included it is a relevant inquiry whether, upon general principles, the right which a stockholder in a corporation has by reason of his ownership of shares is a debt or duty of the corporation, existing in a foreign jurisdiction wherever the offices of the corporation may be found engaged in the prosecution of the corporate business. If the corporation, by having its officers and transacting business in a state other than its domicile of origin, is deemed to be itself present as an entity in such foreign state, to the same extent and in the same sense as it is present in the state which created it, it may be conceded that its shares might be properly attached in such foreign jurisdiction. But we regard the principle to be too firmly settled by repeated adjudications of the federal and state courts to admit of further controversy, that a corporation has

its domicile and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction." In speaking of this subject further, the court said, in reference to domestic corporations, that "such corporations are completely subject to the jurisdiction of our courts, and may be compelled to recognize a title to corporate shares derived under proceedings by attachment. In respect to foreign corporations, such power does not exist, and it could scarcely be expected that the courts of another state would recognize a title to corporate stock of its own corporations founded upon a sale under an attachment issued by courts against a nonresident, when the only semblance of jurisdiction over the property was the service of notice in the attachment proceeding upon an officer or agent of the corporation here. . . . The abstract entity, the corporation, is the owner, and only owner, of the property. . . . We do not doubt that shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation, by intentment of law, always remains, to wit, in the state or county of its creation. In all other places, it is an alien. It may send its agents abroad as any other individual may do without passing personally into the foreign jurisdiction or changing its legal residence." It was accordingly held that the statute applied to domestic corporations alone, and that stock in a corporation could not be attached or garnished outside of the state creating it. This reasoning and ruling was approved, applied, and followed in *Armour etc. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12; 35 Am. St. Rep. 691; *Winslow v. Fletcher*, 53 Conn. 390; 55 Am. Rep. 122, and *Morton v. Grafflin*, 68 Md. 545. Certificates of stock or shares of stock can be attached or garnished only in the state creating such corporation, whether the party against whom the attachment proceedings are prosecuted is a resident of that or of another state: *Reid Ice Cream Co. v. Stephens*, 62 Ill. App. 334; *Morton v. Grafflin*, 68 Md. 545. In deciding the case of *Ireland v. Globe etc. Co.*, on September 19, 1895, the supreme court of Rhode Island said: "We think it is well settled that shares of stock in a foreign corporation cannot be reached by process of attachment, although the officers of the corporation are within the state, and the business of the corporation is being carried on here. The situs of the stock, for the purpose of attachment and execution, is the domicile of the corporation, and that place only": *Ireland v. Globe etc. Co.*, 19 R. I. 000. The only exception or limitation to this rule is found in *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, in which it is held that stock in a corporation created and formed in one state, but also formed and existing as a domestic corporation in another state, is subject to attachment in the latter state against a nonresident owner, although the certificates are in his possession beyond the limits of the state.

JUDGMENTS—WHO BOUND BY.—One not a party to a record, but whose counsel is present and participates in the trial of an action against his agent or employé, is not bound by the judgment therein; *Central Baptist Church v. Manchester*, 17 R. I. 492; 33 Am. St. Rep. 893, and note. See the discussion of this subject in the extended note to *Hill v. Bain*, 2 Am. St. Rep. 876-878.

STATE v. BUCKLES.

[8 INDIANA APPEALS, 282.]

COUNTIES—EXECUTION AGAINST.—An execution may issue against a county upon a judgment rendered against it, and may be levied upon any property owned by such county not needed for governmental or public purposes.

EXECUTION AGAINST COUNTIES—FAILURE TO MAKE RETURN—LIABILITY OF SHERIFF.—A sheriff who fails to make return of an execution issued against a county within the time provided by law, is liable in nominal damages, without reference to the question whether or not there was any property out of which he could have made a levy and return.

H. S. Cauthorn, for the appellant.

O. H. Cobb, for the appellees.

²⁸² **REINHARD, J.** This is an action by the appellant's relator, against the appellee Buckles, on his official bond, as sheriff of the county of Knox, the other appellees being sureties on such bond.

The complaint is in two paragraphs, and the breach alleged in each paragraph is, that the appellee Buckles, as such sheriff, for more than one hundred and eighty days failed to levy an execution, in his hands, on a judgment in favor of the relator and against the board of commissioners of the county of Knox, which judgment was rendered by, and execution issued out of, the Knox circuit court.

For the purposes of the questions here involved, the ²⁸³ averments in each paragraph are substantially the same.

The court sustained a demurrer to each paragraph of the complaint, and this ruling presents the only ground upon which a reversal is asked.

The appellee has not favored us with a brief in the case, but we are informed, by appellant's brief, that the court based its ruling upon the theory that a judgment against a county could, under no condition, be enforced by means of an execution to be levied upon and satisfied by the sale of the county's property.

The statute makes it the duty of the sheriff, when an execution comes into his hands, to serve it upon the defendant or defendants in his county, and levy the execution, if not paid, upon any property of such defendant or defendants, and make at least one effort to sell such property, within sixty days after the execution comes into his hands: Rev. Stats. 1881, sec. 719. The execution is returnable within one hundred and eighty days from its date: Rev. Stats. 1881, sec. 683.

If he neglect or refuse to levy upon property, or return such execution, as required by law, the sheriff shall be amerced to the extent of the value of the property, not exceeding the amount necessary to satisfy the execution: Rev. Stats. 1881, sec. 783.

It is averred, in each paragraph of the complaint, in substance, that the execution defendant had, during the time the sheriff had the said execution in his hands, and during the life of said execution, personal property subject to execution, and on which he might have levied said execution and made the whole amount of money due thereon.

The effect of the judgment upon the demurrer, therefore, if the same is to stand, is to declare the law to be that an execution is in no case proper to enforce a judgment ²⁸⁴ against the board of commissioners of a county. Is this sound law?

Counties being but subdivisions of the governmental power of the state, the property held by them and used for such governmental or public purposes, such as a courthouse, or jail, or a public square, cannot be sold upon legal process: *Lowe v. Board of Commrs.*, 94 Ind. 553; 2 *Dillon on Municipal Corporations*, 3d ed., sec. 576.

"The rule rests upon the principle that the public good requires that property needed for the proper administration of local governmental affairs shall not be taken from the local authorities, lest the due administration of such affairs be so much disturbed as to cause the public to suffer": *Lowe v. Board of Commrs.*, 94 Ind. 553.

We do not think it can be said, however, that a county may never be the owner of property which is not needed for governmental or public purposes. We are not aware of any reason why a county, which, like other corporations, is an artificial person, subject to the power and authority of the courts within whose jurisdiction it is situated, may not, in a proper case, be bound and controlled by such process as an execution, as other persons within such jurisdiction are bound. We are aware that in some jurisdictions it is held that a judgment against a county or municipal corporation amounts to no more than the establishment of a valid claim, which the officers of such corporation may be compelled to pay out of the proper funds by mandate: *Emeric v. Gilman*, 10 Cal. 404; 70 Am. Dec. 742; *Kinmundy v. Mahan*, 72 Ill. 462; *Wilson v. Commissioners*, 7 Watts & S. 197; *Board of Supervisors v. Edwards*, 76 Ill. 544.

But this rule is not followed in all the states: *Savage v. Supervisors of Crawford County*, 10 Wis. 49.

We think the better rule is, that execution may issue against a county upon a judgment rendered against it, ²⁸⁵ and may be levied upon any property owned by such county not needed for governmental or public purposes: 1 Freeman on Executions, sec. 126.

Our statute makes counties bodies corporate and politic, and clothes them with power to prosecute and defend suits, and confers upon them such rights, duties, and powers generally as are incident to corporations: Rev. Stats. 1881, sec. 5735.

There is nothing in the law which creates these corporations that in any manner conflicts with the view that judgments against them may be enforced by execution, if the same can be levied and made out of property other than that needed for governmental purposes. We have not been able to find any case decided by the supreme court which holds that this may not be done. If there was in fact no such property, the question can be fully met by pleading the general denial. At all events, we think it was the duty of the sheriff to make return of the execution within one hundred and eighty days, and, for failure to do so, he would be liable for nominal damages, without reference to the question of whether or not there was any property out of which he could have made the same.

Judgment reversed, with directions to overrule the demurrer.

EXECUTION AGAINST PUBLIC CORPORATIONS.—The property of public corporations reasonably necessary and essential to the exercise of their franchises is exempt from levy and sale by an execution creditor: Reynolds v. Reynolds Lumber Co., 169 Pa. St. 628; 47 Am. St. Rep. 935. An execution cannot issue against a municipal corporation: Pekin v. McMahon, 154 Ill. 141; 45 Am. St. Rep. 114, and note; note to Sherman v. Williams, 31 Am. St. Rep. 68.

EXECUTION—DAMAGES FOR FAILURE OF OFFICER TO MAKE RETURN AT PROPER TIME.—An officer is liable for nominal damages for neglect to return an execution until long after the return day, where no actual damages are proved: Lafin v. Willard, 16 Pick. 64; 26 Am. Dec. 629, and note. Under the Texas statute, a sheriff who fails to return execution as directed by law is prima facie liable to the plaintiff in execution for the full amount of the debt, interest, and costs, but this is not conclusively the measure of damages: Smith v. Perry, 18 Tex. 510; 70 Am. Dec. 295, and note. See the extended note to Sloan v. Case, 25 Am. Dec. 573, for a further discussion of this subject.

PARRETT v. PALMER.

[8 INDIANA APPEALS, 356.]

HUSBAND AND WIFE—PROPERTY RIGHTS—HOW AFFECTED BY MARRIAGE.—The respective rights of husband and wife in their personal property acquired by them by their marriage are determined by the law of the place of their matrimonial domicile, and this, in the absence of any contrary intention, is the domicile of the husband at the time of the marriage.

HUSBAND AND WIFE—SEPARATE ESTATE.—Not only the property actually acquired by a wife by gift, devise, or descent, during her marriage, is preserved to and becomes her separate estate, but also the proceeds of such property, whether the natural increase, or the money produced by its sale, or other property purchased with that money.

HUSBAND AND WIFE—SEPARATE ESTATE—USE BY HUSBAND.—If a wife voluntarily delivers her money to her husband, the law presumes that he takes it as trustee for her, and not as a gift, even though there is not express promise to repay.

HUSBAND AND WIFE—SEPARATE ESTATE—USE BY HUSBAND.—If a husband uses his wife's money, with her consent, to build a family residence, it is presumed, in the absence of facts indicating a gift by her, that he is a trustee for her, and either he, or his estate, is liable to her for such money.

HUSBAND AND WIFE.—STATUTE OF LIMITATIONS does not run as to dealings between husband and wife.

EXECUTORS AND ADMINISTRATORS.—In presenting claims against estates, it is sufficient if the statement shows the nature and amount of the claim with sufficient precision to bar another action, and discloses a prima facie right to recover.

W. A. Tipton, C. S. Wesner, H. H. Stilwell, and W. F. Stilwell, for the appellant.

J. A. Lindley and O. P. Lewis, for the appellee.

³⁵⁶ **GAVIN, J.** The appellee, as administrator of the estate of Caroline Parrett, deceased, filed a claim against the estate of her deceased husband, William Parrett, for her five hundred dollars, and also for additional sums received by him from her in 1857.

There was a trial and special finding of facts, with a motion for new trial and exceptions to the conclusions of law overruled.

From the facts found, it appears that at the time of his marriage to Caroline, in 1856, William Parrett was a resident of Fountain county, Indiana, while she was a ³⁵⁷ resident of the state of Ohio, where they were married; that Caroline received, as the proceeds of the real and personal property owned by her in the state of Ohio, the sum of two thousand nine hundred dollars, which money was received by her after her marriage with said William, and while they were both temporarily in the state

of Ohio. Afterward, and prior to 1860, twelve hundred dollars of this money was used by her husband, with her consent, in the erection of a dwelling-house upon his lands, to be used as a family residence, in which both lived until their death, in 1892, the husband dying intestate three days before the wife. No express agreement was made to repay the money so used by William.

Upon these facts, the court concluded that appellee was entitled to recover the five hundred dollars, and also the further sum of twelve hundred and seventy-two dollars. The appellant insists that the conclusion as to the twelve hundred and seventy-two dollars is erroneous.

The laws of Ohio are not before us, and appellant contends that the common law is presumed to be in force there, and that the law of Ohio determines the right to the money received by Mrs. Parrett, because she was married in Ohio and received it there.

We do not so understand the rule. The respective rights in their personal property acquired by husband and wife by their marriage are determined by the law of the place of their matrimonial domicile, and this, in the absence of any contrary intention, is the domicile of the husband at the time of the marriage, which was in Indiana: Story on Conflict of Laws, secs. 191-199; Wharton on Conflict of Laws, sec. 190; 5 Am. & Eng. Ency. of Law, 868.

By her marriage, the wife acquired the domicile of the husband: *McCollem v. White*, 23 Ind. 43; *Jenness v. Jenness*, 24 Ind. 355; 87 Am. Dec. 335; *Cooper v. Beers*, 143 Ill. 25; 5 Am. & Eng. Ency. of Law, 868.

Appellant further contends that even under the law of Indiana in force from 1856 to 1860, when the wife sold her separate property and received money for it, the money became the property of the husband, because it was not acquired by gift, devise, or descent, but by purchase, and was not the money of the wife at the time of her marriage.

Section 5116 of the Revised Statutes of 1881, which was then in force, provides that "no lands of any married woman shall be liable for the debts of her husband; but such lands, and the profits therefrom, shall be her separate property, as fully as if she were unmarried; provided, that such wife shall have no power to encumber or convey such lands, except by deed in which her husband shall join."

By section 2488 of the Revised Statutes of 1881, in force since 1853, "the personal property of the wife held by her at the time

of her marriage, or acquired, during coverture, by descent, devise, or gift, shall remain her own property to the same extent and under the same rules as her real estate so remains."

We cannot concur in giving to these provisions the narrow construction claimed by counsel. On the contrary, we are strongly of the opinion that not only the property actually acquired by gift, devise, or descent is preserved to the married woman, but also the proceeds of such property, whether the natural increase or the money produced by its sale, or other property purchased with that money. It would be a barren ideality, indeed, to hold that a woman should have the rent, corn that grew on her land, or could own a drove of hogs given her by her father, but if she sold them the money would be her husband's. Such a holding would not accord with the spirit of later times.

³⁵⁹ The case of *Mahoney v. Bland*, 14 Ind. 176, is relied upon by appellant in support of his proposition, and it does sustain it, but it has been repudiated by later cases.

In *Ireland v. Webber*, 27 Ind. 256, it is said: "We cannot see why property purchased with the proceeds of the sale of the wife's lands is not as much hers as that purchased with the proceeds of the rents, issues, and profits therefrom." "It is claimed that, inasmuch as the property in controversy (having been bought with the proceeds from the sale of her lands) was not held by the wife at the time of her marriage, and was not acquired by her during coverture by descent, devise, or gift, it is liable to attachment as the property of the husband, for the payment of his debts. We think otherwise.

"The appellant relies on *Mahoney v. Bland*, 14 Ind. 176, for a reversal of the judgment in the case at bar. But we do not think that the case can be reconciled with the ruling in *Johnson v. Runyon*, 21 Ind. 115."

In *Bellows v. Rosenthal*, 31 Ind. 116, it is decided that goods purchased with money which was her separate estate, or the proceeds thereof, were the separate property of the wife.

In *Derry v. Derry*, 98 Ind. 319, it is said that a trust results to the wife, where the husband takes in his own name title to land purchased with the "proceeds or accumulations" from his wife's separate estate in his hands.

In *Garner v. Graves*, 54 Ind. 188, our supreme court held that notes taken by the husband in his own name, in payment for his wife's real estate, belonged in equity to her, and not to his estate.

Whatever language there may be in *Abshire v. State*, 53 Ind. 64, which would seem in its literal interpretation to be incon-

sistent with these holdings must be ³⁶⁰ considered with reference to, and limited to, the circumstances of that particular case.

The principle asserted is no new one. We find it supported by Story's Equity Jurisprudence, section 1375, where he is speaking of the separate allowances to a wife at common law: "And if such allowances are invested in jewels or other ornaments, or property, the latter will be entitled to the same protection against the husband and his creditors": See, also, *Liebes v. Steffey* (Ariz. Jan. 28, 1893), 32 Pac. Rep. 261; *Knapp v. Smith*, 27 N. Y. 277; *Schurman v. Marley*, 29 Ind. 458.

We think the rule is well expressed by the language of the court in *Spooner v. Reynolds*, 50 Vt. 437: "If a married woman purchases personal property with money of her own, the property thus purchased is as much hers as was the money with which she purchased it."

It being established that this money was, in the hands of Mrs. Parrett, her separate property, and governed by our statute, the question then arises as to whether or not, under the facts stated, there is any liability upon the part of the husband's estate to account to her.

The facts found are quite meager, but we are compelled to determine the correctness of the legal conclusions from the facts stated alone, without their being aided by inferences which might have been fairly and with propriety drawn from the evidence.

We have here a case where the wife's money passes directly and voluntarily from her hands to that of her husband, with no finding as to whether a gift was intended, or whether he received the money simply as an agent or trustee for her. Under such circumstances, what is the presumption of the law?

It has long been conceded to be the law that a woman could bestow her separate property upon her husband by way of gift, unless prevented by some special limitation ³⁶¹ of her powers over it, but courts of equity view such transactions with care and caution, and in dread of undue influence: Story's Equity Jurisprudence, sec. 1395.

"There is no doubt that courts should narrowly scrutinize cases of alleged gifts from the wife to the husband": *Hardy v. Van Harlingen*, 7 Ohio St. 208.

"As regards the corpus of the separate estate, no presumption arises in favor of a husband who has received it. He is *prima facie* a trustee for his wife, and a gift from her to him will not be inferred without clear evidence": 2 Lewin on Trusts, *778.

"A simple payment by the wife to the husband of the income

of her separate estate may be treated as a gift to him. . . . The receipt by him of separate capital moneys of the wife stands on a different footing. A transfer of her separate property into his name is *prima facie* no gift": *Crawley's Law of Husband and Wife*, 268.

So also in *Eversley on Domestic Relations*, 409: "She may make a gift of her separate property to her husband for his own use, or that of the family, but the onus lies upon the husband of proving that a gift was intended, and that he has not influenced her act and conduct": *Rich v. Cockell*, 9 Ves. 369; *Hughes v. Wells*, 9 Hare, 749; *Wales v. Newbould*, 9 Mich. 45; *Boyd v. De La Montagnie*, 73 N. Y. 498; 29 Am. Rep. 197; *Reeves on Domestic Relations*, 4th ed., 216, note; *McNally v. Weld*, 30 Minn. 209; *Green v. Carlill*, 4 Ch. Div. 882; *Jones v. Davenport*, 44 N. J. Eq. 33; *Bergey's Appeal*, 60 Pa. St. 408; 100 Am. Dec. 578.

In our own state, the holdings of the supreme court strongly support the doctrine announced above.

In *Hileman v. Hileman*, 85 Ind. 1, the ruling was to the effect that the presumption of law, under the statute of this state, is that the separate property or money of a wife, which is taken into the possession of the husband, is to be considered as taken by him for her ³⁰² use and benefit, until such presumption is overcome by evidence that a gift was intended.

Judge Mitchell says in *Armacost v. Lindley*, 116 Ind. 295: "Transactions between husband and wife are presumably influenced by the peculiar relation which exists between them, and, where a husband obtains possession of the separate money or property of his wife, it must appear from all the circumstances that the wife intended to make a gift of it to him."

In the case from which we have last quoted, it was decided that where the notes for the purchase money of her land were taken, payable to the husband, with the wife's consent, but at his suggestion, the law would presume, nevertheless, that he thus took her separate estate as her trustee, and not for his own benefit.

In *Denny v. Denny*, 123 Ind. 240, the holding in *Hileman v. Hileman*, 85 Ind. 1, is reaffirmed, and the distinction between the income and the principal of the fund is clearly drawn. It is there decided that where the husband, with the consent of the wife, receives and uses her separate income for the benefit of the family, a gift will be presumed, but it is said, "A well-established distinction exists, however, when the husband receives and ap-

propriates the corpus or principal of his wife's separate property."

The trust and confidence ordinarily reposed by the wife in the husband, her natural reliance and dependence upon him for the management of her business; the fact that as a rule the husband is possessed of general business experience, while the experience of the wife is usually limited; all these considerations sustain us in the conclusion that where the wife voluntarily delivers her money to the husband, the law presumes that he takes it as trustee for her, and not as a gift, even though there be no express promise to repay.

383 There are some cases maintaining a different doctrine, but we do not believe them to be in harmony with the legislation or the judicial interpretation of our state. Nor is the mere fact that the husband in this case, with her consent, used the money in building a family residence on his land, in itself sufficient, as the case comes to us on a special finding, to rebut and overthrow this presumption. This, taken in connection with other circumstances, such as the respective values of their estates, failure to assert any claim for a long period of time, and any others which might throw light on the intentions of the parties, might justify a trial court in drawing the inference of fact that a gift was in truth intended, but no such intention is found by the facts in this case, and such intention is an essential element of appellant's case, and must be specifically found before the opposite presumption can be deemed overcome.

There is, in our judgment, sufficient evidence to sustain the findings. The claim was not barred by the statute of limitations, which does not run as to dealings between husband and wife: *Barnett v. Harshbarger*, 105 Ind. 410.

The claim was stated with sufficient accuracy to enable the appellee to recover on the proof made: *Hileman v. Hileman*, 85 Ind. 1.

In presenting claims against estates, it is sufficient if the statement shows the nature and amount of the claim with sufficient precision to bar another action, and show a prima facie right to recover: *Lockwood v. Robbins*, 125 Ind. 398; *Doan v. Dow*, 8 Ind. App. 324.

We find no error in the record.

Judgment affirmed.

HUSBAND AND WIFE—PROCEEDS OF WIFE'S SEPARATE ESTATE, WHETHER HBR SEPARATE PROPERTY.—Profits produced by the labor and skill of married woman in the use of her sep-

arate estate while living with her husband are a part of such estate: *Trapnell v. Conklyn*, 37 W. Va. 242; 38 Am. St. Rep. 30, and note. The proceeds of the sale of property devised to a wife are her separate property: *Huston v. Curl*, 8 Tex. 239; 58 Am. Dec. 110; *Kirkpatrick v. Buford*, 21 Ark. 268; 76 Am. Dec. 363, and extended note, in which is discussed at length the question as to what property is the separate property of the wife under the statutes of the several American states.

HUSBAND AND WIFE—INDEBTEDNESS BETWEEN.—The reception and use by a husband, in his business of the proceeds of his wife's land implies a promise to repay her, and, as between them, creates a valid indebtedness: *Riley v. Vaughan*, 116 Mo. 169; 38 Am. St. Rep. 586, and note. A loan by a wife to her husband out of her separate estate, to be valid as a loan, must be accompanied with an express promise of repayment made at the time. Otherwise it is presumed to be a gift: *Bennett v. Bennett*, 37 W. Va. 396; 38 Am. St. Rep. 47, and note.

HUSBAND AND WIFE—THE STATUTE OF LIMITATIONS does not run against claims between husband and wife: *Fawcett v. Fawcett*, 85 Wis. 332; 39 Am. St. Rep. 944, and note.

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—SUFFICIENCY.—It is sufficient to file a note, executed by one deceased, against his estate without accompanying the same with a formal complaint: *Garrigus v. Home etc. Missionary Soc.*, 3 Ind. App. 91; 50 Am. St. Rep. 262, and note.

HAMILTON v. FEARY.

[8 INDIANA APPEALS, 615.]

DAMAGES.—BREACH OF CONTRACT or covenant entitles the injured party to recover such damages only as proximately result from such breach and were within the contemplation of the parties when the contract was entered into. Remote and speculative damages cannot be recovered.

LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR—DAMAGES.—If a landlord covenants with his tenant to repair and put in safe condition an excavation existing on the premises at the time they are leased, but falls and refuses to make such repairs after repeated requests, and the tenant while performing necessary domestic duties falls into the excavation and is injured, he cannot recover damages therefor in an action for breach of covenant to repair; such damages are too remote and consequential.

LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR—DAMAGES.—Upon the failure of a landlord to keep his covenant to make repairs upon the leased premises after repeated requests to do so, the tenant may make the necessary repairs himself, and charge their cost to the landlord; but as it is his duty to reduce the damages as much as reasonably lies in his power, he is not permitted to allow the defect in the premises to remain, being himself fully cognizant thereof, and then sue to recover damages for an accident resulting from the dangerous condition of the property.

LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR—DAMAGES.—Although a landlord is clearly guilty of a

breach of covenant to repair the leased premises, the tenant cannot remain inactive and allow special damages to accrue, and recover them from the landlord, when, at slight expense, he might have averted the injurious consequences complained of.

LANDLORD AND TENANT—SAFETY OF PREMISES.—A landlord does not insure the safety of the premises, nor does he impliedly warrant them to be inhabitable or fit for certain uses, and, as a general rule, the tenant, under the maxim, *caveat emptor*, assumes all risks incident to the occupancy.

LANDLORD AND TENANT—LATENT DEFECTS IN PREMISES.—A landlord is liable to his tenant for injury arising from the fact that the premises contain some hidden defect or defects, or are infected with some noxious disease, rendering them dangerous or uninhabitable, and of which dangerous elements or defects the landlord had some knowledge or information, but which were not open to the view of the tenant and of which he was ignorant.

LANDLORD AND TENANT—LIABILITY FOR FAILURE TO MAKE REPAIRS.—A landlord is liable to his tenant for injury, if the former, though not bound to do so, undertakes to make repairs, and makes them in so negligent a manner as to produce injury, or if he has covenanted to make repairs and upon being notified has repeatedly promised and led the tenant to believe in good faith that he will make them.

LANDLORD AND TENANT—DEFECTIVE PREMISES—DAMAGES.—A tenant who, with full knowledge of the existence of an excavation on the leased premises before he takes possession, continues to occupy them in such condition during the period of the lease, and after the landlord upon repeated demands has failed and refused to put such excavation in a safe condition, cannot recover in an action of tort for injury received from falling into such excavation, especially when the landlord practices no concealment, fraud, or deception upon the tenant, and the cause of injury, if latent, is not known to the landlord any more than to the tenant.

LANDLORD AND TENANT—DEFECTIVE PREMISES—DAMAGES—NEGLIGENCE.—A tenant cannot recover upon tort for negligence against the landlord for failure to repair the leased premises, or in failing to disclose a defect therein, if the tenant is also guilty of negligence in not avoiding danger arising from the existence of such defect.

T. B. Adams and I. Carter, for the appellant.

A. C. Harris, K. M. Hord, and E. K. Adams, for the appellee.

616 **REINHARD, J.** This case was tried in the court below, upon the second paragraph of the complaint, to which a demurrer was overruled.

The appellee was the tenant of the appellant, in a dwelling-house owned by the latter. The action was for the recovery of damages for a personal injury sustained by appellee while in the occupancy of the premises. The trial was by a jury, and there was a verdict in favor of the appellee for two thousand five hundred dollars, upon which, over appellant's motion for a new trial, and other motions, judgment was rendered.

The overruling of the demurrer is the first specification of

error. The substance of the paragraph of complaint to which the demurrer was addressed, is as follows: That on the twenty-second day of February, 1890, the appellee leased, in writing, from the appellant the premises described; that by the terms of the lease, appellee was to pay, as rent therefor, the sum of eight dollars and thirty-three cents per month, in advance; that the tenancy was to begin on said date, and to continue for six months thereafter; that she was to keep the property in good condition, not sublet the same, and to give possession thereof at the end of six months. A copy of the lease was filed with this paragraph of complaint, as exhibit "A."

It is further alleged that appellee did not take possession under the lease on said day, and that after the execution of the lease, and before appellee took possession ⁶¹⁷ of the property, it was agreed between the parties that appellee should not, and would not, be required to pay the first month's rental until she had taken full possession.

It is then averred that there was at that time, and for several months subsequent thereto, located upon said lot, and in the rear of said house, a circular excavation, about five feet in depth and about seven feet in diameter, which appellant had caused to be made, intending thereby to make a cistern; that a portion of the said dwelling-house was then badly in need of being papered, the walls being smoked and dingy in appearance; that after the signing of said lease, to wit, on the twenty-fourth day of February, 1890, and before any act had been done thereunder, and before possession had been taken by the appellee, and before there was any breach of the terms of said lease by either party, appellee having discovered for the first time the excavation aforesaid, and the condition of the walls aforesaid, refused to take possession of said premises under the said lease, or to pay any sum of money as rental for said premises under said lease, or to comply with any of the terms of said contract; that thereupon, and upon said day, appellee and appellant entered into a parol modification of said lease, as follows: That the said Hamilton, to induce appellee immediately to take possession of said premises as his tenant, and to pay him the said rental therefor, then and there agreed with appellee that if she would, on that day, take possession of said premises and continue as tenant therein for the said period of six months, at the rate and under the terms mentioned in said lease, and if she would, on that day, pay him the sum of eight dollars and thirty-three cents in cash, as the first month's rental, that he would immediately thereafter finish said excava-

tion and make a good cistern, by making the same deeper and walling up the same, and would ^{also} cover up and repair the said excavation so that the same would and could not endanger the lives or bodies of persons who should go upon said lot or in proximity to the place where the excavation existed; that appellant also agreed to paper said house and put the whole thereof in good condition for the use of the appellee, who desired the use of all of said property for a dwelling for himself and family; that thereupon, and before appellee had taken possession of said property, she paid the appellant the sum of eight dollars and thirty-three cents, and immediately thereafter went into the possession of said premises under said lease and said modification thereof, and occupied the same under said lease, as modified, for and during the period aforesaid, for all of which she fully paid appellant at the rate aforesaid, and in all things fully performed her part of said agreement and the said modification thereof; that at the time of said renting, and during the period of said tenancy, the appellant had located and maintained, near the edge of said excavation, a well, in which was a pump, from which, under said lease, appellee obtained water for domestic purposes, said well being the only place on said lot from which water could be obtained; that appellant complied with his said agreement to paper the walls of the said house, but that, although often requested so to do, prior to the injuries herein set out, he neglected and refused to complete said cistern, and allowed the same to remain in the unfinished condition aforesaid during the whole of said period of six months; that heretofore, to-wit, on the twenty-sixth day of July, 1890, and in the night-time, and while appellee was prudently and carefully trying to get some needed water from said well by means of said pump, and while she was standing upon the ground near said excavation, and no nearer than was necessary in order to get said water, she being near to said pump and in the proper place to get water therefrom, ^{also} the earth surrounding said excavation, and upon which she was standing, caved and fell into said excavation so suddenly and unexpectedly to her that, without any fault or negligence on her part, she was thereby precipitated and thrown violently and with great force into said excavation, and upon a piece of timber lying at the bottom thereof, resulting in serious bodily injury to her, as hereinafter set out; that said excavation was made as set out, and without any walls or other barriers thereto, whereby said adjoining earth could be held in place, and that by reason of the same remaining in such condition during the period aforesaid, the earthen walls of said

excavation had become, at the time of said injury, so undermined and in such dangerous condition as to result in the injury aforesaid, which condition was perceptible to appellant; that appellee had no knowledge, prior to said injury, that the earth surrounding said excavation was in said undermined and dangerous condition, and she believed, up to said time, that the same was firm and would support her weight thereon; that by reason of said fall, appellee sustained the following injuries, to-wit:

Then follow a description of the injuries and an averment that the same were not caused by the act, fault, or negligence of the appellee, but were wholly the result of the said wrongful and negligent acts of appellant.

The complaint then proceeds to specify the damages, and concludes with a prayer for five thousand dollars judgment.

A copy of the lease is set out, and, as indicated in the complaint, it contains no stipulation for the making of repairs on the part of the appellant. Assuming that the modified agreement was such as obligated the appellant to place the excavation in a condition of safety, does the appellee show herself entitled, by the averments of the complaint, to the remedy here pursued?

⁶²⁰ Appellee's counsel construe the action to be upon the contract to repair. As such, is the complaint sufficient? Without an express agreement to make repairs, it does not devolve upon the landlord to do so. This is conceded. Assuming that, in the present case, there is such an agreement, what redress is the tenant entitled to for a breach of the obligation?

Appellant's counsel contend that in such case the tenant may either abandon the premises, or make the repairs himself and recoup the expense therefor in an action by the landlord for rent.

On the other hand, the appellee's position is, that the tenant need not pursue either of these remedies, but may sue in damages and recover for any injury proximately flowing from the breach of the covenant: Taylor on Landlord and Tenant, sec. 330; Buck v. Rodgers, 39 Ind. 222; McCoy v. Oldham, 1 Ind. App. 372; 50 Am. St. Rep. 208. That this position is well taken, we shall not undertake to controvert.

It may be stated, as a general rule, that for a breach of contract in any case the injured party is entitled to recover such damages only as proximately resulted from the breach, and were within the contemplation of the parties when the contract was entered into. Damages which are remote and speculative cannot be recovered: 5 Am. & Eng. Ency. of Law, 13.

In this respect, the rule is not different from what it would be

if the contract to repair had been between the tenant and a mechanic or workman employed by her to do the work. The only damages recoverable in such case would be the difference between the price agreed upon and the actual cost of the work if the employer had hired another to do it, and, possibly, such other damages as were sustained by reason of the delay. This would be especially true if the employé had repudiated the contract ⁶²¹ after reasonable notice to her, or had positively refused to perform it; for, upon such refusal, it would have been the privilege of the employer to treat the contract as rescinded, and she could have hired the work to be done by another.

We shall not undertake to assert that if the employé had repeatedly promised to do the work upon being requested to do so, and had thus led the employer to rely upon his carrying out the promise, he might not be held liable as for special and consequential damages, even for a personal injury incurred under the circumstances of the present case. But even then there could be no recovery, unless the employer had done all that she reasonably could do to reduce the damage as much as practicable.

Applying this rule to the case in hand, it may be conceded that there are circumstances under which a tenant may recover special and consequential damages for the breach of the landlord's covenant to repair. Thus it was held in *Buck v. Rodgers*, 39 Ind. 222, that where the landlord had agreed to furnish his tenant a sufficient quantity of rails to keep his fences in repair, so as to protect the crops, and had failed to do so, and the cattle had broken in and destroyed the crops, the landlord was liable to the tenant for the damages occasioned by the injury to the crops. But this and other similar holdings are predicated upon the supposition that the tenant or lessee had used such reasonable means as were in his power to prevent or lessen the damages. The supreme court has repeatedly declared and given effect to this principle, and in a very recent case has expressly decided that the case of *Buck v. Rodgers*, 39 Ind. 222, was determined in full recognition of the same: *Hendry v. Squier*, 126 Ind. 19.

In the case just cited, the lessor had agreed to place a new roof upon the storehouse of which the lessee was ⁶²² the occupant with a stock of goods. By the failure of the lessor to comply with his covenant, the lessee's goods were damaged by a leak in the roof, for which he sued the lessor for damages. The complaint averred that the tenant had repeatedly requested the landlord to make the repair, but that the latter had failed and refused to do so. It was held that, under these circumstances, the

tenant could not recover the damages occasioned by the injury to his goods; that, upon the landlord's refusal, he should have made the repairs himself and charged them to the landlord.

It is averred in the paragraph of complaint under consideration that the appellant, "although often requested so to do, prior to the injuries herein set out, neglected and refused to complete said cistern, and allowed the same to remain in the unfinished condition aforesaid, during the whole of said period of six months."

It was said in the case of *Hendry v. Squier*, 126 Ind. 19: "As shown by the averments in the pleading, the condition of this roof was well known to the appellant long before the time when the landlord was to repair it by putting on a new roof. And it is further averred that the appellant requested the repairs to be made, and the appellees refused to make the repairs. This gave the appellant the right to make the necessary repairs and charge them to appellees: *Hopkins v. Ratliff*, 115 Ind. 213. Certainly, after such refusal appellant could not voluntarily permit his goods to remain in the building and suffer injury, and recover the damage from the appellees. Yet, under these circumstances, the appellant allows his goods to remain in this end of the building, and be damaged by the rainfall, when, for aught that appears in the pleading, it would have been a small expense to have repaired it, or that even a new roof upon ⁶²³ the building would have cost much less than the damages sustained to the goods."

In this particular the case at bar does not differ materially from the case cited. In both cases, the pleading showed that the landlord had, long before the injury, refused to make the repairs. Where this is the case, it would seem to be fruitless for the tenant longer to rely upon the landlord's promise. He would have the right to make the necessary repairs himself and charge their cost to the landlord. Under the principle that it is his duty to reduce the damages as much as reasonably lies in his power to do so, he could not be permitted to allow the defect in the premises to remain, being himself fully cognizant of the same, and then sue for the accident resulting from the dangerous condition of the property.

The case under consideration cannot be distinguished from the one cited by saying that in the latter case the tenant might have removed his goods to another part of the building. The court does not base its conclusion upon this fact. It holds that, under such circumstances, his remedy was to make the repairs and charge them to the landlord. This ruling does not conflict

with the cases which decide that the tenant, instead of making such repairs himself, might recover in damages the diminution of the value of the rent during the time the premises remain out of repair. While in such cases the landlord is clearly guilty of a violation of his contract, the tenant cannot remain inactive and allow special damages to accrue, and recover them from the landlord, when, at slight expense, he might have averted the injurious consequences complained of.

The principle adverted to applies not only to breaches of contracts, but to torts as well. "In case of wrongful injury to person or property, the injured party is required to use reasonable exertion to lessen or moderate the resulting ⁶²⁴ damage": 1 Sutherland on Damages, sec. 90, and cases cited in second edition.

As we have stated, the appellee treats this case as though the complaint declared upon a breach of contract and not upon tort. But it is our opinion that such damages are not the natural and ordinary result of a breach of the covenant, and were not in contemplation of the parties when the contract was entered into. Such damages are too remote and speculative, and could only be recovered as special and consequential damages, under circumstances hereinbefore adverted to.

We think if there is any liability under the facts set up in the complaint, it must be upon the theory of negligence, as upon tort. To determine whether or not there was actionable negligence, it must first be ascertained, what, if any, duty the appellant owed the appellee, and the manner in which the appellant failed to discharge such duty. The duties owing by a landlord to his tenant are various, but they are limited. The landlord does not insure the safety of the premises, nor does he impliedly warrant them to be inhabitable or fit for certain uses, and, as a general rule, the tenant, under the maxim, *caveat emptor*, assumes all the risks incident to the occupancy, having complete control and dominion over the premises. To this general rule there are, however, several exceptions. Thus the landlord is liable where the premises contain some hidden defect or defects, or are infected with some noxious disease, rendering them dangerous or uninhabitable, and of which dangerous elements or defects the landlord had some knowledge or information, but which were not open to the view of the tenant, and of which he was ignorant or uninformed. And so the landlord is answerable where he controls or retains possession of a portion of the premises, or a portion is used in common by two or more tenants, and an ⁶²⁵ in-

jury occurs, through some negligence or fault of the landlord, upon that portion over which he has the control, or which is used in common. Still another instance of liability on the part of the owner is where he, though not bound to do so, undertakes to make repairs, and makes them in so negligent or unskillful a manner as to produce injury to the tenant. Also, where the landlord has covenanted to make repairs, and, upon being notified, has repeatedly promised and led the tenant to believe in good faith that he will make them. The liability of the lessor in these, and perhaps other, instances arises from the principle that he owes the lessee a duty, and if, by the lessor's failure or negligence to discharge such duty, and without any contributing fault of the lessee, the latter sustains injury, a right of action arises in favor of the lessee or tenant, for the damages sustained: Buswell on Personal Injuries, sec. 82, et seq; 1 Taylor on Landlord and Tenant, 8th ed., sec. 175 a; 1 Wood on Landlord and Tenant, 2d ed., sec. 379; Lucas v. Coulter, 104 Ind. 81; Deller v. Hofferberth, 127 Ind. 414; Purcell v. English, 86 Ind. 34; 44 Am. Rep. 255; Toole v. Beckett, 67 Me. 544; 24 Am. Rep. 54; Gregor v. Cady, 82 Me. 131; Kirby v. Boylston Market Assn., 14 Gray, 249; 74 Am. Dec. 682; Bowe v. Hunking, 135 Mass. 380; 46 Am. Rep. 471; Minor v. Sharon, 112 Mass. 477; 17 Am. Rep. 122; Gill v. Middleton, 105 Mass. 477; 7 Am. Rep. 548; Wellington v. Downer etc. Oil Co., 104 Mass. 64; Cowen v. Sunderland, 145 Mass. 363; 1 Am. St. Rep. 469; Willy v. Mulledy, 78 N. Y. 310; 34 Am. Rep. 536; Cesar v. Karutz, 60 N. Y. 229; 19 Am. Rep. 164; McAlpin v. Powell, 70 N. Y. 126; 26 Am. Rep. 555; Arnold v. Clark, 13 Jones & S. 252; 45 N. Y. Sup. Ct. 252; Flynn v. Hatton, 43 How. Pr. 333; Butler v. Cushing, 46 Hun, 521; Snyder v. Gorden, 46 Hun, 538; Kabus v. Frost, 18 Jones & S. 72; 50 N. Y. Sup. Ct. 72; Scott v. Simons, 54 N. H. 426; Little v. McAdaras, 38 Mo. App. 187; Reichenbacher v. Pahmeyer, 8 Ill. App. 217; Mendel v. Fink, 8 Ill. App. 378; Polack v. Pioche, ⁶²⁶ 35 Cal. 416; 95 Am. Dec. 115, with notes; Godley v. Hagerty, 20 Pa. St. 387; 59 Am. Dec. 731.

The appellee admits, in her complaint, that she knew of the existence of the excavation even before she took possession of the premises, and with such knowledge continued to occupy the property for the period of six months, though the appellant had, upon demand, failed and refused to make the repair which he had covenanted to make. The appellant could not have given the appellee any more information of the defect than she admits she possessed. To avoid this dilemma, she undertakes to aver

that the hidden portion of the defect consisted in the ruinous condition of the banks of the excavation, and not in the excavation itself, and she insists that it was the duty of the appellant to have disclosed these to her. She does not aver that the appellant had any peculiar knowledge of these other than she had herself; at least, the facts pleaded show that she had ample time and opportunity for investigation, and there is no pretense that the appellant practiced any fraud or deception upon her in connection with the condition of the walls of the excavation. It must be clear, therefore, that if the cause of the injury was a latent, and not a patent, danger, it was no more patent to the owner than to the lessee, and it does not appear wherein he violated any duty in failing to apprise her of the same. If we should treat the complaint, therefore, upon the theory of a latent defect, we encounter the insurmountable obstacle that it fails to show the appellant guilty of any negligence; and hence, whether the appellee was guilty of contributory negligence or not, there is no right of action: See Buswell on Personal Injuries, sec. 84; Taylor on Landlord and Tenant, sec. 175 a.

But if we take the other end of the dilemma, and say that the particular duty which the appellant owed the appellee ⁶²⁷ here was not to disclose to her the existence of the latent defect of the banks of the excavation, but to fill up the latter and place the premises in safe condition, we then come back to the other obstacle, already mentioned in reviewing the complaint as upon contract, that the appellee has failed to reduce or moderate the damages, as she could have done by making the repairs herself and charging them to the appellant.

In addition to all this, it is very questionable, we apprehend, whether, under the pleading, she does not show herself guilty of contributory negligence. The well from which she got water was in close proximity to the alleged dangerous excavation. She had occupied the premises with the dangerous excavation from February to July. The banks were not walled up, and there was nothing to prevent the changing seasons from having their full effect upon the earth surrounding the cavity. The appellee was bound to make use, not only of her senses, but also of her knowledge and reasoning faculties. She must have known that during all this time the earth constituting these embankments had become liable, under the varying influences of the atmosphere and the weather, to crumble and give way, and hence it is very difficult to perceive how she could have been free from contributory fault by venturing so near to the dangerous pitfall.

And so, if we regard this complaint as counting upon tort for negligence, and there was fault in the appellant in failing to repair, or in failing to disclose the defect, there was likewise fault on the part of appellee in not avoiding the danger.

From what we have said, it must be apparent, we think, that we regard the complaint as totally insufficient to state a cause of action, either as upon contract, for consequential and special damages, or as upon tort, for ⁶²⁸ the negligent failure of the appellant to perform his duty as landlord.

Our conclusion is, that the demurrer should have been sustained. In view of this conclusion, it will not be necessary to consider errors alleged to have occurred after the ruling upon the demurrer.

Judgment reversed.

Ross, J., was absent.

LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR.—Upon a breach of a covenant to repair, the tenant may repair and recover the cost thereof from the landlord, or he may rely upon the covenant and recover all damages proximately flowing from a breach thereof, regardless of the expense or trouble required to make such repairs: *McCoy v. Oldham*, 1 Ind. App. 372; 50 Am. St. Rep. 208, and note. The lessor of a warehouse who has covenanted to repair must keep floors tight so they will not leak, if they were so when originally constructed, and if the business of the lessee requires it, or he will be liable to the latter, who has done the work himself, for the cost thereof: *Ward v. Kelsey*, 38 N. Y. 80; 97 Am. Dec. 773, and note.

LANDLORD AND TENANT—SAFETY OF PREMISES.—The lessee of real property must run the risk of its condition, unless he has an express covenant on the part of the lessor regarding that subject: *Franklin v. Brown*, 118 N. Y. 110; 16 Am. St. Rep. 744; *Cowen v. Sunderland*, 145 Mass. 363; 1 Am. St. Rep. 469, and note. This subject will be found fully treated in the notes to *Eyre v. Jordan*, 33 Am. St. Rep. 546; *Ward v. Fagin*, 20 Am. St. Rep. 654, and the extended notes to *Lowell v. Spaulding*, 50 Am. Dec. 776-783, and *Polack v. Ploche*, 95 Am. Dec. 118-125.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

COMMONWEALTH v. MURPHY.

[165 MASSACHUSETTS, 66.]

RAPE—ASSAULT TO COMMIT ON A MINOR.—The consent of a minor child under sixteen years of age does not constitute a defense to an indictment charging an assault with intent to commit rape on her.

CRIMINAL LAW—CRUEL AND UNUSUAL PUNISHMENT.—A statute subjecting to punishment as for rape every person having carnal knowledge of a female child under sixteen years of age is not unconstitutional as prescribing a cruel and unusual punishment.

CONSTITUTIONAL LAW—RAPE, AGE OF CONSENT.—A statute making it rape to have carnal connection with a female under sixteen years of age, though with her consent, is not unconstitutional.

RAPE—KNOWLEDGE OF AGE OF FEMALE.—Under a statute making the having carnal knowledge of a female under sixteen years of age, rape, whether she consented or not, the defendant may be convicted, though he did not know her age.

CRIMINAL LAW, COMMISSION OF AN OFFENSE DIFFERENT FROM THAT INTENDED.—If one intentionally commits a crime, he is responsible criminally for the consequences of the act, though the offense proves different from what he intended.

Two separate prosecutions for the crime of attempting to commit rape, one being against Daniel F. Murphy, charging an assault to commit rape on Emma Armitage, and the other being against Edward Enos for a similar assault on Miriam Stafford, one of the girls being fourteen and the other fifteen years of age. In each case, there was evidence tending to show the consent of the girl, and in each defendant asked that the jury be instructed to acquit if such consent was proved, and also, unless

the defendant knew, or had cause to know, that the girl was not sixteen years old. The instructions were refused, and the juries convicted in both cases, and the defendants alleged exceptions.

H. J. Fuller and F. V. Fuller, for the defendants.

H. J. Fuller, for the defendant in the first case.

F. V. Fuller and H. J. Fuller, for the defendant in the second case.

A. J. Jennings, district attorney, for the commonwealth.

⁶⁸ KNOWLTON, J. These cases may be considered together, as substantially the same questions are raised in both of them.

Under Public Statutes, chapter 202, sections 27, 28, the question whether an indictment for an assault with an intent to commit rape upon a female child under the age of ten years can be maintained if the child consents to what is done, was very fully considered in *Commonwealth v. Roosnell*, 143 Mass. 32, and decided in the affirmative. This case must be deemed to have settled the law in this commonwealth in accordance with the weight of judicial opinion, although there is some conflict of authority in other jurisdictions.

The several acts in amendment of section 27 above cited, which ⁶⁹ raise the age of consent by girls to carnal connection, do not assume to change the nature of the offense to which they relate. One who unlawfully carnally knows and abuses a female child under the age of sixteen years is guilty of the same crime under the Statutes of 1893, chapter 466, as one who committed the offense upon a child under the age of ten years, when Public Statutes, chapter 202, section 27, were in force: Stats. 1886, c. 305; Stats. 1888, c. 391; Stats. 1893, c. 466. There is no doubt of the intention of the legislature to treat the crime of having carnal connection with a girl under the age of sixteen years as rape, even if she gives her full consent so far as she is capable of consenting.

The defendants contend that the statute last cited is in conflict with article 8 of the amendments to the constitution of the United States, and of article 26 of our declaration of rights, because it provides for the infliction of a cruel and unusual punishment.

The first of these articles has no application to crimes against the laws of a state: *Commonwealth v. Hitchings*, 5 Gray, 482. Without implying that article 26 of our declaration of rights is applicable to the statute before us, it is clear that the punishment prescribed is not cruel or unusual in kind.

There is some ground for the contention that the statute is a departure from the principles which lie at the foundation of our ancient law in regard to rape, and which justify the treatment of it as one of the most heinous crimes that can be committed. The legislation is different in character from the Statutes of 1886, chapter 329, and of 1888, chapter 311, which were enacted for the punishment and prevention of seduction. But whatever we may think of the policy of a statute that treats a girl fifteen years and eleven months old, however mature she may be in body and mind, as if she were incapable of committing the crime of fornication, and subjects a boy of the same age with whom she joins in sexual intercourse to a possibility of the same punishment as if he were guilty of murder in the second degree, the legislature is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe, for prohibited acts. We cannot say that the punishment prescribed for this offense, when the girl is nearly sixteen years of age and voluntarily participates in it, is beyond the constitutional power of the legislature to inflict.

⁷⁰ The presiding justice was asked to instruct the jury that, unless the defendant knew, or had good reason to believe, that the girl was under sixteen years of age, he could not be convicted. How far a mistake of fact in regard to the nature of his act may be availed of by a defendant in a criminal case is sometimes a difficult question to answer. In general, it may be said that there must be *malus animus*, or a criminal intent. But there is a large class of cases in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act.

In such cases, it is deemed best to require everybody at his peril to ascertain whether his act comes within the legislative prohibition. Among these cases are prosecutions for the unlawful sale of intoxicating liquor, for selling adulterated milk, for unlawfully selling naphtha, for admitting a minor to a billiardroom, and the like: *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Raymond*, 97 Mass. 567; *Commonwealth v. Emmons*, 98 Mass. 6; *Commonwealth v. Wentworth*, 118 Mass. 441; *Commonwealth v. Savery*, 145 Mass. 212; *Commonwealth v. Connelly*, 163 Mass. 539. Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question in interpreting a criminal statute is whether the intention of the legislature was

to make knowledge of the facts an essential element of the offense, or to put upon every one the burden of finding out whether his contemplated act is prohibited, and of refraining from it if it is. The application of this rule to crimes like bigamy and adultery has led to some conflict of authority: *Commonwealth v. Hayden*, 163 Mass. 453, 457; 47 Am. St. Rep. 468; *Regina v. Tolson*, 23 Q. B.-Div. 168; see *Commonwealth v. Presby*, 14 Gray, 65.

The defendants in the present cases knew that they were violating the law. Their intended crime was fornication at the least. It is a familiar rule that, if one intentionally commits a crime, he is responsible criminally for the consequences of his act if the offense proves to be different from that which he intended: See *Regina v. Prince*, L. R. 2 C. C. 154, 175.

Exceptions overruled.

RAPE—ASSENT OF FEMALE UNDER AGE OF CONSENT.—If a female is of such age that sexual intercourse with her is by law deemed rape, whether she consents or not, an assault on her with intent to have such intercourse constitutes the crime of assault with intent to commit rape, notwithstanding her actual consent to the act done or attempted: *People v. Verdegreen*, 106 Cal. 211; 46 Am. St. Rep. 234. When the statute defining rape fixes the age at which the female is deemed incapable of consent, the act of carnally and unlawfully knowing a female under that age is rape, though she had attained the age of puberty: *State v. Houx*, 109 Mo. 654; 32 Am. St. Rep. 686, and note. See, also, the note to *McGuff v. State*, 16 Am. St. Rep. 30, and the extended note to *Smith v. State*, 80 Am. Dec. 365.

RAPE—KNOWLEDGE OF AGE OF FEMALE.—A person on trial for rape will not be permitted to prove that he had reason to believe that the prosecutrix was, at the time of the carnal knowledge, over the statutory age of consent: *State v. Houx*, 109, 654; 32 Am. St. Rep. 686.

HARMON v. OLD COLONY RAILROAD COMPANY.

[165 MASSACHUSETTS, 100.]

MARRIED WOMAN, DAMAGES RECOVERABLE BY, FOR PERSONAL INJURIES.—A married woman, in an action to recover damages for personal injuries, is entitled to have considered as elements of damage the impairment of her capacity to perform labor, if the statutes of the state provide that in all cases where married women shall, by their own labor, earn wages, payment shall be made to them therefor, and that the earnings of every married woman from her trade, business, labor, or services shall be her sole and separate property.

Tort for personal injuries to plaintiff, a married woman, alleged to have resulted from the negligence of the defendant.

She was at the time of the accident, and for some years prior thereto, engaged in keeping a restaurant. She offered to prove that she was engaged in this business on her own account, that it was profitable, and that as the result of the accident she had lost in such business two thousand five hundred dollars. The evidence was excluded, and the jury were instructed that in estimating damages they could not take into consideration her impaired capacity for labor. The jury returned a verdict in favor of the plaintiff for two thousand two hundred dollars, but she alleged exceptions.

A. A. Strout and G. E. Smith, for the plaintiff.

J. H. Benton, Jr., and C. F. Choate, Jr., for the defendant.

¹⁰² ALLEN, J. The general question arising in this case is, whether in an action brought by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor can be considered as an element of the damages.

By Statutes of 1846, chapter 209, section 1, it was enacted that, "in all cases where married women shall hereafter, by their own labor, earn wages, payment may be made to them for the same."

This was followed by the Statutes of 1855, chapter 304, section 7: "Any married woman may carry on any trade or business, and perform any ¹⁰³ labor or services, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name; and she may sue and be sued as if sole in regard to her trade, business, labor, services, and earnings; and her property acquired by her trade, business, and service, and the proceeds thereof, may be taken on any execution against her."

By the statutes of 1857, chapter 249, section 6, it was provided that a husband should not be bound by his wife's contracts in respect to her separate property, or to her trade.

The rights of married women in respect to their labor are thus defined in General Statutes, chapter 108:

"Section 1. The property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, that which she acquires by her trade, business, labor, or services, carried on or performed on her sole and separate account . . . shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her

in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts."

"Sec. 3. A married woman may bargain, sell, and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings, in the same manner as if she were sole."

"Sec. 5. The contracts made by a married woman in respect to her separate property, trade, business, labor, or services shall not be binding on her husband, nor render him or his property liable therefor; but she and her separate property shall be liable for such contracts in the same manner as if she were sole."

"Sec. 6. Payment may be made to a married woman for wages earned by her labor," etc.

By the Statutes of 1862, chapter 198, amended by the Statutes of 1881, chapter 64, section 1, a married ¹⁰⁴ woman doing business on her separate account must record a certificate in the town or city clerk's office setting forth various particulars; or her husband may file such certificate. In case of failure to do so, her property will not be protected against his creditors, and he will be liable on her contracts.

By the Statutes of 1874, chapter 184, section 1, "a married woman may . . . make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, and all work and labor performed by her for others than her husband and children shall, unless there is an express agreement on her part to the contrary, be presumed to be on her separate account." And by section 3, "a married woman may sue and be sued in the same manner and to the same extent as if she were sole, but nothing herein contained shall authorize suits between husband and wife."

This enumeration of statutes shows the growth of the legislation on this particular subject, and the foregoing provisions are now embodied, in a somewhat compressed form, in Public Statutes, chapter 147.

By virtue of this legislation, a married woman becomes, in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with

the statutory requirement as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his, subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right in these respects is now made subordinate to her right to employ her time in the ¹⁰⁵ care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her a right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to perform labor on her sole and separate account.

By the common law, the husband was bound to support his wife, and therefore was entitled to her services. By the statutes, which modify the common law, his right to her services is abridged, though his obligation to support her remains.

It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which, perhaps, may require her absence for ten years, thus amounting to a desertion, which would be in violation of her matrimonial duty. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent. To a certain limited extent, as, for example, in fixing the domicile, and in being responsible under ordinary circumstances for its orderly management, the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us, the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances, the right

of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground must be left to the jury to determine, under the circumstances of each particular case.

The radical nature of the change effected by the legislation of this state in the legal condition of married women is illustrated in numerous decisions, of which *Jordan v. Middlesex R. R. Co.*, 138 Mass. 425, most nearly resembles the present case in its facts. But see, also, *Parker v. Simonds*, 1 Allen, 258; *Ames v. Foster*, 3 Allen, 541; *Plumerv. Lord*, 5 Allen, 460; *Chapman* ¹⁰⁸ v. Foster, 6 Allen, 136; *Stewart v. Jenkins*, 6 Allen, 300; *Chapman v. Briggs*, 11 Allen, 546; *Burke v. Cole*, 97 Mass. 113; *Snow v. Sheldon*, 126 Mass. 332; 30 Am. Rep. 684; *Read v. Stewart*, 129 Mass. 407; *Pacific Nat. Bank v. Windram*, 133 Mass. 175; *Butler v. Ives*, 139 Mass. 202; *Binney v. Globe Nat. Bank*, 150 Mass. 574.

Exceptions sustained.

MARRIED WOMEN—DAMAGES FOR INJURIES TO.—A married woman in an action to recover damages for personal injuries caused by the wrongful act of another can only recover for the direct injury, unless she is engaged in carrying on business, trade, or labor upon her sole and separate account in pursuance of a statute permitting her to do so: *Filer v. New York Cent. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327. Where a married woman is injured by the negligence of another, and is habitually engaged in washing clothes for others for compensation, she may prove the value of the time lost by such injury in an action therefor: *Fleming v. Shenandoah*, 67 Iowa, 505; 56 Am. Rep. 354. See, also, the case of *Uransky v. Dry Dock etc. R. R. Co.*, 118 N. Y. 304; 16 Am. St. Rep. 759, and note.

NATIONAL TELEPHONE MANUFACTURING COMPANY v. Du Bois.

[165 MASSACHUSETTS, 117.]

FOREIGN CORPORATION. SUIT BY, RIGHT TO PROSECUTE AGAINST NONRESIDENTS. WHEN WILL BE DENIED.—The courts of equity of this state are not open to foreign corporations as a matter of private right, but only as a matter of comity. If it appears that complete justice cannot be done here, or that the amount involved is small, and the defendant will be subjected to great and unnecessary expense and inconvenience, and that the investigation required will be surrounded, if conducted here, with many and great, if not insuperable, difficulties, which will all be avoided without special hardship to the plaintiff if suit is brought against defendant in the state where he lives, and where the alleged debt was contracted, and where personal service can be made upon him, our court should decline jurisdiction.

Suit in equity in the superior court against John E. Du Bois, Edward D. Van Tassel, and Alexander R. Van Tassel to reach and apply the interest of Du Bois in the partnership, consisting of himself and the other defendants, to the payment of a debt due the plaintiff. A decree was rendered granting the relief prayed for, and defendants excepted.

W. O. Underwood, for the defendants.

W. M. McInnes, for the plaintiff,

¹¹⁸ MORTON, J. The plaintiff in this case is a New Hampshire corporation, with a place of business in Boston, whose claim had not been reduced to judgment, and does not relate to a contract made in this state. The claim is for labor, materials, and disbursements performed, furnished, and made in the state of Pennsylvania. The principal defendant is a resident of Pennsylvania, with no property here except his interest as partner in a firm whose property, assets, books, vouchers, papers, and accounts are all, with some few exceptions in Du Bois, in the state of Pennsylvania, where its business chiefly is carried on, and where one of the other two partners lives with the principal defendant. The service is by publication.

The courts of equity in this state are not open to the plaintiff as matter of strict right, but as matter of comity: *Smith v. Mutual Life Ins. Co.*, 14 Allen, 336, 339. And if it appears that complete justice cannot be done here, or that the amount involved is small, and the defendant will be subjected to great and unnecessary expense and inconvenience, and that the investigation required, will be surrounded, if conducted here, with many and great, if not insuperable, difficulties, which will all be avoided without especial hardships to the plaintiff if suit is brought against the defendant in the state where he lives and where the alleged debt was contracted, and where personal service can be made on him, we think that our courts should decline to take jurisdiction: *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341; 59 Am. Rep. 86; *Pierce v. Equitable Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; *Bank of North America v. Rindge*, 154 Mass. 203; 26 Am. St. Rep. 240.

All of these circumstances are found in this case. The amount of the claim is seventy-two dollars and seventy-five cents which of itself, prior to the passage of the Statutes of 1884, chapter 285, would have prevented the court from taking jurisdiction: *Chapman v. Banker etc. Pub. Co.*, 128 Mass. 478. We do not think that statute was intended to encourage foreign corporations in

bringing suits like the present, or to take away the power of the court to deal with them as equity and justice might require. The alleged debt was contracted in Pennsylvania, and had not been reduced to judgment when this suit was brought, either there or anywhere. There has been no personal service in this proceeding. According to ¹¹⁹ the agreed facts, it is manifest that the principal defendant will be subjected to great and unnecessary expense if compelled to come here, and that the investigation required to ascertain his interest will be surrounded with difficulties, which will all be avoided without any apparent hardship to the plaintiff if it brings its suit in Pennsylvania. It is true that the agreed facts find that it would appear from an examination of the books, vouchers, and papers at the offices in Pennsylvania and in Boston that "the interest of the said John E. Du Bois (the principal defendant) . . . was in excess of the amount sought to be recovered in this suit, including costs and any possible cost of liquidating the affairs of said partnership in Massachusetts"; and, for the purposes of the suit, it is also agreed that the assets in Pennsylvania greatly exceed the entire indebtedness of the firm. But it is expressly stipulated that nothing contained in the agreed statements is to be regarded as a waiver on the part of any of the defendants of the question of jurisdiction. The objection to jurisdiction was seasonably taken, and, without adverting to other grounds that have been urged by the defendants, we think that, for the reasons stated, the bill should be dismissed, and it is so ordered.

Bill dismissed.

FOREIGN CORPORATIONS ARE RECOGNIZED IN FOREIGN JURISDICTIONS not as an act of right, but as an act of grace: *Erie Ry. Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226, and note. A corporation of another state, having there obtained a judgment against another corporation of that state, may maintain a bill in equity here against the officers of the debtor corporation for discovery of the names of its stockholders and of the number of shares held by each, if the officers reside in this commonwealth and the books of the corporation are kept here, in order, by a suit in the other state, to enforce a personal liability of such stockholders: *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341; 59 Am. Rep. 86. See, also, the extended note to *Ducat v. Chicago*, 95 Am. Dec. 537.

GROVER v. SMITH.

[185 MASSACHUSETTS, 182.]

PARTNERSHIP, SALE OF GOODS OF, IN PAYMENT OF PERSONAL DEBT OF ONE PARTNER.—If one member of a partnership sells goods of the firm under an arrangement that part of the price shall be applied to the payment of his personal debt, the partnership cannot recover in an action of contract the whole price of the goods so sold. A tender made after an appeal has been taken from a judgment in an action for goods sold is bad.

Action brought in the municipal court of Boston, in which judgment was rendered in favor of the plaintiff. The defendant thereafter appealed, and during the pendency of the appeal amended his answer by leave of the court so as to allege a tender to the plaintiff after the appeal had been taken.

P. B. Kiernan, for the plaintiffs.

S. W. Creech, for the defendant.

¹⁸² **HOLMES, J.** This is an action of contract brought by the members of a partnership for goods sold to the defendant. The goods were sold under an arrangement, made between the managing member of the firm and the defendant, that one-quarter of the price fixed should be applied to a private debt owed by the former to the latter. It is this part which now is sued for. The rest has been paid, except twelve dollars and nineteen cents, as to which the only question is one of tender.

The case is governed by *Homer v. Wood*, 11 Cush. 62, which is stronger than this. There the claim of the firm, which one partner had undertaken to set off against his own debt, was pre-existing, so that his transaction was only an unauthorized attempt to discharge a valid claim, yet it was held that he could not rescind his own act, and that, as he necessarily was one of the plaintiffs, they could not recover. Here the original terms on which the defendant accepted the goods were as we have stated, and the plaintiff who made the contract, at least, cannot recover on a different contract from the one he made. It is true ¹⁸³ that the agreed facts do not expressly state that the defendant acted in good faith, but that is immaterial: *Farley v. Lovell*, 103 Mass. 387.

The plea of tender is bad: *Brickett v. Wallace*, 98 Mass. 528. Judgment affirmed.

PARTNERSHIP—PAYMENT OF DEBT OF INDIVIDUAL WITH FIRM MONEY.—A payment of partnership moneys to satisfy the personal debt of one partner, if made to one having no notice of

the source whence they came, does not entitle the partnership or any member of it to recover the moneys so paid, or any part thereof. It will be otherwise if the payment was received with such notice: *Babcock v. Standish*, 53 N. J. Eq. 376; 51 Am. St. Rep. 633, and note.

TENDER MUST PRECEDE SUIT where the plaintiff relies on an equitable title under a contract for a conveyance: *Chahoon v. Hollenback*, 16 Serg. & R. 425; 16 Am. Dec. 587.

THAYER v. LOMBARD.

[165 MASSACHUSETTS, 174.]

EVIDENCE.—DYING DECLARATIONS ARE NOT ADMISSIBLE IN A CIVIL ACTION.—Their admission is, by the common law, restricted to prosecutions for homicide.

Action of contract upon a promissory note alleged to have been made by the defendants' testator. The defendants proved that their testator had for a number of years before the date of the note kept a note-book in which were entered notes given by him, and also a cash-book, and that there were no entries therein showing either the giving of the note or the receipt of the money for which plaintiff claims it was given, and they offered to prove that the testator, being in his last illness, and conscious of his immediately approaching death, executed his will, and gave his executors information about his estate, property, and debts, and stated that all notes executed by him appeared in such note-book and all debts in the form of costs in his other books. This evidence was excluded, and the defendants alleged exceptions.

R. T. Lombard, for the defendants.

J. Everett, for the plaintiff.

¹⁷⁵ FIELD, C. J. The dying declarations of the defendants' testator were not admissible to prove the facts to which the declarations related. The facts in controversy were facts in the past, and not facts concerning the feelings or thoughts of the testator existing at the time the declarations were made: See *Chapin v. Marlborough*, 9 Gray, 244; 69 Am. Dec. 281. The present case does not bring the declarations within any of the exceptions known to the common law where declarations of deceased persons are admitted in evidence. The admission of the declarations of a deceased person on the ground that they are dying declarations is, by the common law, confined to prosecutions for homicide, and there is no statute which makes them evi-

dence in a civil action such as this is: 1 Greenleaf on Evidence, section 156.

Exceptions overruled.

EVIDENCE—DYING DECLARATIONS AS IN CIVIL CASES.—In a civil suit, the dying declarations of a person fatally injured by the act of another are not admissible in evidence against the defendant. Such declarations are only admissible in criminal cases, where the death of the deceased is the subject matter of the charge, and the circumstances of the death the subject matter of the declaration: *Daily v. New York etc. R. R. Co.*, 32 Conn. 356; 87 Am. Dec. 176, and note; *Marshall v. Chicago etc. Ry. Co.*, 48 Ill. 475; 95 Am. Dec. 561, and note; *Wooten v. Wilkins*, 39 Ga. 223; 99 Am. Dec. 456, and note.

WALSH v. PACKARD.

[165 MASSACHUSETTS, 189.]

COVENANTS, WHEN PERSONAL.—A covenant appended to a lease of real property, whereby the covenantor becomes surety for the prompt and full payment of the rent and performance of the covenants as specified in the lease, is a personal covenant, and an action thereon may be maintained by the administrator of the lessor, and not by his heirs, and the recovery is not restricted to nominal damages, but extends to the entire damages arising from the non-performance of the covenant.

W. M. McInnes, for the defendant.

O. A. Galvin and J. F. Sweeney, for the plaintiffs.

¹⁹⁰ **HOLMES, J.** This is an action upon a covenant appended to a lease, brought by the administratrices of Walsh, the lessor and covenantor. The only objection urged to the plaintiffs' recovery is, that, if the obligation of the covenant did not cease with the life of Walsh, his heirs, and not his administrators, are the proper persons to sue upon it. The covenant is as follows:

"In consideration of the letting of the above-described premises and one dollar to me paid, the receipt of which is hereby acknowledged, I do hereby become surety for the prompt and full payment of the rent and performance of the covenants as specified in the above lease, to be paid by Ida E. Small to John Walsh.

"Witness my hand and seal, the twenty-eighth day of November, A. D. 1892.

[Seal]

"WM. A. PACKARD."

The contract raises a question of construction, as well as a question of law when the construction is settled. It does not

mention heirs, executors, administrators, or assigns, and courts are a little slower to enlarge by implication the undertaking of a surety or guarantor than they are to enlarge that of the principal party. But perhaps the word "surety," although seemingly artificially used, coupled with the nature and object of the contract, makes the collateral undertaking as large as the principal one. We will assume that it is to be read in the broader sense. We have no doubt that it continues to run after the death of the original covenantor. But supposing heirs, executors, and assigns to have been mentioned, it seems to be settled in this commonwealth that the instrument would not work like a letter of credit, offering a new contract to the successors of Walsh (*Saunders v. Saunders*, 154 Mass. 337, 338; *Abbott v. Hills*, 158 Mass. 396), if that would make any difference when there has been no purchase on the faith of it; and therefore, apart from other reasons, the only ground on which the heirs can be preferred to the administratrices as the proper plaintiffs is, that the covenant runs with the land, or, more accurately, runs with the estate of the covenantor, and that the heirs are successors to that estate. The covenant is collateral to the ¹⁹¹ lease (*Virden v. Ellsworth*, 15 Ind. 144), and is not affected by the statute of 32 Henry VIII, chapter 34; *Harbeck v. Sylvester*, 13 Wend. 608; see *Jones v. Parker*, 163 Mass. 564, 568; 47 Am. St. Rep. 485.

In *Allen v. Culver*, 3 Denio, 284, 301, a similar covenant was held by the supreme court of New York to pass to assigns, but the point was decided without discussion on the supposed analogy of *Pakenham's case* (a covenant on the part of a convent that the convent should sing every week in a chapel in the plaintiff's manor), Year Book, 42 Edward III, page 3, plate 14. The reference to this case showed that the court did not have in mind the distinction pointed out by Lord Coke in *Chudleigh's case*, 1 Coke, 120 a, 122 b, and discussed in *Norcross v. James*, 140 Mass. 188, between those covenants which create or follow the analogy of easements, and go with the land even to disseisors, and those pure contracts like covenants for title upon which no one can sue except parties and privies. *Pakenham's case*, Year Book, 42 Edward III, page 3, plate 14, was of the former class. The argument for the plaintiff in that case of most weight in the mind of the court was, that the plaintiff was tenant of the land, and that the service claimed was a thing annexed to the land (being of a kind that could be created by prescription), or, as it was stated by Fitzherbert, everyone who has the land shall have the covenant: Fitzherbert's Abridgment, pl. 17. Those who are cu-

rious to verify the fact assumed in Pakenham's case, Year Book, 42 Edward III, page 3, plate 14, that such services from a stationary ecclesiastical corporation might be due by prescription may consult Year Book, 22 Henry VI, p. 46, pl. 36; 21 Hen. VII, p. 5, pl. 2; Williams case, 5 Coke, 72 b, 73 a; Slipper v. Mason, Nelson's Lutwyche, 43, 45; Rastell's Entries and Statutes, pl. 2 b. See further Middlefield v. Church Mills Knitting Co., 160 Mass. 267. The case at bar, on the other hand, is more analogous to the covenants for title. For although rent savors of the realty, any warranty or insurance of rent is a purely personal contract, of which another than the original contractee can avail himself only on principles of contract. The true question is, whether such a guaranty is wholly analogous to covenants for title. In the case of some of these, at least, assigns of the covenantee are treated as privy to the contract, and can sue in their own names, and, when this is so, heirs also can sue in their own names for breaches happening while they hold the estate of the covenantee: 122 Lougher v. Williams, 2 Lev. 92; Rawle on Covenants, 5th ed., sec. 316.

But this right thus given to assigns only shortened up the old process by which, within certain limits, each purchaser looked in turn to his vendor to make good the warranty imported by a sale. It is a doctrine of tradition and history (Norcross v. James, 140 Mass. 189), and cannot be extended to new cases by analogy without legislation. The old cases, so far as we know, even the most extreme, are all cases of warranties or covenants by owners of the land: Fitzherbert's Natura Brevium, 145 C. Lord St. Leonards says that "there appears to be no direct authority that a stranger to the land can enter into covenants respecting it, which will run with the land in the hands of assignees": V. & P., 14th ed., 587. And although he seems to have missed the distinction between the two classes of covenants to which we have adverted, this statement we believe to be correct with regard to covenants for title and any others, if others there be, which are governed by the same rules: King v. Wight, 155 Mass. 444, 447.

We do not argue from the rule that new and unusual incidents are not to be annexed to land, because that rule seems to belong rather to the law of easements and the like than to the class under discussion: See Norcross v. James, 140 Mass. 188, 192.

It is true, no doubt, that the heirs are the only persons interested in the rent, and therefore are the only persons who suffer

substantial damages by a failure to pay it. We assume that, if the administratrices recover substantial damages, they will receive them as trustees for the heirs. We agree, as suggested by Lord Ellenborough in a different case, that a recovery by them would bar the heirs from recovering at all. But we do not agree to his further suggestion, that they could recover at most but nominal damages: *Kingdon v. Nottle*, 1 Maule & S. 355, 362. At the present day, a trustee may recover damages to the extent of the interest of his cestui que trust: *Drummond v. Crane*, 159 Mass. 577, 580; 38 Am. St. Rep. 460; *Lloyds v. Harper*, 16 Ch. Div. 290. Executors or administrators represent the person of the deceased "more actually" than do the heirs: *Coke on Littleton*, 209 a; *Bullard v. Moor*, 158 Mass. 418, 425. Unless we are prepared to hold that assigns could sue in their own names upon this contract, we ¹⁹³ ought to adhere to the general rule, and allow the administratrices to maintain the action. For the reasons which we have given we are of opinion that the plaintiffs can maintain this suit. In *Harbeck v. Sylvester*, 13 Wend. 608, 609, not noticed in *Allen v. Culver*, 3 Denio, 284, an opposite decision was reached from that in *Allen v. Culver*, 3 Denio, 284. See, also, as to collateral covenants, *Raymond v. Fitch*, 2 Crompt. M. & R. 588, 599; 5 Tyrwh. 985, 996.

Judgment for the plaintiffs.

A COVENANT IS PERSONAL and goes to the administrator, and he alone is entitled to sue upon it, where the obligor claims to be entitled to a *Lovely* donation claim, and covenants to convey it to the plaintiff when the patent issues: *Ross v. Turner*, 7 Ark. 132; 44 Am. Dec. 531 and note. The distinction between real and personal covenants is the subject of the note to *Morse v. Garner*, 47 Am. Dec. 569.

EATON v. LIBBEY.

[165 MASSACHUSETTS, 218.]

CONSIDERATION.—THE PRIVILEGE OF NAMING A CHILD is a sufficient consideration to support a promise to pay a designated sum to such child.

A PROMISE, THOUGH PAYABLE TO AN INFANT and given in consideration of the privilege of naming him, is enforceable by action.

Action upon a promissory note dated November 2, 1886, promising to pay plaintiff two hundred and fifty dollars on demand, with interest, signed by the testator of the defendant. In 1872, soon

after the plaintiff's birth, the decedent promised his parents to give him one hundred dollars for the privilege of naming him. The parents having consented, the decedent named the plaintiff after himself, and, instead of giving the money at the time, executed his note in favor of the plaintiff for one hundred dollars, with interest, and delivered it to the plaintiff's mother. In 1886, the note sued upon was given in place of the original note, and was delivered to plaintiff's mother, who kept it in her possession until she gave it to him to take to an attorney for the purpose of commencing the present action. The defendants contended that the note was given without consideration, and was therefore void, and requested the trial judge to so rule. This he declined to do, but, on the contrary, gave judgment for the plaintiff, and the defendants alleged exceptions.

G. W. Anderson, for the defendants.

E. W. Chapin, for the plaintiff.

²¹⁹ BARKER, J. The defendants concede that the privilege which was given to their testator of naming the plaintiff was a valid consideration for the testator's promise to the plaintiff's parents to pay him the sum of one hundred dollars, for which sum the testator then gave his promissory note, payable to the plaintiff. But they contend that the plaintiff was a stranger to the consideration, and that he could not recover upon that note, and that he cannot recover upon the note in suit, which the testator afterward gave to the plaintiff in renewal of the original note.

We have no doubt that the privilege of naming a child is a valid consideration for a promise. It was so held in *Wolford v. Powers*, 85 Ind. 294, 307; 44 Am. Rep. 16. See, also, *Parks v. Francis*, 50 Vt. 626; 28 Am. Rep. 517. ²²⁰ Gifts to a child because of its name are common, and a change of name is often made the condition of a gift or bequest. In many jurisdictions the change of a name is regulated by statute.

If we assume that the right to name a child belongs to its parents, and ultimately to its father, the child cannot be said to have no interest in the name imposed. The consequences affect the child more than anyone else. He is deprived of the advantage of receiving any other name, and is subjected to the possibility of detriment because he bears the name imposed.

Assuming that the privilege belongs to the parents, if they waive the right in favor of another, we think the child has an interest in the name which it shall bear analogous to the interest

which the child has in its own services, which belong to the father, but which, if the father waives his right, furnish a good consideration for a promissory note given to the child by a person to whom they have been rendered: *Nightingale v. Withington*, 15 Mass. 272; 8 Am. Dec. 101.

The right of the parents is one which they have as the natural guardians of the child, and they may be presumed to act in the matter for its interest. If, for exercising the right in a particular manner, they receive a reward which they recognize and treat as belonging to the child, it should be considered as its property, even if the parents could have kept the reward as their own.

In this case, it is fair to say that in the transaction in which the original note was given the parents were acting for the child, and were understood by the defendant's testator to be so acting. The plaintiff has continued to bear the name, and has accepted the present note since he arrived at years of discretion, and he has further ratified the contract by bringing this suit since he became of age.

We are of the opinion that there was a valid consideration for the note moving from the plaintiff himself. It is unnecessary to consider whether the action could be maintained on any other ground.

Exceptions overruled.

CONSIDERATION—NAMING CHILD AS.—A promissory note executed in consideration of a father's naming a child after the promisor, and in pursuance of the promisor's agreement that if the child was so named he would provide for its education and support, is based on a valid consideration: *Wolford v. Powers*, 85 Ind. 294; 44 Am. Rep. 16.

TOWNSEND v. TYNDALE.

[165 MASSACHUSETTS, 293.]

THE STATUTE OF LIMITATIONS DOES NOT EXTINGUISH a debt nor affect a trust created for its payment.

THE RUNNING OF THE STATUTE OF LIMITATIONS AGAINST a debt which a policy of insurance was pledged to secure does not prevent the enforcement of a claim arising out of such policy, nor does it impair the rights of the holders of the indebtedness to the proceeds of the insurance.

A PARTNERSHIP IN WHOSE FAVOR PROMISSORY NOTES WERE GIVEN, and which has set over such notes to the estate of one of its members, without any written assignment, may maintain an action to enforce them, though the proceeds of the action must be held in trust for such estate.

AM. ST. REP., VOL. LII.—33

Action against the administrator of the estate of Judas M. Josephson for money had and received, being the proceeds of a policy of insurance issued April 25, 1877, on the life of the decedent "for the benefit of Messrs. Lane and Townsend as collateral security for the amount of their then subsisting pecuniary demands against said insured." In 1870, Josephson delivered to the firm of Lane & Townsend, three promissory notes in payment of pre-existing indebtedness, payable respectively in six, eight, and ten months after their date. No payment was made on any note, except that seventy-two dollars were received as a dividend upon proof of the notes against the estate of Josephson in bankruptcy. He, on April 25, 1877, procured from the New England Mutual Life Insurance Company, a policy of insurance upon his life, which he delivered to Lane & Townsend as collateral security for the payment to them of the promissory notes. The special partnership of Lane & Townsend was dissolved in July, 1870, George W. Townsend being the liquidating partner thereof, and the general partners, Alexander T. Lane and George W. Townsend, being indebted to the special partner, Solomon Townsend. After the issuing of the policy of insurance, it and the notes were assigned and transferred without any writing by the liquidating partner to the estate of Solomon Townsend, the amount of the notes being then due to his estate in the settlement of the firm affairs. The first premium on the policy was paid by George W. Townsend as liquidating partner of the firm, and the subsequently accruing premiums were paid by George W. Townsend, as executor of the will of Solomon Townsend, deceased. The total payments made, with interest to the death of Josephson, amounted to fifteen hundred and thirty-nine dollars and forty cents. Plaintiffs have ever been residents of the state of Pennsylvania. Josephson was also a resident of that state at and before the delivery of the notes, but, at and subsequent to the issuing of the policy of insurance, he was a resident of the state of New York, where he died on the 23d of December, 1891, leaving a widow and children who appeared and took upon themselves the defense of the present action. At the death of Josephson, all the notes were barred by the statute of limitations of Massachusetts, New York, and Pennsylvania, and, at the issuing of the policy, the note which first became due was barred by the statute of limitations of the two states last named. The judge ruled that the plaintiffs were entitled to recover.

N. B. Levenson, for the claimants.

B. L. M. Tower and F. A. North, for the plaintiffs.

205 HOLMES, J. It is found as a fact that the policy was taken out by the defendant's intestate as security for the three notes on which the plaintiffs now rely in their claim upon its proceeds, and that the plaintiffs are entitled to recover the amount of these notes and interest. These notes still are "subsisting pecuniary demands" within the words of the policy, although they ²⁰⁶ all are outlawed, as indeed one of them was when the policy was issued to secure it. As is said in *Campbell v. Maple*, 105 Pa. St. 304, 307, the statute of limitations "does not extinguish the debt, nor affect a trust created for its payment, as long as the trust subsists": See *Champion v. Buckingham*, 165 Mass. 76; *Shaw v. Silloway*, 145 Mass. 503, 506, 507; *Norton v. Palmer*, 142 Mass. 433; *Ball v. Wyeth*, 8 Allen, 275, 278.

The fact that, in winding up the firm and settling the accounts between the partners, the notes have been set over to the estate of one partner, but without writing, does not deprive the notes of the security. The demands on the notes remain in form demands of Lane and Townsend, and Lane and Townsend continue to have an interest in getting the amount of them paid, although, if paid, the sum will be received by them as trustees for one of their number in settlement of his claims against the firm. It is not necessary to consider more exactly what effect we should give to the word "their" in "their then subsisting pecuniary demands."

Judgment on the finding.

LIMITATIONS OF ACTIONS—EFFECT.—The statute of limitations disables the plaintiff from suing, and does not establish merely a presumption of payment: *Pritchard v. Howell*, 1 Wis. 131; 60 Am. Dec. 363. The effect of the statute of limitations is to destroy the remedy without impairing the right: 7 N. J. L. 113; 11 Am. Dec. 529, and note; *Commonwealth v. McGowan*, 4 Bibb, 62 7 Am. Dec. 737; *Belknap v. Gleason*, 11 Conn. 160; 27 Am. Dec. 721; *Pittsburg etc. R. R. Co. v. Byers*, 32 Pa. St. 22; 72 Am. Dec. 770; *McCormick v. Brown*, 36 Cal. 180; 95 Am. Dec. 170, and note. See, also, the extended note to *Bizzell v. Nix*, 81 Am. Rep. 41.

LIMITATIONS OF ACTIONS—COLLATERAL SECURITY.—Neither the running of the statute of limitations against a debt secured by a trust deed, nor the recovery of a judgment on such debt, nor any lapse of time short of the period sufficient to raise the presumption of payment, deprives the party of his right to enforce the trust for the purpose of compelling the payment of the debt: *Gibson v. Green*, 89 Va. 524; 37 Am. Dec. 888. A deposit of collaterals does not prevent the running of the statute of limitations upon the debts secured thereby, but the barring of any action upon such debt through the running of the statute of limitations does not affect the right of the pledgee to realize upon the collateral: *Hartranft's Estate*, 153 Pa. St. 530; 34 Am. St. Rep. 717, and note.

NEW ENGLAND DRESSED MEAT AND WOOL COMPANY v. STANDARD WORSTED COMPANY.

[165 MASSACHUSETTS, 228.]

SALE OF CHATTELS, WHEN PASSES TITLE.—In a sale of a portion of a larger mass, the whole remaining in the possession of the vendor with the right and power in him to make separation, no title passes until this is done, so as to enable him to recover the purchase price.

SALE OF GOODS TO BE MANUFACTURED, TITLE WHEN PASSES SO AS TO SUSTAIN AN ACTION FOR THE PURCHASE PRICE.—Under a contract to buy all the wool of a designated quality which the plaintiffs may make for thirty days, not to exceed fifteen thousand pounds, no title passes; and no action can be maintained for the purchase price, except as to wool which has been separated in a body by itself, not mixed with, nor a part of, any greater quantity of wool. The setting apart and shipping to the purchasers of a quantity greater than they agreed to take does not vest title to any part in them, and hence will not sustain an action.

STATUTE OF FRAUDS.—IF THE NAME OF A PARTY to be bound on a contract appears in the body of the memorandum thereof, instead of being signed at the end, this is a sufficient subscription, if the name was so written by him or his authorized agent.

STATUTE OF FRAUDS.—A MEMORANDUM OF A SALE MUST DESIGNATE THE PROPERTY SOLD.—The want of such designation cannot be supplied by parol evidence.

STATUTE OF FRAUDS.—MEMORANDUM, EVIDENCE TO PROVE MEANING OF LETTERS IN.—The meaning of the letters "F C" in a memorandum of sale, when they are technical abbreviations used in the wool trade, may be shown by parol evidence.

STATUTE OF FRAUDS.—SALE.—PAROL EVIDENCE is not competent to contradict or vary the terms of a memorandum of sale to prove what was intended, but the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown to apply it to the subject matter.

STATUTE OF FRAUDS.—A MEMORANDUM OF SALE SUFFICIENTLY DESIGNATES THE PROPERTY sold when it describes such property as "about 2,000 to 2,500 lbs F C, and all they may make for thirty days, say up to 10,000 to 15,000 lbs." and the evidence shows that the vendor was engaged in the wool business, and the letters "F C" are used by persons in that trade as designating a particular grade of wool, and that the vendor had on hand at the time of contracting two thousand four hundred and forty-three pounds of wool recently manufactured of that grade.

STATUTE OF FRAUDS.—THE ACCEPTANCE OF PART of the property sold takes a case out of the statute of frauds.

Action of contract to recover the price of five thousand and fourteen pounds of "F C wool" claimed to have been sold by plaintiff to defendant. The defendant pleaded the statute of limitations. In the trial court, the jury rendered a verdict for the plaintiff, and the defendant alleged exceptions. The memorandum of sale referred to in the opinion was made by one Pratt

in the words and figures following: "Mar. 24, '93. Bought of New Eng. D. M. & W. Co. about 2,000 to 2,500 lbs F C and all they may make for thirty days say up to 10,000 to 15,000 lbs, at 40 cents net cash 1 per cent brokerage to me for account Standard Worsted Co."

G. R. Swasey and J. Nelson, for the defendant.

A. P. French, for the plaintiff.

³²⁸ KNOWLTON, J. The plaintiff seeks to recover only upon the first and third counts of the amended declaration, which set forth a claim for the price of goods sold. As the case was submitted to the jury, a verdict could not be rendered for the plaintiff unless it was proved that the title passed to the defendant. The contract of sale covered certain specific property, namely, the fine combed wool which the plaintiff had on hand when the contract was made, and also such fine combed wool as the plaintiff ³²⁹ should manufacture within the next thirty days, the whole to be paid for at forty cents per pound. The present action concerns only a part of the wool subsequently manufactured, and the principal question in the case is, whether the title passed before the action was brought. The two thousand four hundred and forty-three pounds of F C wool on hand at the plaintiff's factory, where the parties were at the time of making the contract, became the defendant's property as soon as the contract was made.

What was necessary to give the contract effect upon the wool to be produced so as to change the ownership from the plaintiff to the defendant? The plaintiff was a manufacturer of wool, and it is clear that, of the quantity of wool of different kinds in its possession, none would pass to the defendant until something occurred to designate it as that covered by the contract. The parties contemplated, as their contract shows, that the plaintiff, who was to manufacture the wool, should, in connection with the work of manufacturing it, separate it from the mass of wool then in his possession and determine its weight, so that it would appear to be the property called for by the contract, and its price would be ascertained. A learned writer states the law to be as follows: "In a sale of a portion of a larger mass, the whole remaining in the possession of the vendor, with a right and power in him to make a separation, both upon principle and the weight of authority, no title passes until that is done, so as to enable the vendor to recover the price, even for goods 'bargained and sold'": Benjamin on Sales, 6th Am. ed. 308. This doctrine is well es-

established in Massachusetts, and, while the decisions are not uniform, it is a rule which prevails generally in this country, as well as in England: *Scudder v. Worster*, 11 Cush. 573; *Weid v. Cutler*, 2 Gray, 195; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Ropes v. Lane*, 9 Allen, 502; *Nichols v. Morse*, 100 Mass. 523; *Morse v. Sherman*, 106 Mass. 430, 432; *Keeler v. Goodwin*, 111 Mass. 490; *Turner v. Langdon*, 112 Mass. 265; *Elgee Cotton cases*, 22 Wall. 180, 187; *Hatch v. Oil Co.*, 100 U. S. 124, 134; *Morrison v. Dingley*, 63 Me. 553; *Bailey v. Smith*, 43 N. H. 141; *Haldeman v. Duncan*, 51 Pa. St. 66; *Hahn v. Fredericks*, 30 Mich. 223; 18 Am. Rep. 119; *Woods v. McGee*, 7 Ohio, 467; *Browning v. Hamilton*, 42 Ala. 484; *Commercial Nat. Bank v. Gillette*, 90 Ind. 268; 46 Am. Rep. 222; *Ferguson v. Northern Bank*, 14 Bush, 555; 29 Am. Rep. 418; *Baldwin v. McKay*, 41 Miss. 358; *Upham v. Dodd*, 24 Ark. 545; *Courtright v. Leonard*, 11 Iowa, 32; *McLaughlin v. Piatti*, 27 Cal. 451, 463.

We think that this rule is applicable to the present case. The regular process of manufacture which was necessary to bring the property within the contract would leave it a part of the larger mass in the possession of the plaintiff. According to the uncontradicted testimony, as the wool was manufactured it was conducted into bins by a spout, and, in the absence of some special action taken for the purpose, there would be nothing to distinguish the wool made on one day from that made on the next day. The defendant requested the judge to instruct the jury as follows: "In order to recover on either the first, second, or third counts of its amended declaration, the plaintiff must prove exactly five thousand and fourteen pounds of F C wool was separated into a body by itself, not mixed with, or a part of any greater quantity of wool of a different grade, or with a greater quantity of F C wool, at the time the defendant was entitled to receive the wool the subject of the contract; in other words, the plaintiff, under the first three counts of the amended declaration, must show that the title to five thousand and fourteen pounds of F C wool passed to the defendant, and the title could not so pass until and unless that exact quantity of F C wool was made a distinct and separate portion by itself." The judge adopted this instruction, and said he would give it, omitting the words "exactly" and "exact." The instruction was not given in the words in which it was written, and the defendant contends that, considering the whole charge together, it was not given in substance or according to its meaning. We do not deem it necessary to determine the correctness of this contention. The defend-

ant concedes that some parts of the charge correctly stated its position. The fair interpretation of the request is, "that the wool subject to the contract," that is, the identical wool manufactured during the thirty days, must have been separated from the other wool of the plaintiff so that it could be identified, in order to entitle the plaintiff to recover. We think the presiding justice intended to present to the jury the question raised by this request, and we also think that there was no evidence in the case to warrant a finding for the plaintiff upon it. As we understand the testimony, ³³¹ which is reported in full in the bill of exceptions, the plaintiff, in manufacturing the wool, weighed it as it went into the bins, so that the weight of the product of each day was known. The wool produced within the thirty days was weighed in the ordinary course of manufacture, and in that way the plaintiff knows how many pounds are covered by the contract. When the plaintiff undertook to deliver, or to set apart for the defendant, the balance of the wool covered by the contract remaining after the previous delivery, it shipped six thousand two hundred and twenty-three pounds, instead of five thousand and fourteen pounds, the balance of the amount which was produced within the thirty days. The defendant was not bound to take any wool except that manufactured within the thirty days; and unless the plaintiff, whose duty it was to separate that from its other property, separated it so that it could be identified, the title to it never passed. We find no statement from any witness indicating that it was so separated. Apparently nothing was done under the contract to determine what wool belonged to the defendant. Taking the weights as the wool was manufactured did not enable the plaintiff to determine what portion of the contents of the bins was made at one time, and what at another.

The first request of the defendant was for a ruling that, on the evidence, the plaintiff could not recover on the first, second, or third count of its amended declaration. We think the jury were erroneously permitted to find for the plaintiff.

As additional facts may be presented at another trial, it becomes necessary to consider other questions in the case. The defendant contended that there was no sufficient memorandum of the contract, as required by the statute of frauds. It is immaterial that the defendant's name appears in the body of the memorandum, instead of as a signature at the end of it, and that the name was written by the defendant's agent and broker, instead of by one of its officers: *Hawkins v. Chace*, 19 Pick. 502; *Cod-*

dington v. Goddard, 16 Gray, 436; Clason v. Bailey, 14 John. 484; Tourret v. Cripps, 48 L. J., N. S., 567.

The quantity given in the statement of the goods to be manufactured ³³² is merely an estimate, or at most a limitation, and the language creates no uncertainty in regard to the manufactured goods: Brawley v. United States, 96 U. S. 168, 172. The most doubtful question arising on the memorandum is whether the words "about two thousand to two thousand five hundred pounds F C," taken in connection with the words following, "and all they make for thirty days," etc., is a sufficient designation of the property sold. The rule is, that the goods sold must be designated in the writing, and cannot be shown by parol: Waterman v. Meigs, 4 Cush. 497; May v. Ward, 134 Mass. 127; Pulse v. Miller, 81 Ind. 190; Holmes v. Evans, 48 Miss. 247; 12 Am. Rep. 372; Eggleston v. Wagner, 46 Mich. 610. But we have no doubt that the meaning of the letters "F C," which are technical abbreviations used in the wool trade, may be shown by parol, as well when they appear in a memorandum relied on under the statute of frauds as in any other writing.

While parol evidence is not competent to contradict or vary the terms of such a memorandum to show what is intended, we are of opinion that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown to apply the contract to the subject matter. Upon this point the decision in Macdonald v. Longbottom, 1 El. & E. 987, which was concurred in by all the judges sitting in the exchequer chamber, is an authority which fully covers the present case. When it is shown who and where the parties were at the time of making the contract, and what property the plaintiff had on hand of the kind described, it is clear, without more, that the memorandum referred to the two thousand four hundred and forty-three pounds of wool on hand recently manufactured and to the additional amount which might be manufactured within the thirty days: See Mead v. Parker, 115 Mass. 413; 15 Am. Rep. 110; Hurley v. Brown, 98 Mass. 545; 96 Am. Dec. 671; Scanlan v. Geddes, 112 Mass. 15; Slater v. Smith, 117 Mass. 96; Nichols v. Johnson, 10 Conn. 192; Waring v. Ayres, 40 N. Y. 357; Colerick v. Hooper, 3 Ind. 316; 56 Am. Dec. 505.

Moreover, upon the undisputed evidence, there was an acceptance of a part of the property, which takes the case out of the statute. There is no testimony that would warrant a finding that the wool which was delivered and paid for was received by the defendant in any other way than as delivered by the ³³³

plaintiff in part performance of his contract: See *Marsh v. Hyde*, 3 Gray, 331; *Gault v. Brown*, 48 N. H. 183; 2 Am. Rep. 210; *Scott v. Eastern Counties Ry. Co.*, 12 Mees. & W. 33; *Van Woert v. Albany etc. R. R. Co.*, 67 N. Y. 538.

We do not think there was evidence in the case which made it the duty of the presiding judge to give any of the other instructions requested by the defendant.

324 As the questions in regard to the admission of evidence will not be likely to arise again in the same form, we do not think it necessary to consider them.

Exceptions sustained.

SALES.—SEPARATION of articles sold out of a large number, where all are exactly of the same quality, is unnecessary to constitute such delivery as will pass the property: *Pleasants v. Pendleton*, 6 Rand, 473; 18 Am. Dec. 726. Property in grain sold, constituting part of a mass in an elevator, passes to the vendee without separation: *Cushing v. Breed*; 14 Allen, 376; 92 Am. Dec. 777, and note; to the same effect see *Russell v. Carrington*, 42 N. Y. 118; 1 Am. Rep. 498; *Hurff v. Hires*, 40 N. J. L. 581; 29 Am. Rep. 282; *Kingman v. Holmquist*, 36 Kan. 735; 59 Am. Rep. 604; *Cloke v. Shafroth*, 137 Ill. 393; 31 Am. St. Rep. 375, and especially note; on the sale of a quantity of goods of the same kind, no title passes without separation or particular designation: *Commercial Nat. Bank v. Gillette*, 90 Ind. 268; 46 Am. Rep. 222; to the same effect see *Hubler v. Gaston*, 9 Or. 66; 42 Am. Rep. 794.

SALES—MEMORANDUM—SIGNING BY PARTIES.—A memorandum of a sale containing the names of the vendor and vendee, but which was not subscribed to by the parties, was held sufficient to satisfy the statute of frauds: *Merritt v. Clason*, 12 Johns. 102; 7 Am. Dec. 286, and note. A memorandum of sale in order to satisfy the statute of frauds, must either name the vendors or describe them so they can be identified by other evidence: *McGovern v. Hera*, 153 Mass. 308; 25 Am. St. Rep. 632, and note. See, also, the note to *Gerli v. Poldebard Silk Mfg. Co.*, 51 Am. St. Rep. 616.

SALES—STATUTE OF FRAUDS—ACCEPTANCE OF GOODS.—Where a contract of sale is verbal, the delivery of the goods after acceptance to a carrier designated by the buyer is sufficient to satisfy the statute of frauds: *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721. The delivery of goods to, and their acceptance by, a carrier named by the purchaser is a sufficient receipt and acceptance to take the sale out of the statute of frauds: *Spencer v. Hale*, 30 Vt. 314; 73 Am. Dec. 300, and note; but see *Johnson v. Outtle*, 105 Mass. 447; 7 Am. Rep. 545.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN THE MEANING OF TERMS or forms of expression used in a particular trade or business, wherever knowledge of their peculiar or technical use becomes material in construing a written contract: *Dana v. Fredler*, 12 N. Y. 40; 62 Am. Dec. 130; *Hatch v. Douglass*, 48 Conn. 116; 40 Am. Rep. 154.

**JORDAN v. NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY.**

[165 MASSACHUSETTS, 346.]

RAILWAYS—PASSENGER INJURED IN TOILETROOM.—A railway company is answerable for injuries received by a person then at a passenger depot for the purpose of taking a train, through its negligence in leaving an unguarded hole in the floor of a toilet-room into which, the room being without light, the person fell, while in the exercise of due care.

SUNDAY.—THE FAILURE TO OBSERVE A SUNDAY LAW on the part of a person injured by the negligence of a railway corporation does not constitute any defense to an action to recover compensation for such injury.

C. F. Choate, Jr., for the defendant.

J. F. Kilton, for the plaintiff.

³⁴⁶ **KNOWLTON, J.** The only exception in this case is to the refusal of the judge to rule that upon all the evidence the plaintiff cannot recover. The plaintiff went to the defendant's passenger station in Holbrook to take a train for South Braintree. She bought a ticket and passed from the ladies' waiting-room into the ladies' toiletroom, which opened out of the waitingroom. There was no light in any part of the station except the ticket office. The door of the toiletroom was open. The plaintiff had often been there before, and was familiar with the place. She had occasion to use the toiletroom, and when she felt with her hand for the seat she failed to find it and fell through an opening in the floor and was injured.

The opening of the station for the sale of tickets upon a train which was about to pass over the railroad, and the condition of the station at the time, were an invitation to persons to come ³⁴⁷ there if they wished to take a train, and the maintenance of a toiletroom for a long time previously, the door of which was then open, was an invitation to lady passengers to enter if they wished to use it. The plaintiff was a passenger, and the defendant owed her the highest degree of care consistent with the proper management of the business in which it was engaged: *Dodge v. Boston etc. S. S. Co.*, 148 Mass. 207; 12 Am. St. Rep. 541. The existence of a dangerous hole in the floor of the toiletroom, under the circumstances, was evidence of negligence on the part of the defendant.

There was also evidence that the plaintiff was in the exercise of due care. She had been familiar with the toiletroom for many years, and she had no reason to suppose that it was dan-

gerous to enter it. That it was not then lighted was not very significant, in view of the fact that the ladies' and gentlemen's waitingrooms were also without lights except from the ticket office. The jury might find that after she entered it she did what ordinarily prudent persons might be expected to do under like circumstances.

It is contended that the plaintiff should not be permitted to recover because the accident happened on the evening of the Lord's day. This argument, if it would otherwise be valid, is answered by the Statutes of 1884, chapter 37, which is as follows: "The provisions of chapter 98 of the Public Statutes, relating to the observance of the Lord's day, shall not constitute a defense to an action for a tort or injury suffered by a person on that day."

Exceptions overruled.

RAILROADS—DUTY TO KEEP STATION SAFE.—A railway carrier is liable for negligence in its construction or maintenance in repair of its station approaches, station buildings, and station platform, and for its failure to adequately light them: *Johns v. Charlotte etc. R. R. Co.*, 39 S. C. 162; 39 Am. St. Rep. 706, and note; *Moses v. Louisville etc. R. R. Co.*, 39 La. Ann. 649; 4 Am. St. Rep. 231, and note.

SUNDAY LAWS—VIOLATION OF AS A BAR TO RECOVERY FOR TORT.—The fact that a passenger traveling on a Sunday excursion train is wrongfully ejected on that day from the train does not bar his right to recover damages for injuries sustained thereby: *Chicago etc. R. R. Co. v. Graham*, 3 Ind. App. 28; 50 Am. St. Rep. 214. A passenger traveling on Sunday in violation of law is not precluded from recovering for an injury arising from the carrier's negligence, when such violation of law was merely a condition and not a contributory cause of the injury: *Delaware etc. R. R. Co. v. Trautwein*, 52 N. J. L. 169; 19 Am. St. Rep. 442, and note; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221.

DRISCOLL v. SCANLON.

[155 MASSACHUSETTS, 343.]

MASTER AND SERVANT.—FOR A SERVANT DRIVING A DUMPCART TO INVITE A BOY to drive it for the latter's pleasure is not within the scope of the former's authority, and the master is, therefore, not answerable for injuries received by the boy while so driving.

NEGLIGENCE, CONSEQUENCES FOR WHICH NO LIABILITY EXISTS.—A person owning a cart is not bound to expect, or look out for, people falling from his cart, where they had no business to be. A boy getting on the cart assumes all risks, and therefore cannot recover if he falls under the wheels, and is run over because the driver is asleep and consequently neglecting his duties.

Tort for personal injuries claimed to have been suffered by the plaintiff from the negligence of the defendant's servant. In the trial court, the judge instructed the jury to return a verdict for the defendant, and the plaintiff alleged exceptions.

E. O. Achorn, for the plaintiff.

O. A. Galvin and J. F. Sweeney, for the defendant.

³⁴⁸ HOLMES, J. This is an action for personal injuries. The plaintiff was a boy of nine. He was invited to drive upon a dumpcart drawn by two horses belonging to the defendant, and driven by the defendant's son, who was employed by him as a teamster. The plaintiff got upon the cart, and soon was asked by the driver to take the reins, which he did. The driver went to sleep, one of the reins was dropped by the plaintiff, and in trying to catch it he fell off and was hurt. The case is here on exceptions to a ruling that the plaintiff could not recover.

We are of opinion that the ruling was right. It was not within the scope of the employment of the driver of the dumpcart to invite persons to drive upon it for their pleasure: *Bowler v. O'Connell*, 162 Mass. 319; 44 Am. St. Rep. 359; *Powers v. Boston etc. R. R. Co.*, 153 Mass. 188, 190. He had equally little authority to invite them to take his place in performing what was a personal trust: See *Gwilliam v. Twist* (1895), 2 Q. B. 84, 86.

It was argued that we might look only to the later moment when the plaintiff was under the wheels, that it did not matter how he got there, and that the defendant was liable for running over the plaintiff, if he would have been in case his cart had ³⁴⁹ run over a third person when his driver was asleep. But it does make all the difference in the world how the plaintiff got under the wheels. The defendant was not bound to expect or look out for people falling from his cart, where they had no business to be, and persons who got into it took the risk of what might happen as against him. The driver's slumber was so intimately connected with the unauthorized act that it is impossible to separate the two. The driver would not have been asleep, and the plaintiff would not have fallen, but for the driver's unauthorized act, and if the plaintiff had not been driving. The plaintiff does not stand in the same position as if he had been run over when crossing the road. The case is not affected by the fact that the plaintiff is a child: *Bowler v. O'Connell*, 162 Mass. 319; 44 Am.

St. Rep. 359; see *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253.

Exceptions overruled.

MASTER AND SERVANT.—A MASTER IS NOT ANSWERABLE for the negligent act of his servant or agent, if the latter, in performing the act from which the injury resulted, was not acting in the course of his employment: *Walker v. Hannibal etc. R. R. Co.*, 121 Mo. 575; 42 Am. St. Rep. 547; *Bowler v. O'Connell*, 162 Mass. 319; 44 Am. St. Rep. 359, and note. So where a servant is employed to manage a dumpcar hauling stone and other material out of a tunnel, he has no authority to assent to a third person riding in such car, and his permitting such person to so ride is not equivalent to an invitation by his master, and cannot make him answerable for acts or omissions in the management of the car from which the person so riding is killed or suffers substantial injuries: *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751. Where a minor child is drowned through having been invited aboard a tugboat by the servants of the owner, which act is outside of their authority and against orders, no recovery can be had, if the right of action is made to depend upon the invitation of the owner: *Cook v. Houston etc. Nav. Co.*, 76 Tex. 333; 18 Am. St. Rep. 52.

GUINZBURG v. H. W. DOWNS COMPANY.

[165 MASSACHUSETTS, 467.]

PLEDGE, SALE BY.—A PLEDGEE, on default in the payment of his debt, may sell the pledged property at public auction, giving to the pledgor notice of the time and place of sale, but he must exercise reasonable skill and diligence in order to get the value of the property; and this includes the fixing of a reasonable time and place of sale.

PLEDGE, FAILURE OF TO OBJECT TO TIME OR PLACE OF SALE.—A pledgor of stock having notice of the time and place of sale fixed by his pledgee, and making no objection thereto, and taking no notice thereof, by his silence waives any objection existing as to such place.

PLEDGE'S SALE IN PRESENCE OF BUT ONE BIDDER.—The fact that a pledgee's sale of stock was attended by but one bidder only does not render it invalid.

Suit in equity to establish plaintiff's ownership of stock in the corporation defendant. Such corporation was organized under the laws of Massachusetts, with a capital stock of sixteen thousand dollars. In April, 1892, it gave the I. B. Kleinert Rubber Company, a corporation established under the laws of New York, a promissory note agreeing to pay five thousand dollars on demand, and, at the execution of such note, it delivered as collateral security therefor two certificates of its stock for twenty-seven

shares each. The notes remaining unpaid, the Kleinert Rubber Company, in 1894, sent by mail to the defendant corporation a notice specifying the amount of the indebtedness with accrued interest and the holding of the stock as security for the payment of such indebtedness, and declaring that, unless the indebtedness was paid, the securities would be sold at public auction at the Real Estate Exchange salesrooms, No. 59-65 Liberty street, in the city of New York, by Richard V. Harnett & Co., as auctioneers, on July 24, 1894, at half past twelve o'clock in the afternoon. The defendant corporation received this notice on July 20, 1894, and made no objection thereto, nor to the time or place of sale. The stock was sold, pursuant to the notice, to James A. Hudson, attorney of the Kleinert Company, who purchased for the plaintiff, paying for the stock fifty dollars, and the auctioneer's expenses, there being no other bidder present. There was evidence tending to show that no stock of this character had ever been sold at auction in the city of New York, nor was there any statute in the state of New York regulating the sales of pledges or of personal property held as collateral security, such sales there being regulated by the rules of the common law. The plaintiff, after the sale of the stock to him, demanded that it be transferred to his name upon the books of the corporation, and that new certificates be issued to him therefor. This demand was refused, and the plaintiff's title to the stock denied.

F. M. Davis, for the defendant.

C. R. Darling, for the plaintiff.

⁴⁶⁹ ALLEN, J. A pledgee, on default in the payment of his debt, may sell the pledged property at public auction, giving to the ⁴⁷⁰ pledgor notice of the time and place of sale: Washburn v. Pond, 2 Allen, 474; Union Cattle Co. v. International Trust Co., 149 Mass. 492, 501. But, in making such sale, he is bound to exercise reasonable skill and diligence in order to get the value of the property: Newsome v. Davis, 133 Mass. 343; Clark v. Simmons, 150 Mass. 357. This includes the fixing of a reasonable time and place of sale: Markham v. Jaudon, 41 N. Y. 235, 243. The facts reported in the present case are somewhat meager; for instance, we do not know what public notice was given of the sale, nor whether the price obtained was much, if any, below the value of the shares. We are much inclined to think the place of sale was an unreasonable one. The pledged property consisted of over one-third of the whole number of shares in a small Massachusetts corporation, whose whole capital stock

was only sixteen thousand dollars. None of the stock had ever been sold at auction in New York, and it was not listed. It did not appear that it was known in New York. The note for which the stock was pledged was made and delivered in Massachusetts, and was payable here, and the pledge was made here. The pledgee was a New York corporation. Under these circumstances, it would have been better to make the sale in Massachusetts.

But it appears that the Downs Company, which was the pledgor, and its officers, whose names were also on the note, all received notice of the proposed sale on July 20, 1894, and the sale was fixed for July 24th; and the pledgor and its officers, after the receipt of the notice, did not communicate with the pledgee, or take any action in regard to the said notice or the proposed sale. Since all the parties whose names were on the note had notice for this length of time, and omitted to make any protest or objection to the place or time of sale, and took no action whatever in regard to the notice or proposed sale, we think this omission and silence amounted to a waiver of objection on this score, and that they cannot now be heard to complain that the place was unreasonable: See *Metcalf v. Williams*, 144 Mass. 452, 455.

The fact that there was only one bidder does not render the sale invalid: *Learned v. Geer*, 139 Mass. 31.

On the facts reported, the sale was valid, and the plaintiff is entitled to a decree in his favor.

Decree for the plaintiff.

PLEDGE—SALE OF BY PLEDGEE.—A pledgee, upon the failure of the pledgor to redeem, may either sell the articles pledged under a judicial decree, or at auction, upon giving reasonable notice to the pledgor to redeem, and apprising him of the time and place of sale: *Lucketts v. Townsend*, 8 Tex. 119; 49 Am. Dec. 723, and extended note at page 786; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248, and note; extended note to *Griggs v. Day*, 82 Am. St. Rep. 730.

CLAFLIN v. UNITED STATES CREDIT SYSTEM COMPANY.

[165 MASSACHUSETTS, 501.]

INSURANCE, CONTRACT OF, WHAT IS.—An agreement to purchase at a fixed price all accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied, is a contract of insurance.

A **CONTRACT OF INSURANCE** IS an agreement by which one person for a consideration promises to pay money or its equivalent, or to do some act of value to the insured upon the destruction or injury of something in which he has an interest.

THE ILLEGALITY OF A CONTRACT NEED NOT BE SET UP as a defense, because no court will consciously lend its aid for its enforcement.

H. N. Shepard, for the defendant.

B. E. Perry and G. H. Perry, for the plaintiffs.

502 BARKER, J. The contract in suit, although signed and sealed by the officers of the defendant in the state of New Jersey, was sent by the defendant to its agent in this commonwealth, and was here delivered. It was made on April 6, 1891, and purports to bind the defendant, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied.

It is a contract of insurance, within the meaning of the Massachusetts insurance act of 1887, then in force. By that act, (Stats. 1887, c. 214, sec. 3), which adopted the definition given in *Commonwealth v. Wetherbee*, 105 Mass. 149, 160, "A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury of something in which the other party has an interest." By the same section, it was made "unlawful for any company to make any contract of insurance upon or concerning any property or interests or lives in this commonwealth, or with any resident thereof," unless and except as authorized under the provisions of the act.

The defendant is a foreign corporation domiciled in the state of New Jersey. By the act cited, no foreign insurance company shall be admitted to transact here any class of insurance until it does certain acts, and obtains from the insurance commissioner a certificate that it has complied with the laws of the common-

wealth, and is authorized to make contracts of insurance. Before the enactment of the Statutes of 1887, chapter 214, if insurance was made by a foreign company without complying with the requisitions of the statute, the contract was declared valid by statute, while a penalty was imposed upon the making of the contract: Pub. Stats., c. 119, sec. 200; Gen. Stats. c. 58, sec. 72.

No authority is given by the Statutes of 1887, chapter 214, to any insurer, domestic ⁵⁰³ or foreign, to insure mercantile credits or accounts. So far as the record before us shows, the defendant has not been admitted to transact insurance in this commonwealth. The contract sued on seems to be made unlawful by the provisions of the Statutes of 1887, chapter 214, section 3, both for the reason that the defendant has not been admitted to transact insurance here, and because insurance of credits or accounts is not authorized by the statute.

The illegality of the contract is not set up in defense, nor was it noticed in the superior court, where the plaintiff had a verdict. But no court will consciously lend its aid for the enforcement of an illegal contract: *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, 120 Mass. 285; *Riley v. Jordan*, 122 Mass. 231, 233; *Low v. Peers*, Wilm. 364, 378.

In the present case, the question was brought to the attention of counsel by the court at the argument, and since the argument counsel have been given an opportunity to argue it upon briefs, and have declined or omitted so to do.

One of the exceptions is to a refusal to rule that the plaintiffs cannot recover. The ruling should have been given, for the reasons we have stated. In our view of the case, the questions argued by the parties are immaterial to the decision of the cause, and need not be discussed.

Exceptions sustained.

INSURANCE IS A CONTRACT OF INDEMNITY, in which parties may stipulate for the manner and time in which that indemnity shall be made and valued; and, where such is the case, the law will carry out their contract: *Commonwealth Ins. Co. v. Sennett*, 87 Pa. St. 205; 78 Am. Dec. 418.

CONTRACTS—ENFORCEMENT OF, WHEN ILLEGAL.—A court will not, in an action between the parties to an illegal contract, lend its aid, either to annul it when executed or to enforce it when executory: *Bradfeldt v. Cooke*, 27 Or. 194; 50 Am. St. Rep. 701, and note with the cases collected.

AM. ST. REP., VOL. LII.—34

TAYLOR v. BUTTRICK.

[165 MASSACHUSETTS, 547.]

TRUST DEED—MISTAKE, AVOIDING FOR.—A trust deed will not be set aside in equity where it conveys property in trust to pay the net income to the grantor for life and upon her death without will, leaving a child or children, to pay the principal to them; otherwise, to pay it over to those entitled to take under the laws of the state, merely because it contains no restraint on the power of anticipation and no power of revocation, though the grantor or her adviser would probably have desired such restraint had their attention been called to the subject, and also would have wished the grantor's life estate to be more inaccessible to herself and her creditors than it is in fact.

TRUST DEEDS, ATTACK UPON BY MAKER.—THE BURDEN OF PROOF is not upon the defendant to establish that the plaintiff who made and seeks to cancel a deed of trust understood it at the time it was executed.

A VOLUNTARY SETTLEMENT CANNOT BE REVOKED or set aside except upon proof of mental incapacity, mistake, fraud, or undue influence, unless it contains a power of revocation.

MISTAKE IN A DEED OF TRUST, WHAT IS NOT.—A deed of trust cannot be set aside for mistake if it was read over to the grantor before execution, and no provision was omitted which he supposed to be inserted, though he failed to think of some contingency concerning which, had he thought, some provision would have been made which is not contained in such deed.

A TRUST DEED CANNOT BE SET ASIDE because the grantor did not understand its legal effect, if he understood its contents.

A TRUST DEED WILL NOT BE SET ASIDE because it contains no power of revocation.

TRUST DEEDS EXEMPTING PROPERTY FROM CREDITORS.—A person cannot settle his property in trust to pay the income to himself for life, with a provision that it shall not be alienated by anticipation so as to prevent his creditors from reaching the income.

Suit in equity to set aside a trust deed executed to the defendant by the plaintiff. The case was heard by Holmes, J., who dismissed the bill, but reported the case for the consideration of the full court.

B. B. Jones and J. J. Winn, for the plaintiff.

G. F. Richardson and L. H. Kileski, for the defendant.

⁵⁴⁷ LATHROP, J. This is a bill in equity to set aside a deed to the defendant in trust, executed by the plaintiff in 1893. The plaintiff was then nearly twenty-two years of age, and she was about to be married. Her property consisted of about one hundred and fifteen thousand dollars, seventy-five thousand dollars of which she conveyed to the defendant in trust to pay the

net income of the same to her during her life, and, upon her death without a will, leaving child or children, to pay the principal to them; and in case she left no child surviving, then the principal was to be paid over to those entitled to take the same under the laws of this commonwealth. The ground upon which she seeks to set aside the deed is undue influence on the part of Frank P. Putnam, a stepfather of the plaintiff, who had also been her guardian until she became of age; and upon the further ground of a mistake, both on his part and upon hers, as to the effect of the deed.

The case was heard by a single justice of this court, upon the pleadings and evidence. The question of undue influence was disposed of at the hearing, and is no longer insisted upon. It has been found as a fact that, at the time plaintiff executed the deed, she was "a very intelligent and capable woman, but without other experience in business matters and in the management of her property than what she had learned from occasional reports of her guardian, and otherwise by chance." She was advised by Mr. Putnam "to put the property in trust, and she assented to it, and left it to him to have the deed prepared for her to sign. Putnam, in so advising, acted wholly and only with a view to the plaintiff's good," and his advice was wise and proper. Putnam, not being a lawyer, relied on a lawyer who was the confidential adviser of several members of the family, including Putnam as guardian, and who also acted in good faith and to his best ability. The plaintiff now has a daughter living.

The single justice also found as follows: "I do not find precisely what the plaintiff understood as to the effect of the deed, deeming it immaterial in view of the facts reported, but I find that the plaintiff, acting freely, intelligently, and wisely, was willing to execute whatever her stepfather should recommend, and to adopt his judgment as her own. I find, further, that he explained, and reasonably supposed, from what took place between her, the lawyer, and himself, that she understood that the instrument irrevocably put the property out of her hands, and limited her to the receipt of income from a trustee. Putnam understood the operation of the deed as far as it went. His attention was not called by the lawyer to the absence of a restraint on anticipation, and of a power of revocation, nor did he notice such absence. The lawyer simply did not think of them, as they are not very usual in our every-day conveyancing. If Putnam's attention had been called to the matter, I have no doubt he would have wanted a restraint on anticipa-

tion, if valid, but I doubt as to the power of revocation, and he would rather have had the deed as it is than no trust. Probably, he assumed that the plaintiff's life estate was more inaccessible to herself and to her creditors than it is in fact. But I do not find that he had any very definite thought on the matter. He did understand, I think rightly, that the corpus of the fund, the capital, could not be taken by her creditors, to the destruction of the remainder limited by the deed."

The single justice was of opinion that, under the law of this state, the foregoing facts did not constitute a ground for setting aside a voluntary settlement, and ordered the bill to be dismissed; and, at the plaintiff's request, reported the case to the full court, such decree to be made as equity might require.

We are of opinion that the ruling was correct, and in accordance with our decisions. We do not assent to the argument for the plaintiff that the burden of proof is upon the defendant to show that the plaintiff understood the deed. While the point has not been directly adjudicated in this commonwealth, our cases proceed upon the theory that the burden is upon the plaintiff to prove the allegations of the bill. Thus, in *Falk v. Turner*, 101 Mass. 494, 496, it is said by Chief Justice Chapman: "After careful consideration of the pleadings, and all the evidence reported by the master, and the character of the deed of trust, the court are of opinion that the allegations are not proved." So in *Viney v. Abbott*, 109 Mass. 300, 302, it is said by Mr. Justice Gray, speaking of a settlement in trust: "There is no evidence of its having been executed under any mistake."

The general rule in this commonwealth is, that a voluntary settlement, when completely executed with no power of revocation reserved, cannot be revoked or set aside, except upon proof of mental incapacity, mistake, fraud, or undue influence: *Hildreth v. Eliot*, 8 Pick. 293; *Falk v. Turner*, 101 Mass. 494; *Viney v. Abbott*, 109 Mass. 300; *Sewall v. Roberts*, 115 Mass. 262; *Keyes v. Carleton*, 141 Mass. 45; 55 Am. Rep. 446; *Thurston*, petitioner, 154 Mass. 596, 597; 26 Am. St. Rep. 278.

In *Keyes v. Carleton*, 141 Mass. 45, 55 Am. Rep. 446, the plaintiff alleged that she did not ⁵⁵⁰ understand the full effect of the deed; that she supposed that in case of her husband's death before her own the estate would be reconveyed to her discharged of trusts; and that she executed the deed under an entire mistake and misapprehension of its force and effect, as bearing upon her rights in case her husband died before her. It was found by the justice who heard the case that the deed was care-

fully read over to her; that there was no mistake, in the sense that she thought the deed contained any other or different provision than in fact it contained, and no accident in the sense that anything was omitted which was intended to be put in; and also that the contingency of her surviving her husband was not in her mind or in that of her advisers, and, if it had been, there was no means of determining what the provision, if any, would have been. It was said by Chief Justice Morton: "From these findings, it is clear that there was no mistake, in the sense that she wrongly apprehended the contents of the deed. The most that can be said is, that she did not, at the time she executed the deed, anticipate or have in her mind what would be its legal effect in the contingency of her husband's dying before her. She did not, at the time, think of this contingency, but this is not a mistake which will justify setting aside a settlement, especially when it is not shown that, if this contingency had been in her mind, she would have made a deed in any respect different."

In the case at bar, it is expressly found that the plaintiff acted freely, intelligently, and wisely, and that the deed was explained to her. Whether she understood precisely what was the legal effect of the deed is unimportant, if she understood its contents. No settlement of a married woman could stand, however beneficial to the settler it might be, if she could have it set aside on her testimony that she did not understand its legal effect. If it is shown that the instrument was explained to her, and that she understood its contents, which is fairly to be inferred from the report in this case, there is no mistake in a legal sense because its legal effect was not fully understood by her.

It is contended for the plaintiff that there was a mistake in not inserting a power of revocation; but at the time the deed was executed she was about to marry and leave her mother and stepfather. His conduct is found to have been "only with a ⁵⁵¹ view to the plaintiff's good," and that, in advising her to put seventy-five thousand dollars of her property in trust, "his advice was wise and proper." The purpose of a trust deed made in contemplation of marriage is, as is said by Chief Justice Chapman in *Falk v. Turner*, 101 Mass. 494, to disable the wife "from disposing of the property while under the influence of her husband, and thus relieve her from exposure to such influence." If such a power had been inserted, it would have defeated the object of the settlement: *Thurston*, petitioner, 154 Mass. 596; 26 Am. St. Rep. 278.

It is further contended that the deed did not give the plaintiff

sufficient protection, because it contained no restraint against anticipation of the income; but it is well settled in this commonwealth that "a person cannot settle his property in trust to pay the income to himself for life, with a provision that it shall not be alienated by anticipation, so as to prevent his creditors from reaching the income": *Pacific Nat. Bank v. Windram*, 133 Mass. 175; *Jackson v. Von Zedlitz*, 136 Mass. 342.

We are aware that the courts in England, in recent times, have decided some of the questions above considered in a different manner from this court. In England, it appears from the decisions that a power of revocation is generally inserted in trust deeds, and its absence is the principal ground for setting aside such a deed; but in this commonwealth such a power is rarely to be found, and, as shown above, its presence would generally defeat the object for which the deed is made.

On the whole case as it is presented to us, we are of opinion that the order of the single justice dismissing the bill should be affirmed.

SETTLEMENTS—VOLUNTARY—AVOIDANCE.—A voluntary settlement completely executed, with no power of revocation reserved, cannot be set aside, except upon proof of mental incapacity, mistake, fraud, undue influence, or the accomplishment of the purposes of the trust or the consent of all parties: *Petition of Thurston*, 154 Mass. 696; 26 Am. St. Rep. 278, and note. Voluntary settlements are binding on the grantor if properly made, unless there is clear and decisive proof that he never parted with, or intended to part with, the possession of the deed, and even if he retained it, the weight of authority is in favor of its validity, unless there are other circumstances to show that it was not intended to be absolute; *Shultz v. Shultz*, 159 Ill. 654; 50 Am. St. Rep. 188. See further the extended note to *Bristol v. Tasker*, 20 Am. St. Rep. 858.

BROWN v. FRANKLIN MUTUAL FIRE INSURANCE CO.

[165 MASSACHUSETTS, 565.]

INSURANCE, USAGE AS TO POWER OF AGENTS.—A general usage or custom to the effect that persons authorized to solicit insurance can bind their principal until notice of the refusal of the risk is received by the agent and communicated to the person desiring insurance, is valid, and is binding both upon stock and mutual insurance corporations insuring against loss by fire.

INSURANCE.—AN ORAL CONTRACT of insurance is valid.

INSURANCE, ORAL CONTRACTS OF.—The power of an insurance corporation to make an oral contract of insurance is not impaired by a provision in its by-laws that its "directors may authorize the president and secretary to make insurance, and will issue policies at such rates of insurance and under such limitations and restric-

tions as they shall prescribe." These are enabling, not restraining, words.

INSURANCE.—PRIVATE INSTRUCTIONS TO AN AGENT LIMITING HIS AUTHORITY cannot bind persons having no knowledge thereof.

PRINCIPAL AND AGENT.—THE AUTHORITY OF AN AGENT MUST BE DETERMINED BY the nature of his business and the apparent scope of his employment therein. It cannot be narrowed by private and undisclosed instructions, unless there is something in the nature of the business or the circumstances of the case to indicate that the agent is acting under special instructions or limited powers.

Action of contract upon an alleged oral agreement to insure the plaintiff's property against loss by fire. The plaintiff had for several years effected insurance with the defendant corporation at the solicitation of Thomas F. Porter, its general agent in the town of Lynn. When insurance was about to expire upon the property, the agent, receiving no notice not to do so, was in the habit of renewing it. On November 28, 1891, the agent called upon plaintiff, and asked him if he desired the policy renewed, and, receiving an affirmative reply, the agent agreed to renew it, and thereupon sent notice to the defendant on the afternoon of the same day of having obtained a renewal, and on the day following notified the defendant of the destruction of the property. The defendant, on its part, offered testimony tending to prove that Porter's only authority was to solicit insurance, and that the application for a renewal forwarded by him was not received by the defendant until after the property had been destroyed. The plaintiff offered, and the court received as against the objection of the defendant, evidence of a general custom and usage in business that persons authorized by mutual fire insurance companies in Massachusetts to solicit insurance could bind the corporation until notice of the refusal of the risk was received by the agent and communicated to the person desiring insurance or reinsurance. The jury having returned a verdict in favor of the plaintiff, the defendant alleged exceptions.

G. D. Williams, for the defendant.

H. G. Allen and N. M. Nye, for the plaintiff.

⁵⁰⁷ **LATHROP, J.** The only exception taken in this case by the defendant is to the admission of evidence of a general custom and usage to the effect that persons authorized by mutual fire insurance companies in Massachusetts to solicit insurance can bind the company until notice of the refusal of the risk by the com-

pany is received by the agent and communicated to the person desiring the insurance.

⁵⁶⁸ If this were a stock company, there could be no doubt of the admissibility of such evidence: *Baxter v. Massasoit Ins. Co.*, 13 Allen, 320; *Putnam v. Home Ins. Co.*, 123 Mass. 324; 25 Am. Rep. 93; *Baker v. Commercial Union Assur. Co.*, 162 Mass. 358. And we see no reason why the same rule should not apply to a mutual insurance company, unless there is something in the statutes or in the by-laws of the company which necessitates a different conclusion. A stock company may undoubtedly make an oral contract of insurance: *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448, 454; 77 Am. Dec. 419; *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398, 409; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 318. We find nothing in the Statutes of 1887, chapter 214, sections 44 and 45, to which we are referred by the defendant, which indicates that such an insurance cannot be effected, nor do we find anything in the by-law of the company which is stated in the exceptions that shows such a mode of insurance to be invalid. The by-law is: "The directors may authorize the president and secretary to make insurance, and will issue policies at such rates of insurance and under such limitations and restrictions as they shall prescribe." These are merely enabling words, and do not restrain the power which such a company has by law to make contracts: *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448, 77 Am. Dec. 419, and *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 318.

The case at bar differs essentially from *Brewer v. Chelsea Ins. Co.*, 14 Gray, 203, and *Baxter v. Chelsea Ins. Co.*, 1 Allen, 294, 79 Am. Dec. 730, in each of which cases the by-law provided that before the policy should be delivered the assured should pay such premium and give such deposit note as the president and directors should determine. The effect of this by-law was held to be that the contract could not be completed, nor the policy take effect, until the premium was paid and the note given.

There was sufficient evidence in this case to warrant the jury in finding that Porter, if not the general agent of the company, was held out by the company as having authority to make such a contract as is alleged to have been made in this case, and as the evidence shows was made. If Porter's authority was limited by private instructions given to him by the officers of the company, this cannot bind the plaintiff if he had no knowledge of it. His authority "must be determined by the nature of his business" ⁵⁶⁹ and the apparent scope of his employment therein. It can-

not be narrowed by private or undisclosed instructions, unless there is something in the nature of the business or the circumstances of the case to indicate that the agent is acting under special instructions or limited powers": *Markey v. Mutual Ben. Ins. Co.*, 103 Mass. 78, 92.

Exceptions overruled.

AGENCY—AUTHORITY OF AGENTS, HOW DETERMINED.—Whatever attributes properly belong to the character bestowed upon an agent will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant: *Austrian v. Springer*, 94 Mich. 343; 64 Am. St. Rep. 350, and note.

AGENCY—CUSTOM.—Where the authority of an acknowledged agent to make a contract giving a jobber an exclusive right to sell a certain line of cigars in a certain territory is questioned, the evidence of another jobber of like goods in the same territory that a custom or usage existed for such traveling agents to make similar contracts to the one in suit is admissible, and should be submitted to the jury to aid it in determining whether the agent had authority to make the contract in question: *Kaufman v. Farley Mfg. Co.*, 78 Iowa, 679; 10 Am. St. Rep. 462, and note.

INSURANCE—VALIDITY OF PAROL CONTRACTS OF.—A contract of insurance may be oral: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83, and note; *Ruggles v. American etc. Ins. Co.*, 114 N. Y. 415; 11 Am. St. Rep. 674, and note; *Ellis v. Albany etc. Ins. Co.*, 60 N. Y. 402; 10 Am. Rep. 495. A parol contract of insurance was valid at common law: *Northwestern Iron Co. v. Aetna Ins. Co.*, 23 Wis. 160; 99 Am. Dec. 145, and note. A contract of insurance, to be valid, need not be in writing: *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448; 77 Am. Dec. 419, and note.

•

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

LAKE v. MINNESOTA MASONIC RELIEF ASSOCIATION.

[61 MINNESOTA, 96.]

INSURANCE, MUTUAL LIFE—DUES “REMAINING” IN TREASURY—CONSTRUCTION.—The word “remaining,” used in the articles of association of a masonic relief society, which is merely a mutual life insurance company, proceeding on the assessment plan, and which articles limit the sum provided for the payment of a death benefit to the total sum of dues “remaining” in the treasury of said society, must be construed as meaning “received” or “realized.”

INSURANCE, MUTUAL LIFE—EFFECT OF FAILURE TO MAKE ASSESSMENT.—If a membership insurance company, proceeding on the assessment plan, insures the life of a member, the beneficiary may maintain an action at law on the contract, though the company has refused or neglected to make the proper assessment. The company cannot defeat a recovery in such an action by showing that it has not made an assessment. To permit it to do so would be to allow it to take advantage of its own wrong.

EVIDENCE—PECULIAR KNOWLEDGE OF ONE PARTY—BURDEN OF PROOF.—When a fact is peculiarly within the knowledge of a party, he must produce the necessary evidence to prove it.

INSURANCE, MUTUAL LIFE—AMOUNT OF RECOVERY ON DEATH BENEFIT—BURDEN OF PROOF.—If the articles of association of a masonic relief society, which is merely a mutual life insurance company, proceeding on the assessment plan, provide that the funds to pay the beneficiary of a deceased member shall be raised by voluntary contributions to the same, by members of the association, of such dues as the by-laws provide, said sum “in no case to exceed the total sum of such dues remaining in the treasury of said society,” and the by-laws expressly provide that the amount to be paid shall be one dollar for each member, not exceeding the limit of the benefit, and there is no contract to pay out of a special fund, there is an implied, if not an express, obligation upon the company, when the death of a mem-

ber is proved, to make an assessment, to the full extent authorized by the by-laws, to raise funds to pay the benefit. In case an assessment has been made, and the beneficiary sues upon the certificate of membership, the plaintiff's recovery would be limited to the amount realized; but the burden of proving that it was made, and that the amount realized therefrom was less than one dollar for each member, is on the defendant. Unless the defendant does show that an assessment was made as provided by the by-laws, the beneficiary is entitled to recover the sum of one dollar for each member.

Action upon a certificate of membership issued by the defendant. The amendment to article 10, section 6, of the by-laws, referred to in the opinion, was as follows: "It being further understood that if an assessment levied to the full maximum of the table of rates as provided by the by-laws will not produce a sum sufficient to pay the full limit named, then and in that case the payment above shall be made pro rata." The defendant appealed from an order denying a motion for a new trial.

William Pitt Murray and Alva Hunt, for the appellant.

C. D. and Thomas D. O'Brien, for the respondent.

⁹⁷ MITCHELL, J. This action was brought upon a certificate of membership issued by defendant to plaintiff's husband, James H. Lake, since deceased. The complaint alleged that, by the terms of this certificate, the defendant promised to pay to her, as beneficiary, within ninety days after proof of the death of James H. Lake, a sum equal to one dollar for each member of the association at the date of his death, not exceeding two thousand dollars, and that the membership at that date was sixteen hundred and twenty-four. The defendant, by its answer, alleged, in substance, that it only agreed to make an assessment on its members, in accordance with its by-laws, to pay the death loss, and to pay plaintiff the amount realized therefrom, not exceeding two thousand dollars; that it had made such assessment; that the amount realized therefrom was only six hundred and eighty dollars and ninety cents, which it offered to pay.

It appears that the defendant is a corporation organized under ⁹⁸ the laws of this state in 1873. Its purpose, as expressed in its articles of association, is "to provide for the payment to the widow, children, or mother (or to such person or persons as may have been duly designated to receive the same) of any member of such society as may from time to time decease, of such sum as the by-laws of such society may, from time to time, prescribe; the said sum to be raised by voluntary contribution to the same by the members of said society of such dues as such by-laws may

from time to time prescribe, and said sum so to be paid in no case to exceed the total sum of such dues remaining in the treasury of said society." The only portions of the by-laws which are here material are sections 3 to 6, inclusive, of article 10. Section 3 provides that at the death of a member each surviving member shall be assessed (payable bi-monthly) at certain specified rates, ranging, according to the age of the member when he joined the association, from seventy cents to one dollar and fifty cents per each one thousand dollars of insurance carried by the member. Section 4 provides that eighty per cent of all moneys received in payment of assessments shall be designated as "mortuary funds"; that all other moneys received by the association shall be credited to the "contingent fund," and may be used: 1. To defray expenses; 2. To pay benefits before assessments therefor are actually collected, provided that any money so paid out shall be replaced by the assessments made for such benefits; 3. To pay benefits without an assessment whenever the directors are of the opinion that it can be done consistently with the interests of the association; 4. To be invested in securities, if deemed expedient by the directors. Section 5 provides for the creation of a "reserve fund," not exceeding twenty-five thousand dollars, by appropriating to that purpose the excess of the contingent fund over two thousand dollars. This reserve fund may be deposited or invested, the interest to be placed to the credit of the contingent fund, but the principal never to be drawn upon, except in payment of extraordinary death losses, when deemed by the directors for the best interest of the association to do so. Section 6, which is the only part of the by-laws providing for the amount to be paid the beneficiary on the death of a member, expressly provides that the amount to be paid shall be "one dollar for each member," not exceeding the limit of the benefit, which in the present case was two thousand dollars. Upon the back ⁹⁹ of Lake's certificate was indorsed the following extract from the by-laws: "At the death of a member, his widow or designated heirs shall receive a sum equal to one dollar for each member; said sum, however, not to exceed two thousand dollars, which amount shall be paid within sixty days from the time at which satisfactory evidence of death shall have been received." It was admitted that the number of members of the association at the date of Lake's death was sixteen hundred and twenty-four. The defendant introduced evidence from which it appeared that after notice of Lake's death it made a bi-monthly assessment for this and nine other death losses; that, fifteen hundred and fifty-

three members paid the assessment; that the total amount realized therefrom was seven thousand nine hundred and forty-three dollars and eighty cents, of which only seven hundred and fifty-six dollars and fifty-five cents, including the twenty per cent (reduced to ten per cent by the directors) applicable to the contingent fund, was on account of the death of Lake. It is also fairly inferable from the evidence that the defendant has no reserve fund; and it does not appear that it has any contingent fund, unless it be the twenty (or ten) per cent of the amount realized from the assessments on account of these ten deaths. On this evidence the court ordered judgment against the defendant for sixteen hundred and twenty-four dollars.

It is clear to us that, whatever more its name may imply, the defendant is merely a mutual life insurance company proceeding on the assessment plan, and hence its contracts are to be construed according to the same rules as those of any other mutual life insurance company. Conceding, as we must, that the articles of association are the supreme law of every contract between the association and its members, and that their provisions, as well as those of the by-laws, not inconsistent with the articles, enter into and form a part of every such contract, and giving them their full effect, we are clearly of the opinion that the contract of the defendant was not merely to make an assessment on its members for plaintiff's benefit, nor to pay out of a special fund, but to pay her the sum stipulated, not exceeding the amount realized from an assessment for the death loss made pursuant to the by-laws. The word "remaining," used in the articles of association, must be construed as meaning "received" or "realized." There was an implied, if not an express, obligation upon the defendant, upon proof of the death of Lake, to make an assessment, to the full extent authorized ¹⁰⁰ by the by-laws, to raise funds to pay the benefit. If it had appeared that defendant had done this, then plaintiff's recovery would have been limited to the amount realized from such assessment. But the burden of proving this was on the defendant.

All the authorities, so far as we are aware, are agreed that, in the case of a contract like this, if the company refuses or neglects to make the proper assessment, the beneficiary may maintain an action at law on the contract, and that the company cannot defeat a recovery by showing that it has not made an assessment. To permit it to do so would be to allow it to take advantage of its own wrong. There is, however, some difference of opinion as to the proper form of pleading in such cases. Some cases hold

that an action in the nature of assumpsit will lie, declaring on the contract as one to pay the limit of the insurance, leaving it to the company to plead, as well as prove, any facts which would reduce the recovery below that amount, while others hold that the action should be in the nature of one for damages for breach of the contract, in failing to make an assessment: See *Elkhart etc. Assn. v. Houghton*, 103 Ind. 286; 53 Am. Rep. 514; *Lueders v. Hartford etc. Ins. Co.*, 4 McCrary, 149; 12 Fed. Rep. 465; *Freeman v. National Ben. Soc.*, 42 Hun, 252. Also, *Curtis v. Mutual Ben. etc. Co.*, 48 Conn. 98; *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md. 465; 6 Am. St. Rep. 460. In view of the issues tendered by the answer, and the way in which the action was tried, any question of pleading was waived in this case, and hence it is unnecessary to consider which is the proper form; for even under the latter the proper rule of evidence, and the one sustained by the great weight of authority, is that the limit of the insurance is *prima facie* the measure of the plaintiff's damages, and the burden is on the defendant to prove any facts that would reduce them below that amount. The fact that all these matters are peculiarly within the knowledge of the company, and presumably are not within the knowledge of the beneficiary, is sufficient reason for adopting this rule as to the burden of proof. In this case the defendant failed to prove that it had made an assessment as provided by the by-laws. It does not appear at what rate it assessed its members. The assessment must have been purely arbitrary, and at a less rate than authorized by the by-laws, because, if every member carried only one thousand dollars insurance, and paid ¹⁰¹ only the lowest rate, of seventy cents, the amount realized on the assessment for the ten deaths would have been ten thousand eight hundred and seventy-one dollars, instead of seven thousand nine hundred and forty-three dollars and eighty cents. Therefore the defendant failed to prove any facts to reduce plaintiff's recovery below sixteen hundred and twenty-four dollars.

We have not considered whether the defendant sufficiently excused its omission to introduce in evidence the amendment to section 6, article 10, of the by-laws, because, if introduced, it would not have aided the defendant.

Order affirmed.

Features of the Law Specially Applicable to Mutual or Membership Life or Accident Insurance.*

Law Governing Mutual Insurance—Generally.—A contract of insurance is purely a business adventure, not founded on any philanthropic, benevolent, or charitable principle; and the design and purpose of an insurance company, and the dominant and characteristic feature of its contract, is the granting of an indemnity, or security against loss, for a stipulated consideration. The design, however, of what are known as benevolent societies, or benefit associations, which are largely of a philanthropic or benevolent character, is, not to indemnify, or secure against loss, but, from the contributions of members, to accumulate a fund to be used in their own aid or relief, in the misfortunes of sickness, injury, or death: *Commonwealth v. Equitable etc. Assn.*, 137 Pa. St. 412. While a majority, perhaps, of philanthropic and benevolent societies are fraternal and social in their organization, and have secret meetings and rituals, many are organized and conducted with a view of enjoying the benefits of co-operative insurance, together with their fraternal and social functions, and others are organized and conducted for the sole purpose of mutual insurance. The principles governing the subject of mutual insurance apply alike to fire, marine, life, accident, and livestock insurance, but the purpose of this note is to show the features of the law specially applicable to life or accident insurance, conducted on the assessment plan, as settled by the courts of last resort of the several states. The courts have often been called upon to determine whether benevolent societies and benefit associations were really such, or came within the requirements intended for insurance companies; and the decisive test applied by them is the object for which such associations are organized, and the consideration upon which the contracts of membership are based. Where such associations have an insurance department, and the provisions of a fraternal character are eliminated, their primary and only purpose is that of a life insurance organization. Hence, an association, the principal object and functions of which are to secure to each member thereof the payment, on his death, to his beneficiary or representative, of a certain sum of money, subject to the fulfillment of the conditions imposed by the charter and by-laws, is essentially a life insurance company; and the relations between such companies and the members are purely those of business, based upon contract, and that contract is one of insurance, subject to the rules of law applying to insurance policies, except so far as those rules must be deemed to be modified by the peculiar organization, objects, and policy of such associations: *Masonic Aid Assn. v. Taylor*, 2 S. Dak. 324; *Hanford v. Massachusetts Ben. Assn.*, 122 Mo. 50; *Danlher v. Grand Lodge A. O. U. W.*, 10 Utah, 110; *Supreme Council American Legion of Honor v. Larmour*, 81 Tex. 71; *Smith v. Bullard*, 61 N. H. 381; *Elkhart Mut. Aid etc. Assn. v. Houghton*, 98 Ind. 149; note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 781, 782; *Goodman v. Jedid-*

***REFERENCE TO MONOGRAPHIC NOTES.**

Mutual benefit associations: 19 Am. St. Rep. 781-791. Results of the death of a beneficiary before the death of a person whose life is insured: 11 Am. St. Rep. 721-724. Insurance payable to "heirs": 44 Am. St. Rep. 404-408.

Jah Lodge etc., 67 Md. 117; Endowment etc. Assn. v. State, 35 Kan. 253; Miner v. Michigan Mut. etc. Assn., 63 Mich. 338; Holland v. Supreme Council etc. of Chosen Friends, 54 N. J. L. 490; Supreme Lodge A. O. U. W. v. Hutchinson, 6 Ind. App. 399; Stambler v. Order of Pente, 159 Pa. St. 492; Given v. Rettew, 162 Pa. St. 638; McCorkle v. Texas Ben. Assn., 71 Tex. 149; Supreme Council etc. of Chosen Friends v. Forsinger, 125 Ind. 52; 21 Am. St. Rep. 196; Railway etc. Assn. v. Robinson, 147 Ill. 138. Mutual insurance companies differ essentially from stock insurance companies. They need many by-laws and conditions that are not required in stock companies, and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations toward his associates that he requires from them toward himself: Baxter v. Chelsea etc. Ins. Co., 1 Allen, 294; 79 Am. Dec. 730. But there is no difference between mutual insurance companies and mutual benefit societies, having insurance features, except where the statute makes a distinction: Block v. Valley Mut. Ins. Assn., 52 Ark. 201; 20 Am. St. Rep. 166. A mutual benefit society is not a life insurance company, nor is its certificate of membership a policy of life insurance within the restricted sense of those terms used in the statute relating to life insurance companies, but such certificate is in the nature of a mutual life insurance policy, and such contracts are, therefore, subject to the rules of law governing life insurance policies, except so far as those rules must be held to be modified by the peculiar organization, objects, and policy of such societies: Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 620. It has been held that an association not organized to do business for profit or gain, but to peculiarly aid the widows, orphans, heirs, and devisees of its members, is not an insurance company, and that its membership certificates are not contracts of insurance: Northwestern etc. Aid Assn. v. Jones, 154 Pa. St. 99; 35 Am. St. Rep. 810. But the better opinion is, that a certificate of membership in the insurance department of such association is a contract of insurance, and that it should be governed by the rules of law that are applied to ordinary life insurance companies. Note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 783, and cases above cited to this point. A certificate of membership issued by a benevolent society, whereby the society undertakes, in view of the age and condition of health of the member, and in consideration of a present payment, and of the agreement by the member to pay other contingent sums in the future, to pay a sum to him, or to his widow or heirs, etc., contingent as to time, upon the duration of his life, is, aside from all statutory definitions and classifications, a contract of life insurance; and it has been held that such an undertaking is none the less a contract of insurance, because the amount to be paid by the society is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premium is to be paid upon the uncertain periods of the death of such members; nor because, in case of nonpayment of assessments by members, the contract provides no means of enforcing payment thereof; nor because it is to pay certain sums of money as endowments to living members: Rockhold v. Canton etc. Soc. 129 Ill. 40.

A contract of insurance between an order and one of its members is complete when signed by the supreme lodge of the order, and the subordinate lodge holds it for the member until it is delivered to him: *Lorscher v. Supreme Lodge Knights of Honor*, 72 Mich. 316. The rights of the parties are governed by the contract: *Block v. Valley Mut. Ins. Assn.*, 52 Ark. 201; 20 Am. St. Rep. 166; and it should be construed and interpreted according to the laws of the state where the contract was made, and was to be performed. It should also be construed in accordance with what appears to have been the actual intent of the parties: *Mullen v. Reed*, 64 Conn. 240; 42 Am. St. Rep. 174. It is not a wagering contract: *Northwestern etc. Aid Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810. A contract of life insurance between an association and its members is subject to the charter and by-laws of the association: *Note to Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 782. Mutual benefit societies are subject to the rules applicable to notice and proofs of loss under ordinary insurance policies: *Stambler v. Order of Pente*, 159 Pa. St. 492. The right of one who is insured in a mutual benefit society does not depend upon the action of the officers of the society, for, if he has performed his part of the contract, and is totally disabled by disease or accident, he has a complete cause of action. A refusal by the officers of the society to allow the claim will not defeat a recovery: *Supreme Council etc. of Chosen Friends v. For-singer*, 125 Ind. 52; 21 Am. St. Rep. 196. The by-laws, articles of association, and certificates of membership of mutual benefit associations determine the rights of the members and of the association, and may be enforced by the parties and beneficiaries according to their respective rights as therein provided: *Union Mut. Assn. v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519. A contract of life insurance between an association and one of its members is not a continuing contract: *Mutual etc. Life Ins. Co. v. Hillyard*, 37 N. J. L. 444; 18 Am. Rep. 741. A by-law providing for the payment of dividends to members who have given premium notes, excluding those who have paid for their insurance in cash, is probably invalid, as inapplicable to, and inconsistent with, mutual insurance. Such a by-law is harmless, however, and does not destroy the mutual character of the company, as the effect of paying such dividends is merely to increase the assessments upon the premium notes the same amount: *Davis v. Parcher*, 82 Wis. 488. One insured in a mutual insurance company is a member thereof, and the books of the company are evidence against him as a member: *Diehl v. Adams County Mut. Ins. Co.*, 53 Pa. St. 448; 98 Am. Dec. 302. He is, in no sense, a partner. His relation with the company is one of contract, measured by the terms of the policy: *Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421; 4 Am. St. Rep. 482. An association whose purpose is to endow the wife of each member with a sum of money equal to as many dollars as there are members of the association, to be raised by assessment on them, is not a "benevolent society," for the purposes of incorporation, under the Minnesota statutes: *State v. Critchett*, 37 Minn. 13; and it has been held that the certificate of membership of a beneficial association is not an insurance policy, within the meaning of the Pennsylvania statute; and that

the by-laws of such an association may be admitted in evidence, in assumption to recover a death benefit, although they are not attached to the certificate: *Lithgow v. Supreme Tent of Maccabees*, 165 Pa. St. 292. For the purpose of suits against them, and the service of process, a mutual benefit society, conducting insurance on the co-operative or assessment plan, stands upon the same footing as other insurance companies: *Railway etc. Assn. v. Robinson*, 147 Ill. 138.

Resort to Courts—Arbitration.—It has been held that it is competent for the members of an association to so contract with it that their rights as members, with respect to death benefits, shall depend upon the determination of a tribunal of their own choice, which shall be conclusive; and that the courts will not interfere with nor review such determination, there being no claim of fraud or of any act contrary to law: *Railway etc. Assn. v. Robinson*, 147 Ill. 138; *Canfield v. Great Camp etc. of Maccabees*, 87 Mich. 620; 24 Am. St. Rep. 186; *Screwmen's etc. Assn. v. Benson*, 76 Tex. 552; *Rood v. Railway etc. Assn.*, 31 Fed. Rep. 62.

A provision in the laws of a mutual benefit association that a tribunal created thereby shall have power to pass upon all death claims, which decision shall be final, and bar any suit at law or in equity, does not, it is said, so far contravene public policy as to permit members, who contract with reference to it, or their beneficiaries, to seek relief in the state courts, rather than in those of the order: *Fillmore v. Great Camp etc. of Maccabees*, 103 Mich. 437. A by-law making such decision final and conclusive is constitutional and valid. And a by-law of such an association, making a finding of liability by the association a condition precedent to a right to receive benefits, has also been held constitutional and valid: *Hembeau v. Great Camp etc. of Maccabees*, 101 Mich. 161; 45 Am. St. Rep. 400. But, on the other hand, there are courts which hold that, in the case of a contract of life insurance between an association and one of its members, the member is not bound by the action of the officers of the association; that he need not even exhaust his remedies within the association before resorting to a court of law; that he is not concluded by an adverse decision, of the association, on his claim; and that the association cannot, by provisions in its constitution, by-laws, or relief fund laws, deprive him of this right: *Supreme O. etc. of Chosen F. v. Garrigus*, 104 Ind. 133; 54 Am. Rep. 298; *Bauer v. Samson Lodge, Knights of Pythias*, 102 Ind. 262; *Supreme Council etc. of Chosen Friends v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196; *Supreme Sitting Order of Iron Hall v. Stein*, 120 Ind. 270; *Albert v. Order of Chosen Friends*, 34 Fed. Rep. 721.

A member of a secret order which exercises the privileges and powers of a mutual benefit society, who sues for a benefit due him under a contract, occupies an essentially different position from one who presents a question of policy, doctrine, or discipline, and courts will entertain jurisdiction in the one case, but, as a general rule, not in the other: *Bauer v. Samson Lodge Knights of Pythias*, 102 Ind. 262. One insured in an association, as a member of it, may be regarded, by the courts, as entitled to the rights of membership, although not recognized as such by the officers: *Sourwine v. Supreme Lodge Knights of Pythias*, 12 Ind. App. 447. A by-law of a

benefit society, requiring an appeal to the governing body, is valid, but any attempt to make the decision conclusive is abortive, where the right to a death benefit is involved: *Supreme Council etc. of Chosen Friends v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196. If a valid excuse for the nonpayment of an assessment is offered by a member of an association, who has been insured in it, the officers of the association are bound to be satisfied therewith, and the death of the member, after an alleged forfeiture, does not alter the contract obligations of the association, but the legal right to reinstatement passes to the beneficiary under the policy, and the courts will so declare: *Dennis v. Mass. etc. Assn.*, 120 N. Y. 496; 17 Am. St. Rep. 660. The member before suing for a death benefit, is generally required to first exhaust his remedies prescribed in the constitution, charter, and by-laws of the association in which he is insured: *Oliver v. Hopkins*, 144 Mass. 175; *Supreme Council etc. of Chosen Friends v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196; *Bauer v. Samson Lodge Knights of Pythias*, 102 Ind. 262; as this is in furtherance of orderly proceedings; but the courts lean strongly in favor of the proposition that an association cannot take away the right of its members to invoke the aid of the courts in enforcing claims existing in favor of its members upon contracts: *Bauer v. Samson Lodge Knights of Pythias*, 102 Ind. 262. The conferring of jurisdiction in equity, by agreement of the parties, where a death benefit is involved, is not favored: *Jinks v. Banner Lodge*, 139 Pa. St. 414. The ruling of an association upon the right to a death benefit will, upon the same state of facts, be followed by the courts, as being an authoritative construction of the regulations by the same body that enacted them: *Supreme Lodge Knights of Pythias v. Kalinski*, 57 Fed. Rep. 348.

Where the constitution and by-laws of an association provide for the payment of a fixed sum on the death of each member, and create a board of arbitration, to whom all claims against the association shall be submitted, and whose decision shall be final, such provisions constitute merely a revocable agreement to arbitrate, and do not preclude resort to the courts, nor is such a submission to arbitration a condition precedent to the bringing of an action: *Danlher v. Grand Lodge A. O. U. W.*, 10 Utah, 110. An agreement, contained in a certificate of membership in a mutual accident association, that the rights and obligations of the parties to the contract, which makes provision for the payment of a certain sum of money, upon a specified contingency, shall be determined by arbitration, and that no action shall be maintained on the contract, does not oust a court of jurisdiction, and is no bar to such an action: *Whitney v. National etc. Assn.*, 52 Minn. 378; *Smith v. Preferred etc. Assn.*, 51 Fed. Rep. 520. Such a clause simply refers the question of the amount of damage to arbitration: *Smith v. Preferred etc. Assn.*, 51 Fed. Rep. 520. But in *Robinson v. Templar Lodge, No. 17, I. O. O. F.*, 97 Cal. 62, an action to recover sick benefits, it was held that the voluntary submission, by a member of a benevolent and mutual aid association, of his claim against the association for "sick benefits," to a tribunal of the association established for the purpose of settling

all matters of difference which might arise between the association, and any of its members, growing out of a refusal, upon the part of the association, to pay benefits claimed, is an implied agreement upon his part to be bound by their judgment and award.

Application of Statutes.—Benefit societies, like other associations of persons for agreed and lawful purposes, may be simply voluntary associations, or corporations, incorporated by special act, or under general laws. Whether an association which insures the lives of its members is incorporated or not, is important only in determining its relations with third parties, and the rights of the latter with respect to obligations growing out of dealings with the association. So far as the contracts of its members with the association, and their relative rights with one another are concerned, the fact of incorporation is unimportant. If the association is incorporated, the special act or general incorporation law, together with such rules and regulations as it may adopt, enter into and affect the contracts of membership. If unincorporated, such by-laws alone, in connection with the contract of association, govern the rights of the parties to a contract of insurance, and limit the liabilities of the association. A contract of insurance effected with an association or society unincorporated is generally not less beneficial than a policy effected with an incorporated company. Hence, if an association, whatever its name, and whether it is incorporated or not, has life insurance for its main object, its fraternal character being merely incidental or subordinate to provisions for a beneficiary fund, it is a life insurance company, and is amenable to state laws relating to life insurance companies, including such statutes as those exacting incorporation, requiring applications to be attached to policies, and those imposing a license on foreign corporations before they will be allowed to do business in the state, etc: *Farmer v. State*, 60 Tex. 561; *State v. Nichols*, 78 Iowa, 747; *State v. Miller*, 66 Iowa, 26; *Knight Templar etc. Co. v. Berry*, 50 Fed. Rep. 511; *Sherman v. Commonwealth*, 82 Ky. 102; *Railway etc. Assn. v. Robinson*, 147 Ill. 138; *Rockhold v. Canton etc. Soc.*, 129 Ill. 440; *McConnell v. Iowa etc. Assn.*, 79 Iowa, 757; *Fogg v. Supreme Lodge etc. Golden Lion*, 156 Mass. 431; *National Union v. Marlow*, 74 Fed. Rep. 775; *Commonwealth v. Keystone etc. Assn.*, 171 Pa. St. 465; *State v. Benton*, 35 Neb. 463; *State v. Taylor*, 56 N. J. L. 49; *Endowment etc. Assn. v. State*, 35 Kan. 253; *Order of I. F. Alliance v. State*, 77 Md. 547; *Mutual etc. Life Ins. Co. v. Marye*, 85 Va. 643; *State v. Covenant Mut. etc. Assn.*, 83 Wis. 667. The Ancient Order of United Workmen has been held to be an insurance company: *State v. Miller*, 66 Iowa, 26; *State v. Nichols*, 78 Iowa, 747. There are some cases, however, in which associations conducting insurance on the co-operative or assessment plan have been exempted from the provisions of the general laws relating to life insurance: *State v. Whitmore*, 75 Wis. 332; *Fawcett v. Supreme Sitting Order of Iron Hall*, 64 Conn. 170; *Hanford v. Massachusetts etc. Assn.*, 122 Mo. 50; *Commonwealth v. Equitable etc. Assn.*, 137 Pa. St. 412; *Northwestern etc. Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810; *Knudson v. Grand Coun. L. of H. (S. Dak.)*, decided June 22, 1895. If an endowment order has not complied with the insurance law, the certificate holders may refuse to pay further

assessments under their certificates without incurring a forfeiture, and come into equity for a distribution of the fund, which is a trust, especially where all proper efforts to obtain relief in the order have been made and have failed: *Fogg v. Supreme Lodge etc. Golden Lion*, 156 Mass. 431.

Estoppel—Waiver.—If the facts of the particular case justify it, the doctrine of estoppel may be invoked against an association, which has insured one of its members, to prevent it from denying the privileges of membership to one who is claimed to have forfeited his membership: *McCorkle v. Texas etc. Assn.*, 71 Tex. 149. Thus, an association which has issued a certificate of membership, and executed a contract of life insurance, waives any objection growing out of delay in the payment of an assessment, or a change of residence, etc., where it receives and retains the money offered therefor. It cannot retain the money on some condition created by its officers or agents, and not communicated to the payor, and then, upon his subsequent death, escape liability because of such condition, and the noncompliance therewith: *Shea v. Massachusetts etc. Assn.*, 160 Mass. 289; 39 Am. St. Rep. 475; *Walsh v. Aetna Life Ins. Co.*, 30 Iowa, 133; 6 Am. Rep. 604; *Com. v. Provident Life Assn.*, 103 Pa. St. 374; *Light v. Countrymen's etc. Ins. Co.*, 169 Pa. St. 310; 47 Am. St. Rep. 904. By accepting and retaining the dues or fees of an applicant for a beneficiary certificate, with knowledge of the facts, the Grand Lodge of the Ancient Order United Workmen waives all irregularities in the organization of the subordinate lodge, and in the admission of the applicant to its membership: *Perine v. Grand Lodge A. O. U. W.*, 48 Minn. 82; 51 Minn. 224. An insurer is estopped to insist on a forfeiture for delay in the payment of premiums, if his course of conduct has led the insured to believe that the premiums would be received after the appointed day: *Appleton v. Phoenix Mut. Life Ins. Co.*, 59 N. H. 541; 47 Am. Rep. 220. The fact that the relief department of a railroad corporation, organized for the benefit and protection of railroad employes, is a mutual insurance company, does not relieve it from the operation of the rules of equitable estoppel: *Burlington etc. Relief Department v. White*, 41 Neb. 547; 43 Am. St. Rep. 701. If a party to a contract has complied with its terms, he has no occasion to invoke the doctrine of estoppel; it is only when the terms have admittedly not been complied with, that the question arises whether the other party has, by his representations or conduct, estopped himself from setting up such noncompliance as a ground of forfeiture: *Gunther v. New Orleans etc. Assn.*, 40 La. Ann. 776; 8 Am. St. Rep. 554. If an insurance company has accepted the premiums, and the insured has relied on the indemnity contract provided in the policy, the insurance company is as much estopped to cancel the policy, after the insured has become in such a physical condition that he cannot obtain desirable insurance upon his life in any reputable company, as it would be estopped to avoid the policy after the death of the insured: *Mutual etc. Life Ins. Co. v. Robison*, 54 Fed. Rep. 580. So, if a mutual benefit association, with full knowledge that a deceased member had misstated his age in his application for membership, bases its refusal to pay the death benefit solely upon the failure of the deceased to designate a bene-

beneficiary, the association is estopped, in a suit afterward brought to recover said death benefit, from asserting, as a defense, such misstatement as to age: *Wolf v. District Grand Lodge etc.* 102 Mich. 23. A party cannot take advantage of his own wrong. Hence, a friendly society cannot take advantage of the wrongful and arbitrary acts of its own officers in refusing to transfer a member to a certain endowment class: *Sourwine v. Supreme Lodge Knights of Pythias*, 12 Ind. App. 447. A mutual aid society may, by its conduct, waive a provision in its certificate of membership requiring the beneficiary in the certificate to be the natural heir of the insured: *Lindsey v. Western Mut. Aid Soc.*, 84 Iowa, 734. A soliciting agent to take applications for insurance may waive such conditions of the application as do not relate to the by-laws; and this principle applies as well to benevolent societies as to ordinary insurance companies: *Supreme Council etc. C. B. Legion v. Boyle*, 10 Ind. App. 301.

But an association which has made a contract of life insurance with one of its members, is not estopped from avoiding it for fraud and deception, by means of which the contract was obtained, such as fraudulent representations: *Holland v. Supreme Council etc. of Chosen Friends*, 54 N. J. L. 490. So, where a policy of accident insurance expressly withholds liability for death caused in a certain manner, and a death does occur, the fact that the beneficiary, at her repeated request, was furnished with blank proofs, the company all the while protesting against its liability, does not estop the company from interposing the conditions of the policy: *Sharpe v. Commercial etc. Assn.*, 139 Ind. 92. And a beneficial corporation is not estopped to deny the truth of a statement contained in an application for membership and insurance therein, by the hearsay information of one of its officers, who was in no way charged with the duty of ascertaining the truth or falsity of such statement: *Supreme Council etc. Legion of Honor v. Green*, 71 Md. 263; 17 Am. St. Rep. 527. A contract by a mutual benefit association to pay the death losses of another association, in consideration of the transfer of the assets and membership of such other association, is, in the absence of express authority in its articles of incorporation, ultra vires and void; and the purchasing association is not estopped from denying its liability under such contract, after the receipt of its burdens, where it appears that the insured has not been prejudiced by such transfer, because of the bankruptcy of the association in which he was a member at the time the contract was made: *Twiss v. Guaranty Life Assn.*, 87 Iowa, 733; 43 Am. St. Rep. 418. An advancement made by the insurer, after a death, pursuant to a by-law, and a demand for further proofs of death, do not estop the association from denying its liability on a policy: *Bachmeyer v. Mutual etc. Life Assn.*, 82 Wis. 255.

A member of an association in which he is insured may be estopped from questioning the legality of a will, in so far as it affects the benefit under the certificate of membership, the rule being that no one is permitted to claim under a will, and also adversely to it: *Hainer v. Iowa Legion of Honor*, 78 Iowa, 245. He is estopped to deny the existence of the corporation with which he has made a contract, as a person contracting with a corporation admits its exist-

ence: *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. 124; 43 Am. Dec. 457. And a beneficiary of a certificate, issued by a mutual life benefit society may be estopped by his conduct from claiming that a change of beneficiaries was invalid by reason of the nonsurrender of the original certificate, and the failure to issue a new one: *Supreme Conclave Royal Adelpia v. Cappella*, 41 Fed. Rep. 1.

The fact, however, that the officers of a mutual benefit society received assessments from a member, after the passage of a by-law expelling him therefrom, does not estop him from denying his membership when sued for assessments made after those paid, especially where he made such payments under the impression and the belief that he still owed them: *Ellerbe v. Faust*, 119 Mo. 653. So, where one company issued endowment policies before a statute prohibiting the future issue of such policies, and another company, which had issued no such policies, assumed its liabilities, the members of the latter are not liable to assessment to pay endowment policies assumed; and the fact that members of the association absorbed have paid death assessments for members of both associations, does not estop them from denying liability for endowment policies issued by the first association: *Dishong v. Iowa etc. Assn.*, 92 Iowa, 163. The regular members of a mutual insurance company are not estopped, by reason of having received the benefit of their insurance, to deny their liability to assessment for losses on policies issued by the company to nonmembers, of which they had no knowledge: *Oorey v. Sherman* (Iowa), decided Oct. 8, 1894. The sworn statement by a widow, in the proofs of death, that the insured committed suicide while insane does not estop her in an action to recover the death benefit to show that she made such statement on the faith of what others told her, and that, in fact, the poison which caused the death of the insured was not taken by him intentionally, but by mistake: *Bachmeyer v. Mutual etc. Life Assn.*, 82 Wis. 255. Neither does such statement create an estoppel, though the insurer, a mutual association, claims that under its by-laws the amount of the policy, if payable, should be assessed on the members existing at the time of the death of the insured, that more than a thousand persons then members had ceased to be such, and that several thousand other persons had become members, so that such assessment is impossible, where it appears that no specific assessment for each loss was made, but that there were regular bi-monthly assessments, a part of which went to a reserve fund, and that from the income of such fund all suspended claims could be paid without injustice to any member or violation of any rule of the association: *Bachmeyer v. Mutual etc. Life Assn.*, 82 Wis. 255. A member of a life insurance company on the assessment plan, which company has been fraudulently dissolved and amalgamated with another like company, is not estopped to maintain an action to recover damages of the directors of the former company, occasioned by such fraud and consolidation, by the fact that he applied to the consolidated company for membership, and that it refused his application: *Grayson v. Willoughby*, 78 Iowa, 83. So if an applicant for insurance in an assessment company gives full and correct answers to all questions, but the agent, including a medical examiner, writes false answers, or abbreviates answers, or

omits a part of them, and the company afterward receives the premium and issues a policy, the company, upon the death of the insured will be estopped from insisting on the falsity of the answers, although warranted to be true; but if the applicant discovers that a fraud has been perpetrated on him and the company, he cannot hold the policy without approving the action of the agent: *Providence Life etc. Soc. v. Reutlinger*, 58 Ark. 528; *Mutual etc. Life. Ins. Co. v. Robinson*, 58 Fed. Rep. 723; *Michigan etc. Life Ins. Co. v. Leon*, 188 Ind. 686.

General Features of Mutual Insurance.—Mutual insurance is largely done by benefit assessment associations. They often combine with business objects social and fraternal features; and this is true of many other associations or societies. It makes no difference by what name an association may be called; if it has an insurance feature, and insurance is its main object, the predominant feature of it, as well as of other insurance companies, is the payment of a specific sum on the death of the person who is a member of the organization, or whose life is insured. The contract of insurance is evidenced by a certificate of membership. The association itself is the insurer. The power to designate the recipients of benefits is in the members of the association. These recipients are called the beneficiaries. The consideration for the contract is made up of assessments and dues. In some benefit assessment companies the frequency, as well as the amount of assessments, is left wholly discretionary with the managing agents of the association. In other cases, premium notes are given for definite amounts, which amounts constitute the limit beyond which no assessment may be levied. The manner in which the fund is to be raised to pay benefits and losses is unimportant in determining the nature of mutual insurance, as it is only an incident and a means of performing such contracts. Mutual insurance may be divided, with respect to the risks assumed, into life, accident, fire, marine, and other classes usually engaged in by insurers; but the manner of securing the consideration and performing their contracts are not susceptible of simple classification, as the methods of raising funds to meet losses and pay benefits are of almost infinite variety. The only marked difference between contracts of membership in different societies is that, in some, premium notes are given, while in others, the limit to the power of assessment is either fixed in the charter and by-laws, or not at all. If a premium note is taken as a measure of liability to assessments, part of the note is regularly paid to meet assessments. A mutual benefit association is one providing insurance "upon the assessment plan," although it agrees to pay a definite sum and has fixed rates of assessment which it is authorized to receive in advance, where it has no "legal reserve," but merely an "emergency fund," and its contracts expressly reserve to it the right to increase or lower the specified rates of assessment: *State v. Covenant etc. Assn.*, 83 Wis. 667.

Application, Acceptance, and Membership.—If initiation is made necessary, by the constitution and by-laws of a secret order or benefit society, in order to enjoy benefits of insurance, the fact that a person's application for membership has been accepted, and his "proposition fee" paid, does not entitle his beneficiary to any insur-

ance, in the event of his death, unless he has been initiated as a member of the society: *Matkin v. Supreme Lodge Knights of Honor*, 82 Tex. 301; 27 Am. St. Rep. 886. Only persons of full age may become members. Infants cannot be received: *In re Globe etc. Assn.*, 185 N. Y. 280. Fraud in the application to become a member vitiates it: *Hauf v. Northwestern etc. Aid Assn.*, 76 Wis. 450; *Whitmore v. Supreme Lodge K. of H.* 100 Mo. 36; *Wright v. Mutual etc. Life Assn.*, 118 N. Y. 237; 16 Am. St. Rep. 749; but an arrangement made by an insured woman, whereby she, after the policy was delivered to her, gave it to her daughter in law, with instructions to pay the premiums on the policy, pay the funeral expenses of insured. and, if anything was left, to give it to the granddaughter of the insured, though not disclosed to the insurance company, is not a fraud upon it: *Burke v. Prudential Ins. Co.*, 155 Pa. St. 285. The answers to material questions must be substantially true, or the policy will be avoided, even in the absence of fraud, especially where it is so provided by the contract of insurance: *Perine v. Grand Lodge A. O. U. W.*, 51 Minn. 224; *Swett v. Citizens' etc. Soc.*, 78 Me. 541; *Smith v. Baltimore etc. R. R. Co.*, 81 Md. 412; *White v. Provident etc. Soc.*, 163 Mass. 108; *Jerrett v. John Hancock etc. Life Ins. Co.*, 18 R. I. 754; *Hauf v. Northwestern etc. Aid Assn.*, 76 Wis. 450; *Whitmore v. Supreme Lodge Knights of Honor*, 100 Mo. 36; *Wright v. Mutual etc. Life Assn.*, 118 N. Y. 237; and this rule applies to false answers as well as to matters not material to the risk, if made contrary to the agreement of the parties: *Whitmore v. Supreme Lodge Knights of Honor*, 100 Mo. 36; but in *Vivar v. Supreme Lodge Knights of Pythias*, 52 N. J. L. 455, it is held that false answers as to immaterial matters will not avoid the policy. The certificate of the applicant that he understands the company's classification of risks, and that he belongs to the class given is immaterial: *Pacific etc. Life Ins. Co. v. Snowden*, 58 Fed. Rep. 842. The statements contained in an application for a policy of life insurance, will not be construed as warranties, which, if untrue in any particular, would avoid the policy, unless the provisions of the application and policy, taken together, leave no room for any other construction: *Supreme Lodge A. O. U. W.*, 6 Ind. App. 399; *Northwestern etc. Life Ins. Co. v. Woods*, 54 Kan. 663. Admitting that such statements are warranties, the language, if it is ambiguous will be taken most strongly against the insurer, and it will be considered that the insured warranted the statements to be true only to the best of his knowledge: *Anders v. Supreme Lodge Knights of Honor*, 51 N. J. L. 175. The issuance of a policy upon an application in which some of the questions are imperfectly, or not satisfactorily, answered, is a waiver of objections thereto, and renders such imperfections immaterial: *Manhattan Life Ins. Co. v. Willis*, 60 Fed. Rep. 236. An insured member of a mutual life insurance company is not bound by false answers written by an agent, even where he signs the application without reading it, and does not afterward search the copy thereof to ascertain whether the agent has acted honestly with his principal: *Michigan etc. Life Ins. Co. v. Leon*, 138 Ind. 636; *Mutual etc. Life Ins. Co. v. Robison*, 58 Fed. Rep. 723; *Providence Life etc. Soc. v. Reutlinger*, 58 Ark. 528.

The Pennsylvania statute requiring copies of applications for insur-

ance to be attached to the policies, is held not to apply to beneficial associations: *Johnson v. Phila. etc. R. R.*, 163 Pa. St. 127. The death of the applicant before his application reaches the home office, revokes the offer to become insured. It destroys the subject of the insurance, and renders the making of the proposed contract impossible. The approval of the application by the company's medical director, before receiving notice of the applicant's death, even if it amounts to a determination to accept the same, does not complete the contract, when such acceptance is not communicated to the personal representative of the applicant: *Paine v. Pacific etc. Life Ins. Co.*, 51 Fed. Rep. 689. The contract, however, must be regarded as complete, where the policy is placed by an agent of the company in the hands of a broker, though the applicant dies before the policy is delivered to him, where the agent has received and appropriated to the use of the company the premium which was paid by the insured to the broker: *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253. So, if the secretary of a mutual accident insurance company indorses an acceptance upon the application, and fills out the policy with intent to have it take immediate effect, and causes it to be mailed to the applicant, as of force and effect at that time, the company will not be heard to say that there was no delivery, although the policy did not reach its destination until after the death of the applicant: *Dalley v. Preferred etc. Assn.*, 102 Mich. 289. If the application has not been accepted, nor the dues paid, as required by the policy, there is no binding contract: *Weinfeld v. Mutual etc. Life Assn.*, 53 Fed. Rep. 208; so where there has been neither a payment nor a delivery, as contemplated by the contract, there is no liability upon the policy: *Hawley v. Michigan etc. Ins. Co.*, 92 Iowa, 593; *McClave v. Mutual etc. Life Assn.*, 55 N. J. L. 187. A breach of warranty does not, ipso facto, render the policy void, in the absence of any express stipulation to that effect, either in the application or policy, but merely makes it voidable; and the insurer is liable unless he seasonably manifests an intention to rescind the contract, and tenders back the premium: *Selby v. Mutual Life Ins. Co.*, 67 Fed. Rep. 490; *Phinney v. Mutual Life Ins. Co.*, 67 Fed. Rep. 493. One who desires to take advantage of a change in the contract relation between them, made by the other party, must do so within a reasonable time. If he continues for a long period of time to treat the contract as still in force, he will be bound by it, as changed. Hence, if a member of an association continues to pay assessments for more than three years without protest, after notice of his transfer from one class of insurance to another, the company has a right to assume that the change is assented to; and the member is, therefore, bound by the contract of insurance as changed: *Margut v. United Brethren etc. Soc.*, 148 Pa. St. 185. The member's promise to pay assessments, accruing upon the death of other members, is the consideration for the benefit he derives from his insurance as a member of the society: *Ellerbe v. Barney*, 119 Mo. 632. A provision in a life insurance policy, which withholds from the agents authority "to make, alter, repair, or discharge this or any other contract, in relation to the matter of this insurance," does not limit the powers of the insurer's agents in preparing and accepting an application

for insurance: Mutual etc. Life Ins. Co. v. Robison, 58 Fed. Rep. 723. The fact that a person is obliged, as a condition of employment by a railroad company, to become a member of the relief department, or association, of the railroad company, does not relieve him from the obligation of stating the facts truthfully in his application: Smith v. Baltimore etc. R. R. Co., 81 Md. 412. The statute of the state, articles of association, certificate of membership, and by-laws of a mutual benefit association determine the rights of the members, and of the society; and may be enforced by the parties and beneficiaries according to their respective rights as therein provided: Note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 786. Of these the members must take notice, and be governed by them in all their dealings with the association: Supreme Lodge A. O. U. W., 6 Ind. App. 399.

Certificate of Membership and of Insurance.—A certificate of membership in a life benefit society so far as it embodies a contract of insurance is governed by the rules of law applicable to insurance contracts: Supreme Commandery etc. Golden Rule v. Ainsworth, 71 Ala. 332; 46 Am. Rep. 332; Bauer v. Samson Lodge Knights of Pythias, 102 Ind. 262.

As a contract of mutual insurance it presents no extraordinary features, although the question of construction is complicated by the necessity of examining and interpreting provisions of the charter and by-laws which enter into and form a part of the contract. Such a contract is governed by that rule of construction applicable to all contracts, namely, that the intent of the parties must first be ascertained and then be given effect. A certificate of membership in a benefit society, though it contains on its face no contract of indemnity which entitles the holder to all the rights that appertain thereto, is to be construed in connection with the constitution and by-laws, as if those documents were combined in one: Railway etc. Assn. v. Robinson, 147 Ill. 138. It is the by-laws, articles of association and certificates of membership of mutual benefit associations that determine the rights of the members and of the association: Union Mut. Assn. v. Montgomery, 70 Mich. 587; 14 Am. St. Rep. 519. The members are bound to take notice of the by-laws: Bauer v. Samson Lodge Knights of Pythias, 102 Ind. 262. Words indorsed on a policy of insurance merely to indicate the nature of the paper, are not a part of the policy: Gongower v. Equitable etc. Assn. (Iowa), decided May 15, 1895. Insurance payable on the expiration of a fixed period comes within the definition of endowment insurance: Walker v. Giddings, 103 Mich. 344. The provisions of a certificate of membership in a benefit society will not be extended beyond its terms so as to include a posthumous child: Spry v. Williams, 82 Iowa, 61; 31 Am. St. Rep. 460. A condition, in such a certificate, denying to agents the power to make, alter, or discharge contracts, waive forfeitures, or extend credits, has no application to the general manager or secretary of the association: Bankers' etc. Assn. v. Stapp, 77 Tex. 517; 19 Am. St. Rep. 772. A certificate of membership and insurance in a mutual benefit society is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of the parties: Chartrand v. Brace, 16 Col. 19; 25 Am. St. Rep. 235. The contract of insurance is in the nature of a testament; and, in construing it, the court will,

as far as possible, treat it as a will: *Chartrand v. Brace*, 16 Colo. 19; 25 Am. St. Rep. 235. The disposition of benefits created by a mutual benefit association should be construed the same as a bequest by will: *Union Mut. Assn. v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519. If an insurance policy expressly refers to the application, and makes it a part of the contract of insurance, the two instruments must be construed together in determining what the contract really is: *Dalley v. Preferred etc. Assn.*, 102 Mich. 289; *Home Friendly Soc. v. Berry*, 94 Ga. 606; and if the policy, as delivered, contains provisions not in the application, and which are not accepted by the applicant, they may be treated as waived by the company, and as constituting no part of the contract of insurance: *Dalley v. Preferred etc. Accident Assn.*, 102 Mich. 289.

Charter—Constitution—By-laws—Rules.—A majority of the board of directors has power to adopt by-laws, the charter of the corporation authorizing the president and directors to adopt by-laws: *Oahill v. Kalamazoo etc. Ins. Co.*, 2 Doug. 124; 48 Am. Dec. 457. The constitution of a mutual benefit society is superseded by the adoption of another constitution, except as to the parts reproduced in the new constitution: *Supreme Lodge Knights of Pythias v. La Multa*, 95 Tenn. 157. If a by-law conflicts with a provision of the constitution of a mutual benefit association, the former must yield to the latter, as the constitution is the fundamental law: *Sherry v. Plasterers' Union*, 139 Pa. St. 470. If the constitution itself contains two inconsistent provisions, that most favorable to the insured will be adopted: *Wolf v. District Grand Lodge etc.*, 102 Mich. 23. The association cannot, by virtue of provisions in the constitution and by-laws, make a statement in the application, executed before the party becomes a member, a warranty, if the statement will not bear such a construction: *Supreme Lodge A. O. U. W. v. Hutchinson*, 6 Ind. App. 399. While a mutual benefit society has the power to make, alter, abrogate, or amend its by-laws: *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489; *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271; 29 Am. St. Rep. 603; *Fugure v. Mutual Soc.*, 46 Vt. 362; it cannot so exercise this right that it will operate as a repudiation of its obligations, or to work a forfeiture of rights previously vested in its members: *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271; 29 Am. St. Rep. 603; *Becker v. Berlin etc. Soc.*, 144 Pa. St. 232; 27 Am. St. Rep. 624; *Metropolitan etc. Assn. v. Windover*, 137 Ill. 417; *Hobbs v. Iowa etc. Assn.*, 82 Iowa, 107; 31 Am. St. Rep. 466.

A new law of a mutual benefit society will not be interpreted to be retroactive in its operation, unless by its terms it is clearly intended to be so, but such law will be construed as operating only on cases or facts that come into existence after it was passed: *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271; 29 Am. St. Rep. 603.

Hence, after a mutual benefit association has become liable on a contract of insurance, it cannot, by a subsequent amendment to its by-laws, reduce the amount of the benefits or take away the same altogether: *Becker v. Berlin etc. Soc.*, 144 Pa. St. 232; 27 Am. St. Rep. 624. So, there can be no discharge of an accrued liability by refunding an assessment; *Burlington etc. Relief Department v. White*, 41 Neb. 547; 43 Am. St. Rep. 701. And, where the original agreement

contains no provision that the member shall be bound by all articles and by-laws that may be adopted by the association, it cannot, by the adoption of new articles of incorporation, create a new condition of forfeiture of the certificate without his consent: *Hobbs v. Iowa etc. Assn.*, 82 Iowa, 107; 81 Am. St. Rep. 466; or, by the adoption of a subsequent by-law, change the time for bringing suit on a certificate: *Cohen v. Supreme Sitting Order of Iron Hall (Mich.)*, decided May 21, 1895. But, the parties are bound by their contract, and the member frequently accepts a benefit certificate subject to the right of the association to amend its constitution and by-laws. In such cases, the contract, so far as it consists of the constitution and by-laws, may be changed by an amendment of the constitution and by-laws, but in so far as it consists of something specifically agreed to between the parties at the time, and not necessarily a part of the constitution and by-laws, an amendment changing the contract is invalid: *Hale v. Equitable Aid Union*, 168 Pa. St. 377. A contract between a member and the association cannot be enlarged or changed except by the consent of both contracting parties: *Supreme Council etc. Legion of Honor*, 45 N. J. Eq. 466; but if the association expressly reserves the right to amend, and the member makes himself subject to whatever change the association may make in the contract, he is bound by the rules "now in force or which may hereafter be enacted," and must take notice of the existence and effect of such reserved power: *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489; *Montgomery etc. Ins. Co. v. Milner*, 90 Iowa, 685; *Supreme Lodge Knights of Pythias v. La Malta*, 95 Tenn. 157. Thus, a provision against liability in case of death by suicide, contained in a certificate of membership in a mutual relief association, though not authorized by its by-laws, is a binding part of the contract of insurance, where it does not violate the articles of organization of the association: *McCoy v. Northwestern etc. Assn.*, 92 Wis. 577. But the board of control of the endowment rank of a mutual benefit society has no power to pass a law that payment will not be made on the certificates of members who commit suicide, under a provision in the constitution that such board shall have "entire charge and full control of the endowment rank," subject to such restrictions as the supreme lodge may provide, as this language imports executive, not legislative functions: *Supreme Lodge Knights of Pythias v. La Malta*, 95 Tenn. 157. The supreme lodge of a mutual benefit society has no authority, where the sole power to legislate with respect to the endowment rank of such society is vested in the association by its charter, to delegate to a board of control the power to pass a general law against suicide, affecting the entire endowment rank: *Supreme Lodge Knights of Pythias v. La Malta*, 95 Tenn. 157. So, a contract of life insurance expressly excluding liability in case of death by suicide cannot be changed by the application of the doctrine of waiver or estoppel so as to cover death from that cause: *McCoy v. Northwestern etc. Assn.*, 92 Wis. 577. Under a contract of life insurance issued by a mutual company, conditioned to be subject to any by-laws thereafter to be enacted, the insured is bound by a subsequent by-law forfeiting such policies, where the insured should die by his own hand, sane or insane: *Supreme Commandery etc. Golden*

Rule v. Ainsworth, 71 Ala. 496; 46 Am. Rep. 332. The constitution adopted by a voluntary association, or a corporation, is not a charter, but only a by-law under an inappropriate name, and the association or corporation may alter or abrogate it, unless prohibited by some higher rule. A conflict, therefore, between such a constitution and a by-law is merely a conflict between by-laws: Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489. For circumstances under which a director or subordinate officer may or may not waive requirements prescribed by the by-laws, see Burlington etc. Relief Department v. White, 41 Neb. 547; 43 Am. St. Rep. 701; Hogan v. Pacific Endowment League, 99 Cal. 248. A by-law must be reasonable: Union Mutual Assn. v. Montgomery, 70 Mich. 537; 14 Am. St. Rep. 519. It cannot prevent an action to enforce a death benefit: Burlington etc. Relief Department, 41 Neb. 547; 43 Am. St. Rep. 701; but a provision requiring a prospective member of a railroad relief association to release the railroad company from all claims for damages for injuries which may be occasioned by accident is not so unreasonable that a court can declare it void: Fuller v. Baltimore etc. Assn., 67 Md. 433. A by-law of a masonic mutual benefit society, passed in view of a by-law of masonic lodges, excluding saloon keepers from the privileges of the lodges, and providing that a member becoming such saloon keeper shall forfeit his membership in the society, and all attendant rights, applies to those who are and continue, as well as to those who become, saloon keepers after its passage: Ellerbe v. Faust, 119 Mo. 653. A by-law requiring an appeal to the governing body of an association, in case of a decision by subordinate officers adverse to the claimant, is reasonable and valid: Supreme Council etc. of C. F. v. Forsinger, 125 Ind. 52; 21 Am. St. Rep. 196; and in an action by a certificate holder against a mutual benefit society whose by-laws require an appeal to the governing body, an answer, alleging the failure of the plaintiff to make such appeal before bringing the action, is good as a plea in abatement: Supreme Council etc. of Chosen Friends v. Forsinger, 125 Ind. 52; 21 Am. St. Rep. 196. Such an association may provide for the presentation of claims to its officers: Supreme Council etc. of Chosen Friends v. Forsinger, 125 Ind. 52; 21 Am. St. Rep. 196; and a by-law making a finding of liability for death claims a condition precedent to a right to receive benefits is held, in some jurisdictions, to be constitutional and valid: Hembeau v. Great Camp etc. of Maccabees, 101 Mich. 161; 45 Am. St. Rep. 400. A by-law of an insurance company is not void as creating a forfeiture when it provides that in case of the failure of any member to pay his assessment for losses, the directors may sue for and recover the whole amount of his deposit note, if the by-law further provides that the money thus collected shall remain in the treasury of the company, subject to the payment of the subsequent losses, till the term of insurance expires, the balance then remaining to be returned: Cahill v. Kalamazoo etc. Ins. Co., 2 Dong. 124; 43 Am. Dec. 457. A policy holder in a mutual insurance company is presumed to know such rules as are contained in the charter and by-laws, but not the business regulations and instructions to agents adopted by the officers of the company: Walsh v. Aetna Life Ins. Co., 30 Iowa,

183; 6 Am. Rep. 664. The contract of insurance between a mutual benefit society and one of its members is made up of the application for membership, the certificate issued, and the charter, constitution, and by-laws of the order: *Holland v. Supreme Council etc. of Chosen Friends*, 54 N. J. L. 490; *Supreme Lodge Knights of Pythias v. La Malta*, 95 Teun. 157; *Union Mutual Assn. v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519.

Power of Company and its Agents.—The business of an insurance company whether conducted on the mutual or stock plan, is managed by its officers and agents, and the corporators are bound by the acts of such agents in all matters properly done within the scope of the powers committed to them: *Akers v. Hite*, 94 Pa. St. 394; 39 Am. Rep. 792. The officers of a subordinate division of an unincorporated association upon application to them for a death report, may waive proof of death by refusing to give the report and disclaiming all liability under the beneficiary certificate: *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110. An officer of a mutual benefit association who is its executive head, keeping its records, holding its funds in trust, and paying out the same on approval, has power to bind the association by waiving a forfeiture provided for in its by-laws: *Moore v. Order of Railway Conductors*, 90 Iowa, 721. A soliciting agent of a benevolent society may waive such conditions of the application for membership as do not relate to the by-laws: *Supreme Council etc. C. B. Legion v. Boyle*, 10 Ind. App. 801. But officers of a mutual benefit society have no power to arbitrarily reject a claimant's proofs: *Supreme Council etc. of Chosen Friends v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196; and the officers of a beneficiary association have no authority to waive a by-law of the association which provides that only persons of a particular class "between the ages of twenty and fifty-one years" may become members, and to admit to membership a person otherwise eligible whose age exceeds that limit: *McCoy v. Roman Catholic etc. Ins. Co.*, 152 Mass. 272. An insurance by a mutual company may be canceled by agreement of the parties, and the insured is not liable to assessment on his premium notes for subsequently contracted indebtedness: *Akers v. Hite*, 94 Pa. St. 394; 39 Am. Rep. 792. A provision in the constitution of a mutual aid society, limiting the beneficiaries in an insurance certificate to members of the family of the holder or those dependent upon him may be waived by the society, and cannot be questioned by third persons: *Johnson v. Knights of Honor*, 53 Ark. 255.

Beneficiaries—Designation.—The subject of beneficiaries is discussed at some length in the monographic note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 786, on mutual benefit associations; but there are some later cases, a synopsis of which is here given. If the by-laws of a mutual life benefit society impose no limit as to the persons to whom certificates shall be payable, the person insured in such an association has a right to direct the amount of his certificate to be paid to a stranger having no insurable interest in his life: *Sabin v. Phinney*, 184 N. Y. 423; 30 Am. St. Rep. 681; *Milner v. Bowman*, 119 Ind. 448; *Masonic etc. Assn. v. Bunch*, 109 Mo. 560; *Ingersoll v. Knights of Golden Rule*, 47 Fed. Rep. 272; *Northwestern*

etc. *Aid Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810; *Bloomington etc. Assn. v. Blue*, 120 Ill. 121; 60 Am. Rep. 558; contra, *Caudell v. Woodward*, 98 Ky. 646; or he may be himself the sole beneficiary: *Rockhold v. Canton etc. Soc.*, 129 Ill. 440; *Harding v. Littlehale*, 150 Mass. 100. Public policy, however, forbids one person, who has no interest in the continuance of the life of another, from speculating on that life by procuring a policy of insurance thereon, without the knowledge or consent of the insured: *Bloomington etc. Assn. v. Blue*, supra. A creditor, however, may lawfully insure the life of his debtor in a mutual aid society: *Ulrich v. Rejnoehl*, 143 Pa. St. 238; 24 Am. St. Rep. 534. The statute or charter of the order designating beneficiaries controls: *Britton v. Supreme Council etc. Royal Arcanum*, 46 N. J. Eq. 102; 19 Am. St. Rep. 376; *National etc. Aid Assn. v. Gonser*, 43 Ohio St. 1; *Caudell v. Woodward*, 98 Ky. 646; but where the statute designates the class of persons to be benefited, the fact that the designation of the beneficiary in a certificate issued by a beneficiary association was invalid does not make the contract void; and on the death of the insured his executor is entitled to the money in trust for the benefit of those who were entitled to be named as beneficiaries at the time the contract was made: *Clarke v. Schwarzenberg*, 162 Mass. 98; *Shea v. Massachusetts etc. Assn.*, 160 Mass. 289; 39 Am. St. Rep. 475; *National etc. Aid Assn. v. Gonser*, 43 Ohio St. 1; *Caudell v. Woodward*, 98 Ky. 646. No person not of the class for whose benefit a mutual benefit association is authorized can be a beneficiary: *Wolf v. District Grand Lodge etc.*, 102 Mich. 23; *Metropolitan Life Ins. Co. v. O'Brien*, 92 Mich. 584; *Britton v. Supreme Council etc. Royal Arcanum*, 46 N. J. Eq. 102; 19 Am. St. Rep. 376; *Alexander v. Parker*, 144 Ill. 355. If, under the constitution of a mutual benefit association, members have the absolute right to name their beneficiaries, it is the duty of the officer who issues a certificate of membership to insert therein the name of the beneficiary named in the application for membership; and there is no legal objection to a member's designating, in his application for transfer to another class of members, the beneficiaries he desires named in the new certificate of membership: *Eckler v. Terry*, 95 Mich. 123. If one of two beneficiaries under a benefit certificate is ineligible, the other is entitled to the whole fund: *Renner v. Supreme Lodge Bohemian etc. Soc.*, 89 Wis. 401; *Caudell v. Woodward*, 98 Ky. 646. Under a statute authorizing the organization of corporations for the purpose of assisting the widows, orphans, and other relatives of deceased members, or any persons dependent upon deceased members, one may be made a beneficiary who is neither a widow, orphan, or other relative of the member, if wholly, or partly, "dependent" upon him for support. Thus, an affianced wife, if partly dependent upon her intended husband, may be made a beneficiary in his benefit certificate: *McCarthy v. Supreme Lodge etc. of Protection*, 153 Mass. 314; 25 Am. St. Rep. 637; but the question of dependence, in such a case, is a question of fact: *Alexander v. Parker*, 144 Ill. 355. A member cannot designate his "estate" as a beneficiary: *Daniels v. Pratt*, 143 Mass. 216; or a mere creditor: *Clarke v. Schwarzenberg*, 162 Mass. 98; 164 Mass. 347. The contract of a mutual railroad insurance association is ordi-

narly to pay the death benefit, where no beneficiary is named, to the wife of a member, if he has one. Hence, if one has become a member of such association without any written formal application, the court will hold the widow to be the beneficiary the same as it would if an application had been filed without designating any beneficiary: *Burlington etc. Relief Department v. White*, 41 Neb. 547; 43 Am. St. Rep. 701. That a widow is the heir of her deceased husband, within the meaning of the by-laws, see *Hanson v. Minnesota Scandinavian etc. Assn.* 59 Minn. 123. Contra, *Johnson v. Knights of Honor*, 53 Ark. 255.

Children may be named and have a right to recover as beneficiaries: *Voorheis v. People's etc. Soc.*, 91 Mich. 469, 473. The stepdaughter of a deceased member is his "orphan," and is properly designated as a beneficiary under his certificate: *Renner v. Supreme Lodge Bohemian etc. Soc.*, 89 Wis. 401. A member may designate his "lodge" or "grove" as a beneficiary in case of his decease: *Bacon v. Brotherhood of R. R. Brakemen*, 46 Minn. 303; *Finch v. Grand Grove etc. Order of Druids*, 60 Minn. 308. The words "legal representatives" in a life insurance policy mean heirs or next of kin, and not executors or administrators: *Schultz v. Citizens' etc. Life Ins. Co.*, 59 Minn. 308. The words "legal representatives" ordinarily mean executors or administrators, and that meaning will be given them in any instance unless there are facts existing which show that the words were not used in their ordinary sense: *Sulz v. Mutual etc. Life Assn.*, 145 N. Y. 563, where the plaintiff was held not entitled to maintain an action on a benefit certificate irrespective of her character as administratrix. A relative by affinity, if selected by the insured member, may draw a benefit fund where, under the statute, a person "related to and dependent upon" him is authorized to draw the sum: *Bennett v. Van Riper*, 47 N. J. Eq. 563; 24 Am. St. Rep. 416. A certificate made payable to the member's stepfather is valid under a statute providing that no such certificate shall issue unless the beneficiary be the husband, wife, relative, legal representative, heir, or legatee of the insured: *Simcoke v. Grand Lodge A. O. U. W.*, 84 Iowa, 383.

Change of.—The right of a member of a mutual benefit society to change the beneficiary named in his benefit certificate arises, not from the character of the association, but from the contract between the parties. The only restriction upon his power to make such change at will is such as is found in the statute, charter, or by-laws of the association. The laws of the society prescribing a mode of changing the beneficiary must be followed. It cannot be made in any other manner: See extended note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 790; *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 260; *Metropolitan Life Ins. Co. v. O'Brien*, 92 Mich. 584; *Lamont v. Hotel Men's etc. Assn.*, 30 Fed. Rep. 817; *Block v. Valley etc. Ins. Assn.*, 52 Ark. 201; 20 Am. St. Rep. 166; *Jory v. Supreme Council etc. Legion of Honor*, 105 Cal. 20; 45 Am. St. Rep. 17; *Leaf v. Leaf*, 92 Ky. 166; *Hopkins v. Hopkins*, 92 Ky. 324; *Bowman v. Moore*, 87 Cal. 306; *Supreme Council etc. Legion of Honor v. Smith*, 45 N. J. Eq. 406; *McLaughlin v. McLaughlin*, 104 Cal. 171; 43 Am. St. Rep. 83; *Holland v. Taylor*, 111 Ind. 121; *Barton v. Providence etc. Assn.*, 63 N. H.

535; Lamont v. Grand Lodge etc. Legion of Honor, 31 Fed. Rep. 177; Titsworth v. Titsworth, 40 Kan. 571; Gentry v. Supreme Lodge Knights of Honor, 23 Fed. Rep. 718; Masonic etc. Ben. Soc. v. Burkhart, 110 Ind. 189; Marsh v. Supreme Council etc. Legion of Honor, 149 Mass. 512; Simcock v. Grand Lodge A. O. U. W., 84 Iowa, 383. In Arkansas it is held that no change of beneficiary can be made, unless it is expressly authorized by the contract itself or the articles of association or by-laws of the society: Johnson v. Hall, 55 Ark. 210. Such change may be made by an indorsement upon the benefit certificate: Bowman v. Moore, 87 Cal. 306; Schmidt v. Iowa Knights of Pythias Ins. Assn., 82 Iowa, 304; Highland v. Highland, 109 Ill. 366; or by an assignment of it: See extended note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 790; Milner v. Bowman, 119 Ind. 448; Hirsch v. Clark, 81 Iowa, 200; Benton v. Brotherhood of R. R. Brakemen, 146 Ill. 570; but the assignment must be as prescribed: Hotel Mens' etc. Assn. v. Brown, 33 Fed. Rep. 11. If the charter of the association specifically provides how and to whom the benefit shall be paid, it is not in the power of the insured, or the company and the insured, by any stipulation in the policy, to defeat their rights: Hopkins v. Hopkins, 92 Ky. 324; Presbyterian etc. Fund v. Allen, 106 Ind. 593; though a mutual benefit association may waive formalities required by its charter to be complied with in changing beneficiaries: Manning v. Ancient Order of United Workmen, 86 Ky. 136; 9 Am. St. Rep. 270; Adams v. Grand Lodge, 105 Cal. 321; 45 Am. St. Rep. 45. But where a wife is entitled to hold separate estate, the husband may, in a policy payable to his wife, reserve the right to change the beneficiary, although the charter of the insuring company provides that a policy of insurance issued for the benefit of the wife of the insured shall be held by her "free from all existing debts, contracts, and engagements" of the insured, and which provision is, in substance, the same as the general insurance law of the state: Hopkins v. Hopkins, 92 Ky. 324. The willingness of a mutual benefit society, after the death of the insured, to pay into court the money called for by the certificate, to be disposed of as the court may direct, cannot affect the rights of the beneficiary, as the society has no power, by stipulation, or otherwise, to change or affect those rights: McLaughlin v. McLaughlin, 104 Cal. 171; 43 Am. St. Rep. 83. It will be presumed, until the contrary appears, that the insured has the right to change the beneficiary named in his certificate at any time before his death: Thomas v. Grand Lodge A. O. U. W., 12 Wash. 500. Owing to irregularities, or complete absence of effort to follow the prescribed method of changing beneficiaries, such an attempted change has, in some cases, been held ineffectual and to confer no rights on the new beneficiary: Grace v. Northwestern etc. Assn., 87 Wis. 562; 41 Am. St. Rep. 62; Thomas v. Thomas, 131 N. Y. 205; 27 Am. St. Rep. 582; Rollins v. McHatton, 16 Colo. 203; 25 Am. St. Rep. 260; Wendt v. Iowa Legion of Honor, 72 Iowa, 682; Hall v. Northwestern Endowment etc. Assn., 47 Minn. 85; Marsh v. Supreme Council etc. Legion of Honor, 149 Mass. 512; Elsey v. Odd Fellows' etc. Assn., 142 Mass. 224.

But, notwithstanding the fact that the acts relied on to effect a change of beneficiaries are not an exact compliance with the laws of the association prescribing the mode of changing a beneficiary,

equity will sometimes treat the substitution as complete and effectual, as illustrated by the following cases: *Rollins v. McHatton*, 16 Colo. 203; 25 Am. St. Rep. 260; *Jory v. Supreme Council etc. Legion of Honor*, 105 Cal. 20; 45 Am. St. Rep. 17; *Leaf v. Leaf*, 92 Ky. 166; *Adams v. Grand Lodge*, 105 Cal. 321; 45 Am. St. Rep. 45; but it is not every case in which equity will interfere to remedy a defective execution of a power: *Thomas v. Thomas*, 131 N. Y. 205; 27 Am. St. Rep. 582. A beneficiary cannot prevent a change of beneficiaries by obtaining a benefit certificate of a member of a beneficial association and refusing to surrender it to him for the purpose of making that change of beneficiary which he is entitled to make: *Jory v. Supreme Council etc. Legion of Honor*, 105 Cal. 20; 45 Am. St. Rep. 17. A member may, after he has transferred the possession of a certificate, and regained possession of it by false and fraudulent representations, surrender it, and name a new beneficiary, to the exclusion of the one first named: *Brown v. Grand Lodge A. O. U. W.*, 80 Iowa, 287; 20 Am. St. Rep. 420. If a member of a beneficial association, the constitution and laws of which authorize its members to change the beneficiary named in the benefit certificates, names his mother in the certificate, but subsequently, on his marriage, changes the beneficiary to his wife, delivering the certificate into her control, and before his death obtains the certificate without his wife's knowledge or consent, surrenders it, and takes out a new one, with his mother named therein as beneficiary, the wife is not entitled to recover from the association the amount of the benefit: *Beatty v. Supreme Commandery etc. Golden Cross*, 154 Pa. St. 484. The marriage of a member who has made a certificate payable to his mother does not revoke the certificate: *Note to Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 787; *Benton v. Brotherhood of R. R. Brakemen*, 146 Ill. 570. The laws in force at the time a change is made are those which control: *Supreme Council C. K. v. Frenke*, 137 Ill. 118. The consent of a designated beneficiary of a member of a mutual benefit association to a change of beneficiaries is not required, because he has no interest or vested right in the fund or bounty of his donor until the death of the latter: *Union etc. Assn. v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519.

A change of beneficiary cannot be made by the will of a member of a benefit association when its by-laws point out a mode in which such changes can be made, and that mode is not adopted. The method prescribed for changing beneficiaries is exclusive: *McCarthy v. Supreme Lodge etc. of Protection*, 153 Mass. 314; 25 Am. St. Rep. 637; *Hainer v. Iowa Legion of Honor*, 78 Iowa, 245; *De Silva v. Supreme Council of Portuguese Union*, 109 Cal. 373; *Holland v. Taylor*, 111 Ind. 121; *Supreme Council etc. Legion of Honor v. Perry*, 140 Mass. 580; *Mellows v. Mellows*, 61 N. H. 137; *Stephenson v. Stephenson*, 64 Iowa, 534.

But the substitution of the executors of the member as his beneficiaries, and the insertion in his will of a direction to them to apply the proceeds in payment of his debts, is not an attempt to devise by will the policy or its proceeds: *Bowman v. Moore*, 87 Cal. 306. Neither can an indorsement on a certificate, "It is my will that the benefit named in this certificate be paid to my sister," be considered a will,

where the certificate was never delivered to the sister. It is a mere direction as to payment: *Highland v. Highland*, 109 Ill. 368.

There are circumstances, however, in which the proceeds of the certificate ought, in good conscience, to go to the person designated in the will, and a court of equity will direct the same in that course: *Order of Mutual Companions v. Griest*, 76 Cal. 494; *Daniels v. Pratt*, 148 Mass. 216. Thus, when a certificate is lost or mislaid by the insured, without fault on his part, so that it is impossible for him to name a new beneficiary in the manner prescribed by the by-laws of the society, a court of equity will enforce his disposition of the insurance by a will in which he names a new beneficiary: *Grand Lodge A. O. U. W. v. Noll*, 90 Mich. 37; 30 Am. St. Rep. 419. However, a change of beneficiary may be made by a member in his last will and testament, where the constitution and by-laws do not prescribe a different method: *Masonic etc. Assn. v. Bunch*, 109 Mo. 560. The results of the death of a beneficiary before the death of a person whose life is insured are discussed in the monographic note to *Hooker v. Sugg*, 11 Am. St. Rep. 721-724. The statutes of Maine regulating the distribution of money derived from life insurance do not affect insurance vested in, or derived by, the testator, as a beneficiary under a policy upon the life of a third person. Such rights will pass by will without special designation: *Small v. Jose*, 86 Me. 120.

Proofs of Death.—When a death occurs, there is ordinarily no definite duty to furnish proofs of death, as in the case of ordinary life insurance; but the beneficiary should inform some officer of the association of it. Benefit associations generally have a way of investigating death claims and to have proofs of death prepared according to prescribed forms, and to do everything required to place the beneficiary in the possession of the benefit secured by the certificate, without expense to him: *Anderson v. Supreme Council etc. of Chosen Friends*, 135 N. Y. 107; *Lorscher v. Supreme Lodge Knights of Honor*, 72 Mich. 316. If, however, an action is brought on the certificate, the beneficiary is not concluded or estopped by the statements of physicians, but the issue made by the pleadings as to the real cause of death is triable as any other issue of fact: *Bentz v. Northwestern Aid Assn.*, 40 Minn. 202; and, if the association refuses to pay upon the ground of fraud practiced by the member in becoming such, it will be presumed that proofs of death were made by those whose duty it was to do so: *Lorscher v. Supreme Lodge Knights of Honor*, 72 Mich. 316. The death of a member is sufficiently proved to authorize a call for an assessment by the record of the board of directors: *Van Frank v. United States etc. Assn.*, 158 Ill. 560.

Insurance Money—Vested Rights—Assignment.—A beneficiary named in a benefit certificate has merely a bare expectancy, which ceases upon his death during the life of the person insured: *Gutterson v. Gutterson*, 50 Minn. 278. He acquires no vested rights which are to accrue upon the death of a member, until such death occurs, at which time his position and rights do become vested: *Masonic etc. Ben. Soc. v. Burkhart*, 110 Ind. 189; note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 789; *Benton v. Brotherhood of R. R. Brakemen*, 146 Ill. 570; *Wells v. Covenant etc. Assn.*, 126 Mo. 630; *Brown v. Grand Lodge A. O. U. W.*, 80 Iowa, 287; 20 Am. St. Rep. 420; *Mil-*

ner v. Bowman, 119 Ind. 448; Haskins v. Kendall, 158 Mass. 224; 35 Am. St. Rep. 490; Rollins v. McHatton, 16 Col. 203; 25 Am. St. Rep. 260; Sabin v. Phinney, 134 N. Y. 423; 30 Am. St. Rep. 681; Michigan Mut. etc. Assn. v. Rolfe, 76 Mich. 146; Jory v. Supreme Council etc. Legion of Honor, 105 Cal. 20; 45 Am. St. Rep. 17; Catholic Knights v. Kuhn, 91 Tenn. 214; Knights of Honor v. Watson, 64 N. H. 517; Martin v. Stubbings, 126 Ill. 387; 9 Am. St. Rep. 620.

It is held in some of the states that a party having no insurable interest in the life of the insured cannot receive an assignment of a policy of insurance issued by a mutual benefit association, especially upon an agreement merely to pay the premiums or assessments necessary to keep the policy alive, as it is against public policy to allow anyone who has no insurable interest to be the owner of a policy of insurance upon the life of a human being, for the reason that it creates a temptation to destroy his life. Such assignment does not, however, vitiate the policy, but will, on the death of the insured, leave the insurance money payable to the parties originally designated in the certificate. The insurance company must perform its contract, but the law will dispose of the money according to the rights of the parties. The person named as beneficiary, or his assignee, neither of whom has any insurable interest in the life of the insured, will hold the proceeds of the certificate as the trustee for the benefit of those entitled by law to receive the insurance money: Price v. Supreme Lodge Knights of Honor, 68 Tex. 361; Cheeves v. Anders, 87 Tex. 287; Pasye v. Adams, 81 Ky. 368. The assignment of a policy of insurance to a party not having an insurable interest is as objectionable as if the assignee took out a policy of insurance in his own name: Basye v. Adams, 81 Ky. 368. But, in other states, it is not necessary to the validity of a benefit certificate that the beneficiary should have an insurable interest in the life of the insured; and it has been held that, if a policy is valid at its inception, it may be assigned to one not having an insurable interest in the life of the insured, when not used as a cloak for a wager. Thus, where the assignee paid three hundred dollars for the assignment of a policy for two thousand dollars, and agreed to pay the dues and assessments on the policy, the court could not say, as a matter of law, in the absence of proof of any age or expectancy of life of the insured, that the sale or assignment was tainted with the vice of gambling, such question usually being one of fact: Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 131. The beneficiary's assignment to one of his creditors has been upheld as valid, at least to the extent of the debt, and not capable of revocation by the beneficiary: Briggs v. Earl, 139 Mass. 473. A policy of life insurance taken out solely for the purpose of reimbursing a creditor of the insured, may be assigned by the insured to such creditor, though it is made payable, in terms, to the "legal representatives" of the insured: Robinson v. Hurst, 78 Md. 59; 44 Am. St. Rep. 260; and such assignment is valid without the assent of the insurance company: Robinson v. Cator, 78 Md. 72. A member of a mutual benefit society may assign his certificate of membership to his creditor, where the laws of the society place no restriction upon his right to name a beneficiary, and the assignee may enforce his claim, to the extent of his debt, even against the widow who was the original bene-

fiary: *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620. Even where an assignment or transfer of the certificate to a creditor of the beneficiary is against public policy, except to the amount of his debt, and cannot be enforced for any further amount by the assignee; yet if the assignment is not forbidden by the rules of the association, and its validity is recognized by the society, after the death of the beneficiary, by payment of the money to the assignee, the heirs or distributees of the deceased beneficiary cannot impugn it: *Stoelker v. Thornton*, 88 Ala. 241. An assignment of the certificate, with directions to the association to pay the proceeds to the assignee, effects a change of beneficiaries: *Milner v. Bowman*, 119 Ind. 448. The beneficiary may pledge or assign a policy of insurance to the extent of his interest in it: *Connecticut etc. Life Ins. Co. v. Baldwin*, 15 R. I. 106.

Of course, if a policy of insurance expressly stipulates that no assignment shall be valid without the consent of the company, an assignment without such consent is without effect: *Moise v. Mutual etc. Life Assn.*, 45 La. Ann. 736; *Harman v. Lewis*, 24 Fed. Rep. 97. A beneficiary undoubtedly has a right to assign her interest after the death of the insured, and before payment, as her interest is then a vested one: *Michigan etc. Assn. v. Rolfe*, 76 Mich. 146; though it is said that, prior to the death of the insured, the beneficiary has no interest which he can assign or devise, or which could descend to his heirs or personal representatives: *Michigan etc. Assn. v. Rolfe*, 76 Mich. 146.

"In an ordinary life insurance policy," says Devens, J., in *Marsh v. Supreme Council etc. Legion of Honor*, 149 Mass. 515, "made payable to a person named, the rights of the beneficiary are fixed by the terms of the policy, and are vested when the policy is issued. In the certificates of a beneficiary association, which are issued to a holder, and which authorize him to designate another beneficiary than the one originally named, the holder may make such changes as the law of the association permits, within the limits of those classes for whom, by statute, such association may provide. All that a beneficiary has during the lifetime of the member who holds the certificate is a mere expectancy, which gives no vested right in the anticipated benefit, and is not property, as, owing to his right of revocation, it is dependent on the will and pleasure of the holder." Hence, a member holding a benefit certificate, payable to his heirs at law, may lawfully assign a part of the money, payable, by its terms, to his sister, where the statute provides that she may be a beneficiary, although one condition of the certificate is, that any assignment of the certificate shall be void unless assented to in writing by the association, if the assent of the association is manifested by the signing of the treasurer's name to the altered contract by a clerk, who acts in so doing under the general authority of the treasurer, as this is sufficient: *Anthony v. Massachusetts etc. Assn.*, 158 Mass. 322. But the member's assignment of his certificate to a creditor, as collateral security for the payment of his debt, is invalid, where creditors are not within the classes of beneficiaries designated by statute: *Briggs v. Earl*, 189 Mass. 473. The fact that an insured member is insolvent at the time of his death does not affect the validity of an assignment

of the policy made by him at a time when he was solvent: *Milner v. Bowman*, 119 Ind. 448.

If the charter of a benefit association provides that a death benefit must be paid to the legal heirs or beneficiary of a deceased member, who is insured, such member cannot sell and assign his policy so as to divert the fund from his legal heir and beneficiary: *Basye v. Adams*, 81 Ky. 368. For a further discussion as to assignment of benefit, see extended note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 790.

Whether a beneficiary acquires a vested interest in the sum of money to be paid on the member's death, must, it is said, be determined by the terms and conditions of the contract of insurance, as shown by the certificate and the constitution of the association: *Supreme Council Catholic Knights v. Franke*, 137 Ill. 118. In Kentucky, it is held that, when a policy of insurance is issued, the right to the benefit at once vests in the beneficiary, and that the insured has no power subsequently over the insurance: *Manning v. Ancient Order of United Workmen*, 86 Ky. 136; 9 Am. St. Rep. 270; but this is contrary to the general rule. And in Arkansas, it is held that, where the contract of insurance reserves no right in a member to substitute another beneficiary for the one originally named in his certificate, but provides that the policy may be assigned, the right of the designated beneficiary becomes vested, and he may assign his interest in the policy, while the member cannot substitute another beneficiary so as to divest the rights of the one first named: *Block v. Valley etc. Ins. Assn.*, 52 Ark. 201; 20 Am. St. Rep. 166. This, too, is an exceptional doctrine. It is held in other states that a beneficiary, designated as such in a certificate, does not thereby acquire any vested rights so as to defeat a subsequent change of beneficiaries effected at the instance of such member, unless the original beneficiary was made such on account of some contract, or has some equities recognized by the courts, and which it would be inequitable to disappoint: *Jory v. Supreme Council etc. Legion of Honor*, 105 Cal. 20; 45 Am. St. Rep. 17. The beneficiaries' interest is such, however, that it can only be effected by a change made in the manner prescribed by the law governing the association: *Holland v. Taylor*, 111 Ind. 121. If a by-law provides that the payment of a benefit shall, in case of the death of a member, be made: 1. To his widow; 2. To his children; 3. To his parents; 4. To his brothers and sisters; and 5. To his subordinate grove, the right of the member to change the order of such beneficiaries, and thereby designate any one of them as the one to receive the benefit, is absolute, and his widow has no vested right to the benefit: *Finch v. Grand Grove etc. Order of Druids*, 60 Minn. 308. Children, as beneficiaries in a certificate of membership of their father, acquire no vested interest therein until his death: *Hoeft v. Supreme Lodge Knights of Honor*, 113 Cal. 91.

The insured member has no interest in the fund. He simply has a power of appointment, which if not exercised becomes inoperative, and, in no event, it has been held, does the insurance money become assets of the estate of the insured or recoverable as such by his administrator: *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 280;

note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 789. It is, in such a case, distributable to the heirs, under the intestate law: See monographic note to Leavitt v. Dunn, 44 Am. St. Rep. 409, on insurance payable to "heirs." But, in a case where a husband made his wife a beneficiary in his certificate, and there was no statute giving the wife a vested interest in the certificate, and no provision therein giving a right to her representatives, the contract was construed as being payable to the wife only in case of her surviving her husband, and, that contingency having failed, it was held that there was a resulting trust in favor of his estate: *Haskins v. Kendall*, 158 Mass. 224; 35 Am. St. Rep. 490. Ordinarily, however, the money due upon the certificate of a member of a benefit association at the time of his death forms no part of his estate, but belongs to the beneficiaries: *Mullen v. Reed*, 64 Conn. 240; 42 Am. St. Rep. 174.

Title to Proceeds—Descent and Distribution.—On a failure of the member to designate a beneficiary capable in law of taking his benefit, and where there is no one, who, under the statute, charter, or by-laws of the association, is capable of taking at his death, the association is, according to some authorities, under no obligation to pay to anyone; and the fund cannot be recovered as assets of his estate by his administrator: See cases cited in the note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 789; *Highland v. Highland*, 109 Ill. 386; *Maryland etc. Ben. Soc. v. Clendinen*, 44 Md. 429; 22 Am. Rep. 52; *Daniels v. Pratt*, 143 Mass. 221. In such a case, the fund goes to the association: *Maryland etc. Ben. Soc. v. Clendinen*, 44 Md. 429; 22 Am. Rep. 52; *Highland v. Highland*, 109 Ill. 386. If the executor of the will of a member of a beneficiary association has received from it the amount due on the death of the member, and the persons who by the by-laws may be designated as beneficiaries are dead, or have relinquished their rights, and the will cannot operate as a designation of the beneficiaries, the executor takes the money in trust to distribute it in accordance with the rules established by the statute of distributions, and not as assets of the estate: *Daniels v. Pratt*, 143 Mass. 216.

On the other hand, however, there are cases holding that, if the member of a mutual benefit association fails to designate a beneficiary, and dies intestate, the death benefit will be distributed to his heirs under the intestate law, to the exclusion of his executor and the creditors of the estate of the deceased: *Wolf v. District Grand Lodge etc. I. O. B. B.*, 102 Mich. 23; *Northwestern etc. Aid Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810. So, if the member, under a statute authorizing him, in his certificate, to provide a fund for the heirs of the insured as individual creditors, or for his estate, to be disposed of by will, makes a contract of insurance for the benefit of himself, the proceeds thereof after his death form a part of his estate to be disposed of under his will: *Harding v. Littlehale*, 150 Mass. 100.

If there has been no change of beneficiaries, the benefit fund goes, of course, to the beneficiary where he has been properly designated: *Chartrand v. Brace*, 16 Colo. 19; 25 Am. St. Rep. 235; but if there has been a change of beneficiaries and all the conditions of the charter and by-laws have been fulfilled, regarding the change, the substi-

tuted beneficiary succeeds to the benefit: *Union etc. Assn. v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519; *Titsworth v. Titsworth*, 40 Kan. 571; and the substituted beneficiary takes the fund where the member has done all in his power to effect a change of beneficiaries, but is prevented from a formal compliance by the act of the original beneficiary. Such a change is an equitable one: *Isgrigg v. Schooley*, 125 Ind. 94; *Luhrs v. Lührs*, 123 N. Y. 367; 20 Am. St. Rep. 754. But if, by reason of some informality, or want of compliance with the conditions of the charter and by-laws, an attempted change of beneficiaries is ineffectual the original beneficiary takes the fund: *Grace v. Northwestern etc. Assn.*, 87 Wis. 562; 41 Am. St. Rep. 62; *McLaughlin v. McLaughlin*, 104 Cal. 171; 43 Am. St. Rep. 83; *Thomas v. Thomas*, 131 N. Y. 205; 27 Am. St. Rep. 582; *Knights of Honor v. Watson*, 64 N. H. 517; *Neville v. Detroit etc. Assn.*, 104 Mich. 149; *Adams v. Grand Lodge*, 105 Cal. 321; 45 Am. St. Rep. 45; *Holland v. Taylor*, 111 Ind. 121.

There can be no double payment on one certificate: *Bock v. Ancient Order of United Workmen*, 75 Iowa, 462; but if a member, after the division of an order, makes a new contract with the original lodge, but retains his membership in the disloyal lodge, his right to recovery on the new contract is not affected by a payment made to him by the disloyal lodge: *Warnebold v. Grand Lodge A. O. U. W.*, 83 Iowa, 23. An action may be maintained to recover a benefit on the member's death where he has been stricken from the by-laws of an association without notice: *Wachtel v. Noah Widows' etc. Soc.*, 84 N. Y. 28; 38 Am. Rep. 478. Unless restricted by the by-laws, a member of an association, who is authorized to make "those dependent upon him" beneficiaries, may name as the beneficiary a woman who has lived with him as his wife, and borne him children, without knowledge that he has a lawful wife living, and she will be entitled to the benefit as against the wife. While not his wife, the named beneficiary is "dependent" upon the insured, and has a moral right to look to him for support: *Supreme Lodge A. O. U. W. v. Hutchinson*, 6 Ind. App. 399. If a statute permits a beneficiary member of a society to designate a person "related to and dependent upon" him, who shall be entitled, under certain conditions, to draw from the society a sum named, a relative by affinity, if selected by the member, is entitled to draw such sum: *Bennett v. Van Riper*, 47 N. J. Eq. 563; 24 Am. St. Rep. 416. The beneficiary is entitled to be paid the full amount for which the member is insured, if there are sufficient funds in the treasury, otherwise an assessment may be levied: *Union etc. Acc. Assn. v. Frohard*, 134 Ill. 228; 23 Am. St. Rep. 664. A certificate issued to a husband in which his wife and daughter are named as beneficiaries makes them joint tenants as to the fund, with right of survivorship: *Farr v. Trustees etc. Grand Lodge A. O. U. W.*, 83 Wis. 446; 35 Am. St. Rep. 73; *Tutorship of Crane*, 47 La. Ann. 896. A certificate is only evidence of the member's right to share in the benefits of an association. If it gets lost, other evidence is admissible: *Grand Lodge A. O. U. W. v. Child*, 70 Mich. 163; *Eastman v. Provident etc. Assn.*, 62 N. H. 555. For the meaning of "occupation," "or other occupation," and "usual or some other occupation," see *Union etc. Accident Assn. v. Frohard*, 134 Ill.

228; 23 Am. St. Rep. 664; *Albert v. Order of Chosen Friends*, 34 Fed. Rep. 721; *Neill v. Order of United Friends*, 149 N. Y. 430; 52 Am. St. Rep. 738; and with respect to insanity as a "sickness or other disability," see *McCullough v. Expressman's Assn.*, 133 Pa. St. 142.

If a wife, being the beneficiary in a certificate, dies before the insured, a resulting trust arises in favor of his estate: *Haskins v. Kendall*, 158 Mass. 224; 35 Am. St. Rep. 490. In such a case, if the husband dies after the wife, the insurance money has been held to belong to the husband's estate: *Washington etc. Assn. v. Wood*, 4 Mackey, 19; 54 Am. Rep. 251. If the wife dies before her insured husband, no interest in the fund vests in her as the beneficiary, though she is named as such, and her son inherits no part of the fund by virtue of his relationship: *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 260. If beneficiaries, having a vested interest in a policy of insurance, die before the insured, who is their sole heir, the latter acquires their interest by inheritance, subject only to the claims of the beneficiaries' creditors, and may assign the same: *Miller v. Bowman*, 119 Ind. 448. If a member of a beneficial association designates a person as beneficiary for the purpose of securing a debt due to a firm of which the person so designated is a member, the firm is in equity to be treated as the real beneficiary, and hence the death of the person so designated does not deprive the firm or the surviving member of the equitable interest, nor entitle the heirs of such member of the association to the fund falling due on his death: *Adams v. Grand Lodge*, 105 Cal. 321; 45 Am. St. Rep. 45. For a further discussion of the results of the death of a beneficiary before the death of a person whose life is insured, see monographic note to *Hooker v. Sugg*, 11 Am. St. Rep. 721-724, discussing the subject.

We have seen above, under the subhead, "Change of Beneficiaries," that there can be no valid change of beneficiaries by will unless the laws governing the association permit it: See, also, *Maryland etc. Soc. v. Clendinen*, 44 Md. 429; 22 Am. Rep. 52; *Moss v. Littleton*, 6 D. C. App. 201. But a member may, by will, dispose of a benefit certificate which is, upon its face, payable to himself: *Catholic Knights v. Kuhn*, 91 Tenn. 214. Compare *Daniels v. Pratt*, 143 Mass. 216; *Brew v. Clement*, 48 Kan. 386. A member's bequest of the proceeds of a certificate to a stranger or a creditor does not make the legatee an "heir" of the testator: *National etc. Aid Assn. v. Gonser*, 43 Ohio St. 1.

Under a certificate payable to the "wife and children" of the insured, the beneficiaries take equally, per capita: *Felix v. Grand Lodge, A. O. U. W.*, 31 Kan. 81; 47 Am. Rep. 479. The scope of this note, however, will not permit us to go into the details of the law of succession; and it may be stated, generally, that the disposition of benefits created by a mutual benefit association should be construed the same as a bequest by will, and that a distribution should be made in accordance with such construction and the statute of distributions: *Union etc. Assn. v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519; *Britton v. Supreme Council Royal Arcanum*, 46 N. J. Eq. 102; 19 Am. St. Rep. 376; *Mullen v. Reed*, 64 Conn. 240; 42 Am. St. Rep. 174; *Northwestern etc. Aid Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810. The rights of various parties to share in or take the insur-

ance money on a benefit certificate, so far as they may be subject to such a construction as is applicable to the law of wills or bequests and the statute of distributions is shown in the following classified cases:

(a) *Wife or Widow*.—*Lyons v. Yerex*, 100 Mich. 214; 43 Am. St. Rep. 452; *Chartrand v. Brace*, 16 Col. 19; 25 Am. St. Rep. 235; *Nally v. Nally*, 74 Ga. 669; 58 Am. Rep. 458; *Fischer v. American Legion of Honor*, 168 Pa. St. 279; *Addison v. New England etc. Assn.*, 144 Mass. 591; *Elsev v. Odd Fellows' etc. Assn.*, 142 Mass. 224; *Michigan etc. Assn. v. Rolfe*, 76 Mich. 146; *Tutorship of Crane*, 47 La. Ann. 896; *Burlington etc. Relief Dept. v. White*, 41 Neb. 547; 43 Am. St. Rep. 701; *Byrne v. Casey*, 70 Tex. 247; *Riley v. Riley*, 75 Wis. 464; *Sanger v. Rothschild*, 123 N. Y. 577; *Alexander v. Northwestern etc. Aid Assn.*, 126 Ill. 558. A divorced wife is not entitled to a benefit designated for her before divorce: *Tyler v. Odd Fellows' etc. Assn.*, 145 Mass. 134; unless equities have arisen in her favor: *Leaf v. Leaf*, 92 Ky. 166. An "affianced wife" is excluded if not within the classes named by statute that may take: *Palmer v. Welch*, 132 Ill. 141; but she may bring herself within those classes: *McCarthy v. Supreme Lodge etc. of Protection*, 153 Mass. 314; 25 Am. St. Rep. 637. An unlawful wife has been held entitled to a benefit: *De Grote v. De Grote*, 175 Pa. St. 50. So with a second wife: *Given v. Wisconsin Odd Fellows' etc. Life Ins. Co.*, 71 Wis. 547; even as against the children by the first wife: *Riley v. Riley*, 75 Wis. 464.

(b) *Heirs, Generally*.—*Moss v. Littleton*, 6 D. C. App. 201; *Small v. Jose*, 86 Me. 120; *Hubbard v. Turner*, 93 Ga. 752; *Silvers v. Michigan etc. Assn.*, 94 Mich. 39; *Sargent v. Supreme Lodge Knights of Honor*, 158 Mass. 557; *Paden v. Briscoe*, 81 Tex. 563; *Brew v. Clement*, 48 Kan. 386; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682; *In re Grist*, 76 Cal. 497; *Milner v. Bowman*, 119 Ind. 448; *Covenant etc. Assn.*, 114 Ill. 108; *Smith v. Covenant etc. Assn.*, 24 Fed. Rep. 685; *Peet v. Great Camp of Maccabees*, 83 Mich. 92; *Smith v. Pinch*, 80 Mich. 332; *Johnson v. Knights of Honor*, 53 Ark. 255; *Thomas v. Leake*, 67 Tex. 469; *Northwestern etc. Aid Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810; *Masonic etc. Assn. v. Jones*, 154 Pa. St. 107; *Taylor v. National etc. Union*, 94 Mo. 35; *Jackman v. Nelson*, 147 Mass. 300. The "legal heirs" may show that no valid change of beneficiaries has been made and that they are entitled to the benefit: *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682. If the certificate is payable to "the legal heirs of the assured," and no change of beneficiaries has been made, the executor of the insured has no right to the fund: *Masonic etc. Assn. v. Jones*, 154 Pa. St. 107. The topic of insurance payable to "heirs" is the subject of a monographic note to *Leavitt v. Dunn*, 44 Am. St. Rep. 404-409.

(c) *Mother*.—If a member's wife has been made the beneficiary in a certificate, he may, if not prohibited by the statute, change such designation to his mother, who is entitled to the fund, although, by reason of the fraud of his wife, acting in collusion with a subordinate officer of the association, the change of designation was not formally effected before his death: *Marsh v. Supreme Council Legion of Honor*, 149 Mass. 512. But, if a member of a railroad relief association designates his mother as his beneficiary, and upon the member's

death, his wife and infant, the persons legally entitled to damages if the death was the result of negligence on the part of the railroad company, not having released the railroad company, bring suit, and recover damages by a compromise, the mother cannot recover the benefit from the association: *Fuller v. Baltimore etc. Assn.*, 67 Md. 433. The word "heirs" does not mean "executor" or "estate," but distributees under the intestate law: *Northwestern etc. Aid Assn. v. Pones*, 154 Pa. St. 99; 35 Am. St. Rep. 810.

(d) *Sister*.—A sister, being designated as a beneficiary, may take as against the widow and children of the insured member, where she has advanced money and paid dues, where there is nothing prohibiting the association from contracting with a member for the payment of benefits to other persons than his widow and orphans: *Maneely v. Knights of Birmingham*, 115 Pa. St. 305.

(e) *Executors and Administrators* of the insured have no right to a benefit fund: *Masonic etc. Assn. v. Jones*, 154 Pa. St. 107; *Eastman v. Provident etc. Assn.*, 62 N. H. 555; though they may recover for the benefit of the heirs only: *Rindge v. New England etc. Aid Soc.*, 146 Mass. 286; *Clarke v. Schwarzenberg*, 162 Mass. 98.

(f) *Personal Representatives*.—The word "representatives," as used in the law of benefit societies, means and includes any person whom the member may designate, or, if he fail to designate, the person whom the by-laws designate, as the person to whom the money shall be paid: *Walter v. Hensel*, 42 Minn. 204.

(g) *Creditors*.—If creditors are not eligible as beneficiaries, they are not entitled to share in the proceeds of a benefit: *Skilings v. Massachusetts etc. Assn.*, 146 Mass. 217; *Clarke v. Schwarzenberg*, 162 Mass. 98; though there are cases in which the insurance money is held subject to their claims: *Talcott v. Field*, 34 Neb. 611; 33 Am. St. Rep. 662. Compare *Levy v. Taylor*, 66 Tex. 652.

(h) *And Others*.—The phrases "related to," "relations," and "next of kin," in a contract of insurance, include only relations by blood, and not connections by marriage: *Supreme Council etc. of Chosen Friends v. Bennett*, 47 N. J. Eq. 39. A mere indorsement by the member, on a benefit certificate, of an order to pay the amount to a person other than the beneficiary named therein, does not entitle the payee to receive the amount from the association: *Jinks v. Banner Lodge*, 139 Pa. St. 414.

Dues and Assessments.—A life insurance policy authorizing the company's board of directors to levy assessments by special notice is within a statute relating to insurance on the assessment plan, though it further provides for certain fixed payments: *Hanford v. Massachusetts etc. Assn.*, 122 Mo. 50. A mutual benefit society, in making assessments upon its members, does not act in a judicial, but in a ministerial, capacity, and no presumption can arise in favor of the regularity or legality of its assessments: *American etc. Aid Soc. v. Helburn*, 85 Ky. 1; 7 Am. St. Rep. 571; *Hogan v. Pacific Endowment League*, 99 Cal. 248. Under an article providing for the assessment of members upon a scale according to age, an assessment is sufficiently levied by an instruction to the secretary, on motion, by the directors, to levy it: *Van Frank v. United States etc. Assn.*, 158 Ill. 560. The designated beneficiary has, upon the death of the insured, an in-

terest fixed and certain in the bounty of his donor, and he may compel the association to levy an assessment for its payment: *Union etc. Assn. v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519; *Lindsey v. Western etc. Aid Soc.*, 84 Iowa, 734; *Lawler v. Murphy*, 58 Conn. 294; and it is the duty of the association to levy the proper assessment, and to pay the full amount: *Union etc. Acc. Assn. v. Frohard*, 134 Ill. 228; 23 Am. St. Rep. 664. Members are liable to but one assessment to pay each death claim, though there is not enough realized on the assessment made to pay the claim: *People v. Masonic Guild etc. Assn.*, 126 N. Y. 615. The association holding a death fund when a loss occurs, is not obliged to pay the loss out of the fund, but may make an assessment therefor: *Crossman v. Massachusetts etc. Assn.*, 143 Mass. 435. A forfeiture clause does not discharge a member from past society debts or dues: *Ellerbe v. Barney*, 119 Mo. 632.

Assessments not legally made need not be paid, and no rights are lost by nonpayment: See monographic note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 784. A payment of excessive assessments by the insured does not waive his right to refuse to pay subsequent similar excessive assessments: *Langdon v. Massachusetts etc. Life Assn. (Mass.)*, decided May 27, 1896. A member of the Knights of Pythias actually suspended by his lodge is not subject to assessment in the endowment rank until his suspension is reversed, when he becomes bound to pay all assessments levied during his suspension: *Vivar v. Supreme Lodge Knights of Pythias*, 52 N. J. L. 455. Payments of annual dues are due at the time prescribed, although there has been no death of any member, and no demand made: *Menard v. Society of St. Jean Baptiste*, 63 Conn. 172. Payment of an assessment within the time prescribed will preserve the validity of the certificate though such payment is made by the beneficiary after the death of the member: *Bankers' etc. Assn. v. Stapp*, 77 Tex. 517; 19 Am. St. Rep. 772; *Wright v. Supreme Commandery Golden Rule*, 87 Ga. 426; *Kerr v. Minnesota etc. Assn.*, 39 Minn. 174; 12 Am. St. Rep. 631. A subordinate lodge cannot waive payment of assessment: See monographic note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 785. Contra, *Wright v. Supreme Commandery Golden Rule*, 87 Ga. 426. Payment is a question of fact, and may be made to a secretary's wife, where no question is raised as to her authority to receive payment: *Anderson v. Supreme Council etc. of Chosen Friends*, 135 N. Y. 107. A premium or assessment which is payable during a specified month is presumed to be payable upon the last day of the month. If that is a holiday, the insured has all of the first day of the following month in which to make payment: *Northey v. Bankers' Life Assn.*, 110 Cal. 547. The time of payment of an overdue assessment may be extended by the sending of notice to pay: *McGowan v. Northwestern Legion of Honor (Iowa)*, decided May 12, 1896.

An association cannot forfeit the certificate of a member until its holder is put in default: *Merriman v. Keystone etc. Assn.*, 138 N. Y. 116. He must have notice, and that notice must contain the information required by the by-laws, or it will be insufficient, and its service will raise no liability on the part of the member served to pay the assessment demanded: *Miner v. Michigan etc. Assn.*, 63 Mich. 838; *Supreme Lodge Knights of Honor v. Dalberg*, 138 Ill. 508; *North-*

western etc. Assn. v. Schauss, 148 Ill. 304; United States etc. Acc. Assn. v. Mueller, 151 Ill. 254. A member must have notice, though he knows that the assessment has been made from his knowledge of the fact that other members have received notices of the assessment: Hannum v. Waddell (Mo.), decided June 23, 1896; and he will not be in default until the stated time after receiving notice. A notice requiring a member to pay an assessment before it is due is invalid: United States etc. Assn. v. Mueller, 151 Ill. 254. But sending a notice a day or two earlier than required does not invalidate it: Wolf v. Michigan etc. Assn. (Mich.), decided March 24, 1896. Neither is an assessment invalidated by the fact that the notice of assessment was mailed to the member before it bore date, where by an article of the society, that was authorized: Van Frank v. United States etc. Assn., 158 Ill. 560. To make a member liable for an assessment, notice must reach him. Notice sent by mail is effectual, if actually received, but the association takes the risk of its reaching him. Until it does, he cannot be charged therewith. The fact that notice was brought home to the member is not necessarily inferable from the fact that it was mailed to his address: Benedict v. Grand Lodge A. O. U. W., 48 Minn. 471; Merriman v. Keystone etc. Assn., 138 N. Y. 116; Northwestern etc. Assn. v. Schauss, 148 Ill. 304; Shea v. Massachusetts etc. Assn., 160 Mass. 289; 39 Am. St. Rep. 475. A member may waive defects in a notice of assessment: Hansen v. Supreme Lodge K. of H., 140 Ill. 301. A notice dates from its actual receipt: Northwestern etc. Assn. v. Schauss, 148 Ill. 304; Merriman v. Keystone etc. Assn., 138 N. Y. 116. The association has the burden of proving that a mortuary assessment for the nonpayment of which it seeks to avoid its liability on a benefit certificate, was duly authorized, and that proper notice thereof was given: Shea v. Massachusetts etc. Assn., 160 Mass. 289; 39 Am. St. Rep. 475.

Forfeiture—Suspension—Expulsion—Surrender.—Forfeitures of insurance policies are not favored by the courts; and, where a forfeiture is claimed, the courts will preserve, if possible, the equitable rights of the holders: Miner v. Michigan etc. Assn., 63 Mich. 338; Modern Woodmen of America v. Jameson, 48 Kan. 718; note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 783. If the association insists upon a forfeiture, it must show a fairly clear right to insist upon it, and, if the facts do not justify it, a court will not declare it: Ball v. Northwestern etc. Accident Assn., 56 Minn. 414; Van Norman v. Northwestern etc. Life Ins. Co., 51 Minn. 57. It has been said that suspension or expulsion is not necessary to a forfeiture: Hogins v. Supreme Council C. of Red Cross, 76 Cal. 109; 9 Am. St. Rep. 173; Eilberbe v. Faust, 119 Mo. 653. It has been held, however, and, we think, very properly so, that a provision in the constitution of a benefit society that a member not remitting his assessment within thirty days from the date of notice thereof shall forfeit his claim to membership, is not self-executing, but requires, in order to terminate the membership, the affirmative action of the association declaring a forfeiture: Northwestern etc. Assn. v. Schauss, 148 Ill. 304; and this applies to a provision for the nonpayment of an assessment: Northwestern etc. Assn. v. Schauss, 148 Ill. 304.

It is a general rule that no rights are lost without notice, where

notice is required: *Hall v. Supreme Lodge Knights of Honor*, 24 Fed. Rep. 450. If, therefore, an assessment has been levied, the member must have legal notice thereof before a forfeiture can be declared for its nonpayment: *McCorkle v. Texas etc. Assn.*, 71 Tex. 149; *Scheufler v. Grand Lodge A. O. U. W.*, 45 Minn. 256; *Mutual etc. Life Assn. v. Hamlin*, 139 U. S. 297; *Supreme Lodge Knights of Honor v. Dalberg*, 138 Ill. 508; *Warner v. National etc. Assn.*, 100 Mich. 157; *Hall v. Supreme Lodge Knights of Honor*, 24 Fed. Rep. 450; *Loughridge v. Iowa etc. Endowment Assn.*, 84 Iowa, 141; *United States etc. Assn. v. Mueller*, 151 Ill. 254; *Merriman v. Keystone etc. Assn.*, 138 N. Y. 116; *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 785; *Passenger Conductors' Life Ins. Co. v. Birnbaum*, 116 Pa. St. 565. The association must, after the delinquency has occurred, ascertain the fact and impose the penalty. Until this is done, the membership is not terminated, unless the policy provides, in apt terms, that the nonpayment of assessments, dues or premiums shall ipso facto work a termination of membership: *Northwestern etc. Assn. v. Schauss*, 148 Ill. 304. But while a member's failure to pay an assessment, due on a certain date, on or before that date, may not oust him from membership in the association, it suspends his right to claim indemnity from the association for an injury received after the assessment became due, and before such payment was made: *National etc. Accident Assn. v. Burr*, 44 Neb. 256. In the absence of notice, no tender of the amount of an assessment is necessary in order to prevent a forfeiture of membership: *Covenant etc. Assn. v. Spies*, 114 Ill. 463. There can be no forfeiture for a refusal to pay an excessive assessment: *Langdon v. Massachusetts etc. Life Assn. (Mass.)*, decided May 27, 1896; or an invalid assessment: *Underwood v. Iowa Legion of Honor*, 66 Iowa, 134. As to when a certificate is not forfeited by a subsequent change to a prohibited employment, see *Hobbs v. Iowa etc. Assn.*, 82 Iowa, 107; 81 Am. St. Rep. 466. Forfeiture of membership in a benefit society, resulting from nonpayment of an assessment, may be waived by the association: *National etc. Assn. v. Jones*, 84 Ky. 110; *Menard v. Society of St. Jean Baptiste*, 63 Conn. 172; *Mills v. Home etc. Life Assn.*, 105 Cal. 232; *Moore v. Order of R'y Conductors*, 90 Iowa, 721; note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 783; *Loughridge v. Iowa etc. Endowment etc. Assn.*, 84 Iowa, 141; *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110. There may be such a waiver by giving the delinquent an extension of time: *Mills v. Home etc. Life Assn.*, 105 Cal. 232; or, by the association's making no demand for the assessment, or taking no measures to collect, and allowing the insured to remain an apparent member: *Menard v. Society of St. Jean Baptiste*, 63 Conn. 172; or, by accepting and retaining, or, by collecting and retaining, over-due assessments: *True v. Bankers' Life Assn.*, 78 Wis. 287; *McDonald v. Supreme Council etc. of Chosen Friends*, 78 Cal. 40; *De Frece v. National Life Ins. Co.*, 136 N. Y. 144; *Knights of Pythias v. Kalinski*, 163 U. S. 289; *Millard v. Supreme Council etc. Legion of Honor*, 81 Cal. 340; *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110; *Murray v. Home etc. L. Assn.*, 90 Cal. 402; 25 Am. St. Rep. 133; note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 784, 786; or, by levying and collecting an assessment from a member who is in default: *Metropolitan etc. Acc. Assn. v. Windover*, 137

Ill. 417; *Hoffman v. Supreme Council etc. Legion of Honor*, 35 Fed. Rep. 252; *Rice v. New England etc. Aid Soc.*, 146 Mass. 248; or, by a course of conduct leading the member to believe that his rights will be protected: *Gunther v. New Orleans etc. Aid Assn.*, 40 La. Ann. 776; 8 Am. St. Rep. 554; *Knights of Pythias v. Kalinski*, 163 U. S. 289. An unconditional offer to accept at a future time, an overdue premium is a waiver of any forfeiture that might have been enforced because the premium was not paid when due: *Murray v. Home etc. Life Assn.*, 90 Cal. 402; 25 Am. St. Rep. 133. A society may waive a forfeiture by its act, though no waiver was intended: *Tobin v. Western etc. Aid Soc.*, 72 Iowa, 261. The acceptance of an overdue assessment is a waiver of a forfeiture, although the assessment was demanded and received by mistake, while the intention was to regard the insurance as forfeited: *Bailey v. Mutual Ben. Assn.*, 71 Iowa, 689. But payment alone does not always constitute a waiver on the part of the association, or create an estoppel against it: *Lyon v. Supreme Assembly etc. Good Fellows*, 153 Mass. 83; *Ronald v. Mutual etc. Life Assn.*, 132 N. Y. 378; nor will the giving of notice always waive a suspension of the right to benefits under a certificate: *Schmidt v. Modern Woodmen etc.*, 84 Wis. 101; *Leffingwell v. Grand Lodge A. O. U. W.*, 86 Iowa, 279. The continued receipt of assessments upon an endowment certificate up to the day of the holder's death is a waiver of any technical forfeiture by reason of nonpayment of lodge dues: *Knights of Pythias v. Kalinski*, 163 U. S. 289. But a forfeiture is not waived by making an assessment upon a member for a death loss after default in the payment of annual dues, if such loss occurred prior to the default in the payment of dues: *Garbutt v. Citizens' etc. Endowment Assn.*, 84 Iowa, 293.

The statement, in an application for life insurance, of the age of the applicant is material. A false statement as to it will forfeit the policy, and is not waived unless the facts clearly establish such a waiver: *Preuster v. Supreme Council etc. of Chosen Friends*, 135 N. Y. 417.

An association may be estopped by its action from claiming that the deceased was not a member in good standing at the time of his death, as illustrated by the following cases: *Warnebold v. Grand Lodge A. O. U. W.*, 83 Iowa, 23; *National etc. Assn. v. Jones*, 84 Ky. 110; but a contract of insurance expressly excluding liability in case of death by suicide cannot be changed by the application of the doctrine of waiver or estoppel, so as to cover death from that cause: *McCoy v. Northwestern etc. Assn.*, 92 Wis. 577.

If the by-laws of an association provide that when a member neglects or refuses to pay any assessment he shall be suspended and treated as no longer a member, the holder of the certificate, in case of death during the period of such suspension, cannot recover, unless the association is estopped by its own acts, or has waived the effects of the suspension: *Estate of Maginnis v. New Orleans etc. Aid Assn.*, 43 La. Ann. 1136; *Modern Woodmen etc. v. Jameson*, 49 Kan. 677; *Schmidt v. Modern Woodmen etc.*, 84 Wis. 101. The suspension or expulsion of a member of a benefit association without notice, or a hearing or trial, or while he is insane, is void and no bar to a suit by

the beneficiary to recover the insurance money: *Supreme Lodge A. O. U. W. v. Zuhlke*, 129 Ill. 298; *Vivar v. Supreme Lodge Knights of Pythias*, 52 N.J. L. 455. A member's rights are not forfeited for nonpayment of dues without a formal suspension from the order: *Schueffler v. Grand Lodge A. O. U. W.*, 45 Minn. 258. The minute entry in the records of a lodge are not conclusive evidence of suspension: *Supreme Lodge Knights of Honor v. Wickser*, 72 Tex. 257. A member who has been expelled without notice or trial may maintain an action for damages: *Ludowski v. Polish Roman etc. Soc.*, 29 Mo. App. 337; and may, for a breach of contract to reinstate, recover the amount of the premiums and assessments paid by him: *Lovick v. Providence Life Assn.*, 110 N. C. 93.

A member of a benevolent association may surrender his certificate without the consent of the beneficiary: *Wells v. Covenant etc. Assn.*, 126 Mo. 630; *Grace v. Northwestern etc. Assn.*, 87 Wis. 562; 42 Am. St. Rep. 62.

The legal right of the member of a benefit association to reinstatement passes to the beneficiary under the policy of insurance: *Dennis v. Massachusetts etc. Assn.*, 120 N. Y. 496; 17 Am. St. Rep. 660. The right to reinstatement is not a new contract: *Lindsey v. Western etc. Aid Soc.*, 84 Iowa, 734; and an application for reinstatement waives defects in a notice of assessment: *Hansen v. Supreme Lodge Knights of Honor*, 140 Ill. 301. A policy holder may have a reasonable time in which to apply for reinstatement: *Lovick v. Providence Life Assn.*, 110 N. C. 93. There is a difference between a reinstatement and a reinsurance; the first is the revival of the original contract, while the latter is a new one. Though the member applying for reinstatement is beyond insurable age, he is entitled to be reinstated upon paying past dues: *Lovick v. Providence Life Assn.*, 110 N. C. 93. A member's remedy for a violation of the contract to reinstate is not by mandamus against the association, but in a court of equity by way of specific performance: *Bradbury v. Mutual etc. Life Assn.*, 53 N. J. Eq. 306. Other questions as to reinstatement are discussed in the note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 784, 785; *Colby v. Life etc. Investment Co.*, 57 Minn. 510; *Davidson v. Old People's etc. Soc.*, 89 Minn. 303; *Coburn v. Life etc. Investment Co.*, 52 Minn. 424; *O'Grady v. Knights of Columbus*, 62 Conn. 223; *True v. Bankers' etc. Assn.*, 78 Wis. 287; *Rice v. Grand Lodge A. O. U. W.*, 92 Iowa, 417; *Grand Lodge A. O. U. W. v. King*, 10 Ind. App. 639.

Actions.—If a mutual assurance association, after due notice of death, neglects to make the call necessary to produce the death fund required to cancel a benefit certificate, an action may be sustained against it for damages for breach of its contract of insurance, without first resorting to proceedings in equity to compel the levying of a call or assessment. This latter remedy is cumulative merely, and the association cannot successfully urge its own lack of duty in not making a call as a defense to an action brought upon the policy: *Darrow v. Fam'l v Fund Soc.*, 116 N. Y. 537; 15 Am. St. Rep. 430; *United States etc. Acc. Assn. v. Barry*, 131 U. S. 100; *Bentz v. Northwestern Aid Assn.*, 40 Minn. 202; *Newman v. Covenant etc. Assn.*, 72 Iowa, 242; *Bailey v.*

Mutual Benefit Assn., 71 Iowa. 689; Tobin v. Western etc. Aid Soc., 72 Iowa, 261; Wabash etc. Union v. James, 8 Ind. App. 449; Lawler v. Murphy, 58 Conn. 294; Smith v. Covenant etc. Assn., 24 Fed. Rep. 685; Union etc. Acc. Assn. v. Frohard, 184 Ill. 228; 23 Am. St. Rep. 664; McClave v. Mutual etc. Life Assn., 55 N. J. L. 187; Jackson v. Northwestern etc. Assn., 73 Wis. 507; O'Brien v. Home Ben. Soc., 117 N. Y. 310; Southwestern etc. Assn. v. Swenson, 49 Kan. 449; Earnshaw v. Sun etc. Aid Soc., 68 Md. 465; 6 Am. St. Rep. 460.

The rule of damages would be the maximum sum or face value of the certificate, in the absence of proof on the part of the defendants that they had made an assessment and had failed to collect that sum: Lawler v. Murphy, 58 Conn. 294; Bentz v. Northwestern Aid Assn., 40 Minn. 202; Taylor v. National etc. Union, 94 Mo. 35; Darrow v. Family Fund Soc., 116 N. Y. 537; 15 Am. St. Rep. 480; O'Brien v. Home Ben. Soc., 117 N. Y. 310; Metropolitan etc. Acc. Assn. v. Windover, 187 Ill. 417. The plaintiff is, at least, entitled to recover what, upon proof, he can show such assessment would have yielded, if it had been duly made: Earnshaw v. Sun etc. Aid Soc., 68 Md. 465; 6 Am. St. Rep. 460; Newman v. Covenant etc. Assn., 72 Iowa, 242; In re Solidarite etc. Assn., 68 Cal. 392. If it appears that the assessment would have produced a substantial sum, the plaintiff may recover substantial damages not exceeding the full amount of the certificate: Jackson v. Northwestern etc. Assn., 73 Wis. 507; Kerr v. Minnesota etc. Ben. Assn., 39 Minn. 174; 12 Am. St. Rep. 681; Oriental Ins. Assn. v. Glancey, 70 Md. 101; Elkhardt etc. Assn. v. Houghton, 108 Ind. 286; People's etc. Ben. Soc. v. McKay, 141 Ind. 415; Tobin v. Western etc. Aid Soc., 72 Iowa, 261. Interest on the certificate is recoverable: Supreme Lodge A. O. U. W. v. Zuhlke, 129 Ill. 298; Supreme Council etc. Catholic Knights v. Franke, 137 Ill. 118. The association cannot defeat a recovery by pleading that the contract is ultra vires: Bloomington etc. Assn. v. Blue, 120 Ill. 121; 60 Am. Rep. 55. The beneficiary may compel the association to levy an assessment for the payment of a benefit certificate: Union etc. Assn. v. Montgomery, 70 Mich. 587; 14 Am. St. Rep. 519; and may bring an action to enforce the specific performance of the contract: Lindsey v. Western etc. Aid Soc., 84 Iowa, 734. An administrator or executor has sufficient interest to sue on a certificate, and may sue for the benefit of the heirs: Bishop v. Grand Lodge etc. of Mutual Aid, 112 N. Y. 627; Burns v. Grand Lodge A. O. U. W., 153 Mass. 173; Winterhalter v. Workmen's Fund Assn., 75 Cal. 245; Peet v. Great Camp of Maccabees, 88 Mich. 92; Flynn v. Massachusetts etc. Assn., 152 Mass. 288. Contra, Davenport v. Northeastern etc. Assn., 47 Vt. 528. The burden of proof is upon the association to show all matters of defense: American etc. Aid Soc. v. Helburn, 85 Ky. 1; 7 Am. St. Rep. 571; Shea v. Massachusetts etc. Assn., 160 Mass. 289; 39 Am. St. Rep. 475; note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 784.

EVIDENCE—PECULIAR KNOWLEDGE OF ONE PARTY—BURDEN OF PROOF.—When a fact is peculiarly within the knowledge of a party, he must produce the necessary evidence to prove it: Weber v. Rothchild, 15 Or. 385; 3 Am. St. Rep. 162. The onus pro-

hand is on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant: *Fort Smith v. Dodson*, 51 Ark. 447; 14 Am. St. Rep. 62, and note; *Great Western R. R. Co. v. Bacon*, 30 Ill. 847; 88 Am. Dec. 199; *Swafford v. Whipple*, 3 G. Greene, 261; 54 Am. Dec. 498.

THOMPSON v. TRUESDALE.

[61 MINNESOTA, 129.]

RAILROADS—POWER OF CONDUCTOR TO WAIVE CONDITIONS.—The conductor of a railroad train, as between him and the passengers under his charge, represents the railroad company, and can waive conditions in the contract for transportation.

RAILROADS—COUPON TICKETS—WAIVER OF CONDITION AS TO DETACHMENT OF COUPONS—EVIDENCE.—It is competent for the parties to a commutation railroad ticket, having printed provisions thereon, and upon the coupons thereof, to the effect that the ticket is not good unless the coupons are detached by the conductor, to waive such conditions, and the conductor's practice of receiving, as fare, coupons detached from the particular ticket, without requiring the remainder of the ticket to be presented, is evidence of such waiver.

RAILROADS—COUPON TICKETS—REVOCAION OF CONSENT TO WAIVE CONDITION AS TO DETACHMENT OF COUPONS.—While a railroad company may have a right to revoke its consent to the waiver of a condition requiring the coupons of a commutation ticket to be detached by the conductor, it is the duty of the company, after the conductor has received, as fare, coupons detached from such tickets, without requiring the remainder of the tickets to be presented, to give reasonable notice of such intended revocation; and if, without such notice, and relying on such waiver, the holder of such a ticket detaches a coupon therefrom, and takes it with him upon the train, without the remainder of the ticket, the company cannot, when such coupon is presented for fare, then revoke its consent to such waiver, so as to deprive the passenger of the use of the coupon, or compel him to pay extra fare.

RAILROADS—COUPON TICKETS—REVOCAION OF WAIVER OF CONDITION—PLACARDS AS EVIDENCE—QUESTION FOR JURY.—Whether or not placards posted in railroad cars give sufficient notice of the company's intention to revoke its consent to the waiver of a condition requiring the coupons of a commutation ticket to be detached by the conductor, when presented for fare, is a question for the jury.

RAILROADS—COUPON TICKETS—WAIVER OF CONDITION BY CONDUCTOR—CUSTOM AS EVIDENCE.—The fact that a general custom prevails between a railroad company and its passengers to waive and disregard a condition requiring the coupons of a commutation ticket to be detached by the conductor, when received as fare, tends to prove that the conductor on the train had authority to waive such condition. It is the duty of the company to know what its conductors are openly and frequently doing.

Trespass against W. H. Truesdale, as receiver of the Minneapolis & St. Louis Railway Company, to recover damages for being

wrongfully ejected from the company's train. The plaintiff obtained a verdict for two thousand five hundred and forty-nine dollars and eighty-three cents. The court granted the defendant's motion for a new trial, conditioned, however, that if the plaintiff should consent to a reduction of the verdict to two hundred and twenty-five dollars, the verdict should stand as reduced, and the motion stand as denied. The reduction was consented to by the plaintiff, and the defendant appealed from the order.

Albert E. Clarke and Wilbur F. Booth, for the appellant.

A. H. Hall and Fred W. Reed, for the respondent.

¹⁸⁰ CANTY, J. In the summer of 1893 the plaintiff resided with her husband and family at Fairview—a station on the line of the Minneapolis & St. Louis Railway seventeen miles from Minneapolis on the shore of Lake Minnetonka. On August 2d of that year, she took the regular passenger train on said railroad at Minneapolis to ride to Fairview, and tendered to the conductor, in payment of her fare, a detached coupon of a commutation ticket, which he refused to receive, for the reason that it was detached, and demanded that she pay the regular fare, which she refused to do, and thereupon he ejected her from the train. This action is brought by her against the receiver operating the railroad to recover damages for trespass in being thus ejected. Plaintiff recovered a verdict, and from an order denying his motion for a new trial the defendant appeals.

The defendant pleaded as a defense to the action: That prior to said day he issued and placed on sale a commutation ticket which entitled the purchaser and holder thereof to ten rides over said railroad between Minneapolis and Excelsior—a station one mile beyond Fairview. That in consideration of the compliance by the purchaser and holder thereof with the provisions and conditions therein contained, he transported the holder thereof for the reduced fare of thirty cents per trip, whereas the regular fare was fifty-four cents per trip. That on the cover of said ten-trip ticket, among other conditions, is printed the condition: "It [the ten-trip ticket] must be presented to the conductor on each trip for detachment; otherwise ordinary fare will be collected." And on each coupon is printed the words, "This coupon is good for one ride between Minneapolis and Excelsior, in either direction, but must be detached ¹⁸¹ by the conductor only, or it will not be accepted for passage." That plaintiff tendered as aforesaid a coupon detached from one of said ten-ride tickets,

refused to produce or exhibit to the conductor the original ticket from which the coupon had been detached, or to pay her fare, and was for these reasons ejected from the train. In her reply, the plaintiff admitted that the ticket from which the coupon which she presented was detached was in the form, and contained the provisions and conditions, alleged, and was sold for the price alleged; but she avers that for a long time prior thereto the defendant waived these conditions in such tickets, by continuously, and as a regular custom, receiving such detached coupons from her and other passengers holding such tickets upon presentation of such coupons without producing the book. There was sufficient evidence received on the trial to establish such custom, both as to plaintiff and other passengers. But it is contended by appellant that the ticket, and each coupon thereof, constitute an express contract between the parties, which cannot be varied or contradicted by proof of waiver, and that the conductors on the trains have no power to waive such conditions, or set aside the express provisions of contract made by their superiors, or establish a custom to that effect.

Conceding, without deciding, that the conditions printed on this ticket and coupon should be given the same force and effect as if they were contained in a written contract signed by the parties, still it was competent for the parties, by a subsequent agreement, to waive these conditions. Evidence of a practice on the part of defendant to waive the conditions of the particular ticket, and receive the detached coupons thereof without presentation of the rest of the ticket, was competent to prove his consent, given subsequent to the purchase of the ticket, that such conditions be dispensed with. And conceding that he had a right to revoke such consent after he had so received some of the detached coupons, it was his duty to give reasonable notice of his intended revocation. If, without such notice and relying on such waiver, the plaintiff detached the coupon in question, and took it with her on the train, leaving the rest of the ticket at home, the defendant could not, when such coupon was presented, revoke such consent, so as to deprive her of the use of the coupon, or compel her to pay extra fare. Whether or not the placards which, it is claimed, had been posted ¹³² in the cars, gave plaintiff sufficient notice of such intended revocation, was a question for the jury. The fact that a general custom existed between defendant and his passengers on these lake trains to waive and disregard these conditions in this class of tickets tended to prove that the conductors on the trains had author-

ity to waive such conditions. It was the duty of the defendant to know what his conductors were openly and frequently doing: *Montgomery etc. Ry. Co. v. Kolb*, 73 Ala. 396; 49 Am. Rep. 54; *St. Joseph etc. R. R. Co. v. Wheeler*, 35 Kan. 185; *Chicago etc. R. R. Co. v. Dickson*, 143 Ill. 368; *Lucas v. Milwaukee etc. Ry. Co.*, 33 Wis. 41; 14 Am. Rep. 735. It has frequently been held that, as between him and the passengers under his charge, the conductor represents the company, and can waive conditions in the contract for transportation.

This disposes of the case, and the order appealed from is affirmed.

RAILROADS—COUPON TICKETS—WAIVER OF CONDITION.

A condition on a railroad coupon ticket that coupons will not be accepted unless detached by, or in the presence of, the conductor is reasonable and valid: *Boston etc. R. R. v. Chipman*, 146 Mass. 107; 4 Am. St. Rep. 293, and note. In this case, the defendant took passage on the plaintiff's train, and when the conductor demanded his fare, tendered a detached coupon having a printed notice thereon that coupons attached to the ticket were to be detached by, or in the presence of, the conductor, and would be accepted for passage only when accompanied by the ticket. The conductor declined to receive the coupon, unless the defendant exhibited the ticket from which it had been detached. This the defendant refused to do, and refused to pay his fare in any other manner. The defendant offered evidence to show that it had been the custom for passengers, including the defendant, to detach coupons and pay their fare therewith, without showing their tickets to the conductor, he not having demanded to see them; and that the defendant had often paid his fare in that way, and on the day in question, other passengers on the same car gave detached coupons in payment of fare, and the same were received without objection and without request to show the tickets. It was held that the plaintiff's conductor was not required, under the contract, to accept, as the defendant's fare, a detached coupon; that he had, at least, the right to demand that he should produce and show the ticket; and that there was no evidence which would justify the finding that the plaintiff had rescinded or waived any of the conditions or terms of the contract.

CAPEHART v. FOSTER.

[61 MINNESOTA, 132.]

FIXTURES—GAS.—AS BETWEEN MORTGAGOR AND MORTGAGEE, gas fixtures, consisting of chandeliers and burners, screwed to the ends of gaspipes projecting from the walls and ceilings of the mortgaged building, and which can be readily unscrewed, are not a part of the realty.

FIXTURES—STEAM RADIATORS.—AS BETWEEN MORTGAGOR AND MORTGAGEE, steam radiators attached at the floor

of the mortgaged building to steampipes, by being screwed to those pipes, are a part of the realty.

FIXTURES—ELECTRIC ANNUNCIATOR.—AS BETWEEN MORTGAGOR AND MORTGAGEE, an electric annunciator attached to the wall of the mortgaged building and to all the wires of the electric bell system thereof, is a part of the realty.

FIXTURES—OFFICE DESK.—AS BETWEEN MORTGAGOR AND MORTGAGEE, an office desk, about twenty-five feet long resting on a tile floor of the mortgaged building, between projections in the walls, to which it is fastened by means of screws, the space behind the desk forming an office for the building, is a part of the realty.

FIXTURES—CIGAR COUNTER.—AS BETWEEN MORTGAGOR AND MORTGAGEE, where the evidence is conflicting as to whether a cigar counter is fastened to the floor of the mortgaged building, and is specially designed for use therein, it is a question for the jury to say whether or not the counter is a part of the realty.

Horton & Denegre, for the appellant.

J. C. Michael, for the respondent.

¹³³ CANTY, J. Plaintiff was the owner of certain hotel property, which he mortgaged to defendant. At the time the mortgage was made the hotel contained two hundred and sixty-eight gas fixtures, consisting of gas chandeliers and burners, one hundred and eighty-four steam radiators, an office desk, a cigar counter, and an electric annunciator. Defendant foreclosed his mortgage, purchased the property at the foreclosure sale, and the time to redeem expired. Plaintiff, being still in possession, threatened to remove all of these articles; whereupon, defendant procured a temporary writ of injunction restraining him from doing so. Defendant also obtained possession of the hotel by an action of forcible entry and detainer, and the action in which the injunction was issued was then dismissed by stipulation. Thereafter, plaintiff brought this action for damages for the conversion of said property. The jury returned a verdict for defendant, and, on motion of plaintiff, the court below granted a new trial. From the order granting the same defendant appeals. The defendant claims that the articles in question are and always were a part of the realty, while plaintiff claims that they are and always were personal property.

1. During all of said time, these gas fixtures were screwed to the ends of the gas pipes projecting from the walls and ceilings, and can be readily unscrewed. It is held by the great weight of authority that, under such circumstances, such gas fixtures are not a part of the realty, even as between vendor and vendee or mortgagor and mortgagee; that they are merely a part of the furniture of the room—a substitute for the lamps and lampholders,

candlesticks, and chandeliers, formerly used to hold candles: *McKeage v. Hanover etc. Ins. Co.*, 81 N. Y. 38; 37 Am. Rep. 471; *Jarechi v. Philharmonic Soc.*, 79 Pa. St. 403; 21 Am. Rep. 78; *Towne v. Fiske*, 127 Mass. 125; 34 Am. Rep. 353; *Montague v. 134 Dent*, 10 Rich. 135; 67 Am. Dec. 572; *Rogers v. Crow*, 40 Mo. 91; 93 Am. Dec. 299; *Ewell on Fixtures*, 299. While this doctrine is rather doubtful in principle, it is too well established as the law of the country generally to be now overturned.

2. The steam radiators were attached to the steampipes at the floor on which they rested, by being screwed to those pipes. We are of the opinion that these radiators should be held to be a part of the realty. The distinction thus made between them and the gas fixtures is not clear in principle. But the rule applied to gas fixtures must be regarded as rather an arbitrary exception to the general rule, and should not be extended to such fixtures as radiators. These radiators were put in immediately after the building was erected. There is no reason for holding that the owner did not intend them to be permanently annexed to the steam plant, and therefore permanently annexed to the realty. He might remove or change them, and so might he remove or change the boiler or the furnace, which is also a part of the steam plant. Such radiators are an essential part of such plant, and are rarely furnished by tenants or temporary occupants of buildings as a part of the furniture brought with them or carried away with them, but the owner who furnishes the rest of such plant usually furnishes the radiators also. When, under ordinary circumstances, the owner of the building attaches such radiators to his steam plant, it should be held that he intended them to be permanently annexed to the realty. We are cited to *National Bank v. North*, 160 Pa. St. 303, which holds to the contrary. This case holds that such radiators are analogous to gas fixtures, and therefore not a part of the realty. By following the same process of reasoning by analogy you would strip a house of all modern improvements, and by continuing the process you would overturn the greater part of the law of fixtures. A correct rule should not, in this manner, be overturned by an inconsistent exception.

3. The electric annunciator was attached to the wall, and to all the wires of the electric call or electric bell system of the hotel. It also was a part of the realty.

4. The office desk is about twenty-five feet long, and is so placed that the ends fitted against projections in the wall in such a manner that the space behind the desk forms the hotel office.

This desk rests ¹⁸⁵ on the tile floor, and is fastened to the wall at each end by means of a short piece of board, which is fastened to the wall and to the desk by means of screws. We are of the opinion that this desk is a part of the realty: *Woodham v. First Nat. Bank*, 48 Minn. 67; 31 Am. St. Rep. 622.

5. The evidence was somewhat conflicting as to whether the cigar counter was fastened to the floor, and as to whether it was specially designed for the hotel. There was at one end of it a gate, which was attached to the wall, and swung against the cigar-stand to which it attached itself by some sort of a latch or catch. There was evidence tending to prove that it stood in a different part of the hotel lobby during a part of the time since the hotel was erected. We are of the opinion that, under these circumstances, it was a question for the jury whether or not this counter was a part of the realty. The acts of the defendant were such as to make him guilty of conversion of those articles which were not a part of the realty. This disposes of all the questions in the case. As to the gas fixtures, the verdict was contrary to law, and the order granting a new trial should be affirmed.

So ordered.

FIXTURES.—To determine whether a thing is a fixture or not, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used: *Notes to Feder v. Van Winkle*, 51 Am. St. Rep. 636; *Winslow v. Bromich*, 45 Am. St. Rep. 287; *Fisfield v. Farmers' Nat. Bank*, 39 Am. St. Rep. 172; *Lansing Iron etc. Works v. Walker*, 30 Am. St. Rep. 491. Whatever is placed in a building subject to a mortgage, by a mortgagor, or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes part of the realty: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235. Gas fittings screwed on the gaspipes of a building are not fixtures: *Monographic note to Gray v. Holdship*, 17 Am. Dec. 692, on what are fixtures; *notes to Smith v. Commonwealth*, 29 Am. Rep. 408; *Towne v. Fiske*, 34 Am. Rep. 355; *Vaughen v. Haldeman*, 33 Pa. St. 522; 75 Am. Dec. 622; *Rogers v. Crow*, 40 Mo. 91; 93 Am. Dec. 299; as between mortgagor and mortgagee: *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 88; 37 Am. Rep. 471; *Montague v. Dent*, 10 Rich. 185; 67 Am. Dec. 572. But gas fixtures have been held to pass upon a sale of the freehold: *Johnson v. Wiseman*, 4 Met. 357; 33 Am. Dec. 475. A counter and back bar, the one fastened to the floor and the other to the wall by nails and screws, in a building used as a saloon, are part of the realty, and pass as such on the foreclosure of a mortgage: *Woodham v. First Nat. Bank*, 48 Minn. 67; 31 Am. St. Rep. 622.

MARVIN v. FOSTER.

[61 MINNESOTA, 154.]

DIVORCE, VOID DECREE OF—ESTOPPEL—PROPERTY RIGHTS.—If a husband leaves his wife and home in this state, and lives in another state, without supporting her, and never lives with her again or returns to this state, and she obtains a judgment of divorce against him, upon the grounds of desertion, which judgment, however, is void because of a defective service of summons, and the husband had actual knowledge of the pendency of the action, but declined to appear and defend, and afterward, upon learning that a divorce had been granted, married another woman, with whom he lived and cohabited as his wife, and she had a child by him, he is estopped, upon the subsequent decease of his abandoned wife, in this state, from taking advantage of the fact that the judgment of divorce so rendered was void for want of proper service of the summons, and cannot successfully assert against the heirs or devisees of his former wife a right to her estate as her surviving husband. This application of the doctrine of estoppel does not, however, countenance the idea that parties may become divorced upon the ground of estoppel by conduct. It simply precludes the husband from asserting the former relation, and the invalidity of the decree of divorce, solely for the purpose of obtaining the property of his former wife.

Partition. The action was brought by William F. Marvin against Clarence H. Foster and Mary P. Foster, his wife, and Edward H. Foster and Sarah C. Foster, his wife. The case was tried without a jury, and the judge ordered a judgment in favor of the defendants. The plaintiff appealed from an order denying a motion for a new trial.

James Spencer, for the appellant.

J. Fawcett and Draper, Davis & Hollister, for the respondents.

¹⁵⁴ **BUCK, J.** This action was brought for a partition of certain lots and parcels of land situate in the city of Duluth, or, if a partition could not be made without material injury to the rights and interests of the parties, then that a sale thereof be made.

¹⁵⁵ In order to dispose properly of the questions raised in this case, we will refer to the facts as briefly as possible: In the year 1842, Thomas Foster and Hannah C. Foster, referred to in the pleadings, intermarried, and lived together as husband and wife until some time in the year 1873, and between the years 1851 and 1873 they were residents of the state of Minnesota. While they were such residents and living in the city of Duluth, Thomas Foster left his wife, went to the city of Washington, D. C., and was there employed by the United States government,

where he remained in that position for some years. The court below found as a fact that after the time that Thomas Foster left his wife in Duluth, in 1873, down to the time of her death there on January 20, 1891, he did not furnish her any money, or in any manner provide for her support, and that he never returned to the city of Duluth after he left there in 1873, and that he has ever since that time been, and at the time of the finding of the court below, he was, a nonresident of the state of Minnesota. On March 8, 1877, the said Hannah C. Foster began proceedings in the district court of St. Louis county against the said Thomas Foster for a divorce from the bonds of matrimony, and for a decree confirming the title of said Hannah C. Foster in and to all of the lands described in the complaint, as well as to certain other lands. In this action the proceedings were regular in form, except a defect in the service of the summons; it appearing that in fact the summons was never served upon the said Thomas Foster, the defendant therein, in the manner and form required by law, that said court did not acquire jurisdiction of said defendant in said action for divorce, and that the decree which was by said court therein granted was in fact null and void and of no legal effect as a decree for divorce, but that in all other respects, except as to the service of said summons, the proceedings were regular in form. And such proceedings were had in such case that on May 30, 1877, a judgment of divorce was rendered in said court in favor of Hannah C. Foster and against the said Thomas Foster, divorcing said parties from the bonds of matrimony, and also confirming in said Hannah C. Foster an absolute title in fee to all the lands described in the complaint.

During the pendency of said action for divorce, and before the rendition of the judgment therein, said Thomas Foster had actual ¹⁵⁶ knowledge of the pendency of said action, and could have defended the same before the time for answering therein had expired, and before the expiration of the time for answering the complaint therein, said Thomas Foster, knowing of the pendency of said action, wrote and mailed a letter to the judge of the said district court, stating therein that he had no objections to the granting of said divorce. After the judgment of divorce was granted in said action, and before the expiration of the time to appeal therefrom, the said Thomas Foster, with full knowledge of the said divorce proceedings, held himself out to one Mary Baum, then an unmarried woman of the city of Washington, as an unmarried man, and, for the purpose of inducing her

to marry him, represented to her that his former wife, Hannah C. Foster had obtained a divorce from him, and that he was free to marry again, he at the same time showing her a copy of a newspaper containing a notice of the granting of the decree of divorce; and she, relying upon the truthfulness of said representations, was married to said Thomas Foster some time in the year 1877, and they lived and cohabited as husband and wife until the trial of this action, and were then so living together. On January 9, 1878, a son was born to said Thomas Foster and Mary Foster, who was living with his parents at the time of the trial of this action.

At the time when Thomas Foster left his wife in 1873, she owned the property in controversy, and continued to own it until the time of her death in January, 1891. But Thomas Foster never at any time after the judgment of divorce asserted any claim or interest in or to any of the said property, nor did he in any manner attempt to exercise any control over it, prior to Hannah C. Foster's death, but she lived and transacted her business as an unmarried woman, and had exclusive control thereof; the said Thomas Foster continually claiming to be the husband of said Mary Baum, and not the husband of Hannah C. Foster. At the time of her death, she was the owner of the land described in the plaintiff's complaint, and she left surviving her two sons, her only heirs at law, viz., Clarence H. Foster and Edward H. Foster, the defendants herein; but, since the action was commenced, Clarence H. Foster has died, and by his last will he made the defendant Mary P. Foster sole devisee of all his estate, which will has been duly probated. Whatever right, title, ¹⁵⁷ interest, claim, or estate Thomas Foster had, if any, in and to the property of said Hannah C. Foster at the time of her death, has been conveyed to this plaintiff, who brings this action in partition, but who took said conveyance with knowledge of the foregoing facts.

We cannot agree with the contention of the appellant that the only question in the case is whether Thomas Foster was the surviving husband of Hannah C. Foster. It must be conceded that the judgment of divorce rendered May 30, 1877, in the action of Hannah C. Foster against Thomas Foster was invalid for want of service of the summons therein upon him. But the conduct of Thomas Foster since his abandonment of his wife in 1873, and his subsequent conduct down to the time of the death of his wife Hannah C. Foster, presents itself for our consideration, and must be considered in connection with the judgment

of divorce between the parties, even though that judgment was void. The question is one of grave importance, because it is not one where the parties to the action are alone concerned, but the rights of society and of the state are involved.

We state the question, then: Where, in 1873, a husband left his wife and home in this state, and lived in the city of Washington without supporting her, and never lived with her again or returned to this state, and she obtained judgment of divorce against him May 30, 1877, upon the grounds of desertion, but which judgment was void for a defective service of the summons, but of the pendency of which action he had actual notice, and declined to appear and defend, but afterward, upon learning that a divorce had been granted, married another woman, with whom he lived and cohabited as his wife, and she had a child by him, can he, upon the subsequent decease of his abandoned wife, take advantage of the fact that the judgment of divorce so rendered is void for want of proper service of the summons, and successfully assert against the heirs or devisees of his former wife a right to her estate as her surviving husband?

If Thomas Foster had challenged the validity of the judgment of divorce, instead of availing himself of its benefits from the time of its rendition until the death of Hannah C. Foster aforesaid, about fourteen years, and had not during such time committed acts which were so inconsistent with his duties as the husband of Hannah C. Foster, there would be little, if any, merit in the defense. But upon ¹⁵⁸ learning of the decree of divorce, he took no steps to investigate its validity, except to inquire about the value of the property standing in his wife's name, and when told it was of little value, seemed content to let the decree stand, and hastened to marry another woman, and enjoy the fruits of that marriage until his former wife's death in 1891.

It is seldom that we have presented for our consideration a more heartless case of a husband's inhumanity to a wife than is presented by the record herein. They came to Minnesota soon after its organization as a territory, and, enduring the usual vicissitudes and hardships of a pioneer life, she bore him two sons, and, with the maternal instincts of true motherhood, cared for them in childhood and early manhood, and, when weighed down with troubles and advancing years, is deserted by the one who, above all others, should have been a true husband, and all that it implies. Not only this, but for months she took care of Thomas Foster's own helpless and suffering relatives, and, when in sorrow and despair, she writes him about the "debts and drag"

which were her lot. Well did the court below describe this letter as pathetic. In it she says: "The property that gives us our living will be sold at auction the last of this month (and it might have been saved for the present, at least), but still I have my home to shelter me, if I can pay the taxes; but in some way I must earn my bread, without you send me the means to live." And we think the court below was fully justified in finding that he did not furnish his wife any money, or in any manner provide for her support, after he left her in 1873.

Whether Thomas Foster knew of the invalidity of the judgment of divorce at the time of its rendition, we do not regard as material in this case. He did know of it many years prior to the time of the death of his first wife, and it was his duty to know whether the judgment was valid or not before he again married, and committed the crime of bigamy. Living in Minnesota for many years, he was presumed to know its laws, and to know that an action for divorce could not be legally granted without due service of the summons upon the defendant in such proceedings. Having violated every marital duty and obligation to the wife whose life he had blighted, he waits until death has ended her sufferings, and then, exhibiting a speculative mood, transfers his right in the property to this plaintiff. ¹⁵⁹ If the court awards him the pecuniary advantages claimed, then the estate of the deceased wife and mother is to be equally divided between them.

Living with a second wife for fourteen years, and raising a child by her, during a period of time when he says that in law he was still the husband of the former wife, is too much of a mockery of law, a travesty upon justice, and an insult to the morality and decency of a civilized government, to be tolerated; and, if there were no legal precedents against such a claim, we should not hesitate to establish one.

Fortunately, there are established rules of equity which come to our aid, and enable us to uphold the sacred obligations of the marital relation, and vindicate the sacredness of the family ties. The record in the case fully discloses the fact that Thomas Foster voluntarily accepted the privileges, benefits, and fruits of the void judgment of divorce, and he is thereby estopped from claiming any portion of the estate of his deceased wife. This estoppel refers, of course, to the property rights of Thomas Foster. Whether he could be punished for bigamy is not a question before us, and the question of all marital rights growing out of his conduct is not involved here, except so far as the property immediately in dispute is concerned.

The case is not one where there can be any collusion between the parties, for Hannah C. Foster is dead, and the various rights and obligations growing out of the marriage relation between her and Thomas Foster are only considered with reference to his own conduct, so far as he claims a right to a share in her estate.

In 2 Bishop on Marriage and Divorce, section 751 a, it is said: "If a party has used the privileges of a decree of divorce, he has thereby affirmed it, and he is too late to complain of any of its burdens. On this principle, where a man appealing from a decree dissolving his marriage, married again, his appeal was dismissed, for, by the marriage, he had affirmed the validity of the divorce. Besides, to permit him to prosecute his appeal would be an injustice to his innocent second wife." This states the rule broadly, but, as we construe it, it is applicable to the party who has been guilty of the wrong, and who is seeking to take advantage of that wrong. A void judgment of divorce cannot be legalized by the acts of the divorced parties, except so far as either one is estopped by his or her own wrongful conduct in enjoying ¹⁰⁰ its benefits, fruits, and privileges. Thus a party who has, as plaintiff, obtained a fraudulent judgment of divorce should not be permitted to enjoy its benefits, nor be allowed to assert its validity for his own advantage. So, too, the same rule should be applied to the defendant who, knowing of a void judgment of divorce against him, acquiesces in it for many years, treats it as valid, permanently renounces his marital obligations, remarries, and who has a child by a second marriage, and he should not be permitted to take advantage of his wrong.

Good morals, as well as good law, forbid it. The innocent second wife should not be made the victim of his turpitude, and the helpless child should not have the stain of illegitimacy resting upon it by Foster now asserting that he is the husband of a former wife. He may publish his own shame to the world for a money consideration; but this court will not aid him to stigmatize his second wife as living an adulterous life, nor hold that her child is a bastard: See *Arthur v. Israel*, 15 Col. 147; 22 Am. St. Rep. 381; *Mohler v. Shank* (Iowa, 1895), 61 N. W. Rep. 981; *Estate of Richardson*, 132 Pa. St. 292.

As we have before intimated, and to avoid any chance for an impression that we lend any countenance to the idea that parties may become divorced upon the ground of estoppel by conduct, we repeat that this action is one relating solely to property rights, unaffected by any considerations which give to the marriage relation its precise status. The marriage relation between Foster

and his deceased wife, with all its duties and obligations, has been terminated by her death; and he is now asserting this former relation, and the invalidity of the decree of divorce, solely for the purpose of obtaining her property. It is to such a state of facts, and in such an action, that we apply the doctrine of estoppel. Beyond this we do not go.

We do not think that the record discloses any reversible errors, and the order of the lower court is affirmed.

ESTOPPEL OF HUSBAND FROM ASSERTING SHARE IN WIFE'S ESTATE.—The husband's interest in the wife's estate is terminated by a divorce a vinculo: *Howey v. Goings*, 13 Ill. 95; 54 Am. Dec. 427; monographic note to *Boykin v. Rain*, 65 Am. Dec. 358, on the effect of a valid decree of divorce. Circumstances much less reprehensible, on the part of the husband than those of the principal case have been held to estop him from claiming property by virtue of the marital relation. Thus, when a husband and wife live separate, at some distance from each other, for seventeen years, without having any more regard for each other than if they were not married, the husband will be estopped, upon the death of his wife, from claiming his marital share of the property of the deceased: Note to *Nuhn v. Miller*, 34 Am. St. Rep. 875.

HEIDEL v. BENEDICT.

[61 MINNESOTA, 170.]

HOMESTEAD—URBAN PROPERTY—UNDIVIDED BLOCKS.

—If blocks in the platted and laid out part of an incorporated city are generally subdivided on the plat into lots of various sizes, the owner of a part of one block which has not been thus subdivided, and which is urban in character, is entitled to hold only a tract equal in area to the average size of platted lots in that part of the city.

PLEADING—AMENDMENT—RIGHTS OF CREDITORS.

—An amendment substituting an entirely different cause of action will not be allowed to prejudice the intervening rights of creditors.

ATTACHMENT—DISSOLUTION OF, BY AMENDMENT, AFTER ASSIGNMENT FOR BENEFIT OF CREDITORS.—If an attachment has been levied, which is followed by a general assignment for the benefit of creditors, an amendment of the complaint, and affidavit for attachment, made after the execution of the assignment, and substituting an entirely different and distinct cause of action, for the one set up in the original complaint and affidavit, discharges the attachment as to the assignee in the assignment proceeding, whatever may be its effect as between the parties to the action.

MOTIONS AND ORDERS—RES JUDICATA—DISSOLUTION OF ATTACHMENT.—If an assignment for the benefit of creditors is made after the levy of an attachment, an order denying a motion to dissolve the attachment, virtually upon the ground that the assignment did not, ipso facto, work a dissolution of the attachment, this being the only question litigated or decided on the motion, is

not *res judicata* upon the question whether the attachment was dissolved by an amendment of the complaint, and affidavit for attachment, made subsequently to the assignment, and does not preclude the court from deciding that such amendment, where it entirely changed the cause, did dissolve the attachment as to the assignee in the assignment proceeding.

Action by August Heidel and Margaret Heidel, his wife, against Henry Benedict and Henry Habighorst, to determine adverse claims to real property. Plaintiffs and Habighorst appealed from an order denying a motion to vacate the decision and for a new trial.

T. R. Palmer, for the appellants Heidel.

Lewis E. Jones, for the appellant Habighorst.

Ambrose Tighe, for the respondent.

¹⁷⁰ MITCHELL, J. Action to determine adverse claims to real property. The contest is triangular, and grows out of the following state of facts: The plaintiff owned two hundred and twenty-seven and one-half feet by one hundred and twenty feet in the southeasterly corner of block 13 in Dayton's addition to St. Paul, upon which was situated a house in which he resided. This block ¹⁷¹ was not subdivided into lots, but the blocks generally in the addition had been subdivided by plat into lots, varying in size from thirty-five to fifty-five feet in width, and from ninety-five to one hundred and seventy feet in depth. The property in the addition is strictly urban in character.

On November 24, 1893, the defendant Benedict commenced an action against the plaintiff, in which a writ of attachment was issued and levied on the property in question. In both the complaint and affidavit for attachment the cause of action was stated to be upon account for goods sold and delivered by Benedict to Heidel. Within ten days after the levy of the attachment, Heidel made an assignment of all his nonexempt property to defendant Habighorst for the benefit of all his creditors. The question is raised whether this was a common-law assignment or an assignment under the insolvent law of 1881; but, as we view the case, this question is not material. After the execution of this assignment, Heidel made a motion to dissolve the attachment. Thereupon Benedict amended his complaint, setting up, in place of the original cause of action, sixteen other separate causes of action, fourteen of which were promissory notes executed by Heidel to various parties, and by them transferred to Benedict, and the two others, respectively, for money loaned and for goods

sold to Heidel by other parties who had assigned the claims to Benedict. Benedict also made a motion for leave to amend his affidavit for attachment, so that the statement of his causes of action would conform to his amended complaint. When the motions came on for hearing, the court denied Heidel's motion to dissolve the attachment, but allowed Benedict's motion to amend his affidavit.

Heidel then commenced this action, his contention being that the entire tract was exempt as his homestead, and hence was not subject to attachment, and did not pass by his assignment for the benefit of creditors. Both of the defendants denied that the whole tract was thus exempt, but, as against each other, Benedict claimed that his attachment constituted a lien on the nonexempt part of the tract prior and paramount to the assignment for the benefit of creditors, while Habighorst claimed that, as to the assignment, the attachment was discharged: 1. By force of the assignment itself, as being made under the insolvent law of 1881; and 2. Because of the amendment of the complaint and affidavit for ¹⁷² attachment substituting entirely different causes of action after the rights of creditors under the assignment had intervened.

The trial court held that Heidel was only entitled, as a homestead, to the dwelling and the land on which it was situated, not exceeding in size the average sized lots in Dayton's addition; and that upon the remainder of the tract Benedict's attachment constituted a subsisting lien, paramount to Habighorst's interest under the assignment. Both Heidel and Habighorst appealed.

1. We are of opinion that the decision of the court as to the extent of Heidel's homestead exemption was correct. The tract was within the laid-out or platted portion of an incorporated city. It was strictly urban in character—a fact which distinguishes the case from that of *In re Smith's Estate*, 51 Minn. 316, relied on by plaintiff's counsel. It is almost impossible to construe the crude provisions of our homestead law without sometimes resorting to what might seem to be judicial legislation, and it is almost equally difficult to build up a line of decisions that will always be strictly logically consistent with each other; but the conclusion arrived at by the trial court is the only equitable and reasonable one under the facts of this case. It is not to be presumed that the legislature intended that where a part of the platted portion of an incorporated city, strictly urban in character, was not subdivided into lots on the plat, a party might claim an exemption to the extent of acres; while his neighbor

across the street, residing on a block of exactly the same kind of property, but subdivided on the plat into lots, could only claim two or three thousand square feet.

2. Assuming that, as between the parties to the action, the amendments to Benedict's complaint and affidavit for attachment were permissible, yet we are of opinion that the effect of them was to discharge the attachment as to the intervening rights of Habighorst, and the creditors whom he represents, under the assignment. The amendment, it will be observed, is not of matters of mere form, or of the manner of stating the same cause of action, but is a substitution of entirely different causes of action, having no connection with that set up in the original complaint and affidavit.

The extent of the right of amendment, as against the defendant in an action, is not necessarily by any means the extent of the right ¹⁷³ of amendment as against third parties who have acquired intervening rights in the attached property. The intervening rights of third parties are quite as sacred as the plaintiff's right of amendment as against the defendant debtor. The courts have likewise generally recognized subsequent attaching creditors as occupying in this regard a more favored position than voluntary purchasers, so that some amendments which would be allowed against the latter would be held to discharge the attachment as to the former; and it seems to us that the rights of creditors under a general assignment for their benefit are quite as great as those of attaching creditors. The authorities seem to be practically all one way on this question, and we have found no case that goes anywhere near so far as to hold that, as against creditors, a plaintiff may amend by substituting an entirely different and distinct cause of action for the one stated in his original complaint and affidavit.

That this cannot be done would seem on principle to be self-evident. Creditors, under this assignment, are entitled to all the surplus that is left after satisfying the liens upon the property existing at the date of the assignment. When this assignment was made, the claim upon which the property had been attached was wholly fictitious and unfounded. Hence no recovery could have been had upon it, and the creditors under the assignment would have secured the property unencumbered. But by this amendment, made after the rights of creditors had intervened, it is sought to secure a lien, paramount to these rights, for other debts which had not been sued on at all at the date of the assignment.

With one exception, all the cases cited by counsel for Benedict relate to the right of amendment as between the parties to the action, and hence are not in point. The only case where the rights of a third party had intervened is *Tilton v. Coffield*, 93 U. S. 163. But in that case the indebtedness stated in the original affidavit and declaration was upon account for goods sold and delivered, while in the amended affidavit and declaration it was upon a note for the same amount given to balance the same account set forth in the prior proceedings and representing the same debt; and the court places its decision expressly upon the ground that, while the description of the cause of action was changed, yet it was, in view of equity and in point of fact, substantially the same with that originally ¹⁷⁴ described. The court also calls attention to the distinction, already alluded to, between creditors and voluntary purchasers, saying that the parties in that case "are not subsequent attaching creditors, nor creditors at all; they are purchasers *lite pendente*." The authorities upon this question are cited in *Waples on Attachment*, section 145, and *Drake on Attachment*, section 282, et seq. Our conclusion is, that the attachment was discharged as to the assignee, *Habighorst*, by the amendment referred to.

It appears that, before this action was commenced, the assignee had intervened in the suit between *Benedict* and *Heidel*, and made a motion to dissolve the attachment, and that the court denied the motion. It is now claimed that, under this decision, the validity and priority of the attachment lien is *res judicata*. But it is well settled that the determination of a motion or summary application is not *res judicata*, so as to prevent the parties from drawing the same matters in question again in the more regular form of an action: 2 *Black on Judgments*, sec. 691; *Kanne v. Minneapolis etc. Ry. Co.*, 33 Minn. 419.

Upon the appeal of the plaintiffs the order appealed from is affirmed, and upon the appeal of defendant *Habighorst* the order appealed from is reversed.

ON REHEARING.

MITCHELL, J. The application for a reargument is denied; but in doing so it is proper to say that possibly the statement in the opinion, that "the determination of a motion or summary application is not *res judicata*, so as to prevent the parties from drawing the same matters in question again in the more regular form of an action," may be too broad, and not universally true under our practice. It was not necessary to go that far in this case. The case of *Dwight v. St. John*, 25 N. Y. 203, relied

on by counsel, as qualified and limited by the subsequent case of *Riggs v. Pursell*, 74 N. Y. 370, only goes to the extent of holding that in the case of an order affecting a substantial right, and appealable when a full hearing has been had on a controverted question of fact, the decision of a point actually litigated upon the motion is an adjudication binding upon the parties, and conclusive to that extent.

¹⁷⁵ In the present case, it appears from the memorandum of the trial judge that the only question which Habighorst, as intervenor, was permitted to litigate, was whether the assignment by Heidel to him for the benefit of creditors was under the insolvent law of 1881, and hence ipso facto worked a dissolution of the Benedict attachment. The court held that it was merely a common-law assignment, and therefore did not ipso facto dissolve the attachment; and this was the only question litigated or decided on the motion. Hence, under any rule, the questions decided by us were not *res judicata* by the order denying the motion.

HOMESTEAD.—The usual tests of a homestead are use and value, without limitation as to quantity: *Gregg v. Bostwick*, 33 Cal. 220; 91 Am. Dec. 637; monographic note to *Pryor v. Stone*, 70 Am. Dec. 344-353, on what may be exempt as a homestead.

PLEADING—AMENDMENT.—A different cause of action cannot be introduced by way of amendment: See monographic note to *Flanders v. Cobb*, 51 Am. St. Rep. 414, 415, on what amendments to pleadings are not admissible because they change the cause of action.

ATTACHMENT—DISSOLUTION OF, BY AMENDMENT OF DECLARATION.—Where it does not appear that the amended declaration is for any cause of action different from the original declaration, or that it varies from it in any essential particular, the court cannot determine what amendments or alterations of the original writ will discharge the property taken thereon. If the defendant relies on any such variance, he should point it out: *Lowry v. Cady*, 4 Vt. 504; 24 Am. Dec. 628.

MOTIONS AND ORDERS—RES JUDICATA.—The doctrine of *res judicata* is applicable only to those judgments, decrees, or orders of record, which are so far material and final that a review thereof may be had through the ordinary procedure, such as appeals or writs or error. The granting or refusing of other applications or motions does not necessarily prevent a subsequent renewal thereof upon the same or different grounds, when jurisdiction over the subject matter remains in the same tribunal: *Rockwell v. District Court*, 17 Col. 113; 31 Am. St. Rep. 265. Generally, the doctrine of *res judicata* is not applicable to motions in the course of practice: *Chichester v. Cande*, 3 Cow. 39; 15 Am. Dec. 238; *Benz v. Hines*, 3 Kan. 390; 89 Am. Dec. 594, and note; monographic note to *Lea v. Lea*, 93 Am. Dec. 778, on what facts are not *res judicata*, though apparently found by the court; but orders made upon motions, petitions, or rules affecting substantial rights, and from which an appeal lies, if the matter in

question has been fully tried, are as conclusive upon the issues necessarily decided as are final judgments or decrees: *Burner v. Hevener*, 34 W. Va. 774; 26 Am. St. Rep. 948. An order discharging a writ of attachment after a full hearing is appealable either before or after judgment upon the main issue in the case. Such order is conclusive of all matters adjudicated thereby: *Hall v. Harris*, 1 S. Dak. 279; 36 Am. St. Rep. 730.

HOHL v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

[61 MINNESOTA, 321.]

RAILROADS—CARE AS TO ANIMALS AT CROSSING—RESTRAINT BY OWNER.—There is a clear distinction as to the measure of care which a railway company, at a highway crossing, owes to the owner of domestic animals who voluntarily permits them to go at large, in violation of a law prohibiting them from going at large upon the highway, and one who uses due diligence to restrain them.

RAILROADS—DUTY TO SIGNAL—ANIMALS AT CROSSING.—It is the general duty of a railway company to observe due care in the movement of its trains over a highway crossing, and to give the statutory signals in order to secure so far as may be done by the exercise of ordinary care, the safety of domestic animals lawfully upon the highway.

RAILROADS—ANIMALS AT CROSSING, WHEN TRESPASSERS.—Even where domestic animals are not permitted to run at large it is only where the owner suffers or permits his animals to go at large that as to him they may be treated, by a railway company at a highway crossing, as trespassers upon the highway.

RAILROADS—KILLING ANIMALS AT CROSSING—WHEN LIABLE.—If plaintiff's colt, without his fault, escapes from his premises, and goes upon the public highway, in a town wherein domestic animals are not permitted to run at large, and is killed at a crossing thereof by a railroad locomotive, through the negligence of the servants of the railroad company in charge of such locomotive, the colt, so far as the conduct of the company is concerned, in the management of its train, must be regarded as having been lawfully upon the highway, and the company is liable for killing it.

RAILROADS—KILLING ANIMALS AT CROSSING—EVIDENCE ADMISSIBLE.—In an action by the owner of a colt against a railway company for negligently killing the colt at a highway crossing, in a town wherein domestic animals are not permitted to run at large, evidence tending to show that the animal had escaped from its inclosure without the fault of the owner is material and admissible.

RAILROADS—KILLING ANIMALS AT CROSSING—REQUESTS FOR INSTRUCTIONS.—In an action by the owner of a colt against a railway company for negligently killing the colt at a highway crossing, in a town wherein domestic animals are not permitted to run at large, the defendant's special requests for instructions to the jury which ignore the question of plaintiff's responsibility for the animal being upon the highway are correctly denied.

INSTRUCTIONS—FURTHER AND MORE SPECIFIC.—If there is any reason to apprehend that instructions given are not sufficiently specific, further and more specific instructions should be requested.

RAILROADS—ANIMALS AT CROSSING—FAILURES TO SIGNAL AS EVIDENCE OF NEGLIGENCE.—A failure to comply with a statute requiring a railroad company to give signals at a highway crossing is evidence of negligence against the company, in an action against it for negligently killing a colt at a highway crossing, in a town wherein domestic animals are not permitted to run at large.

RAILROADS—CAUSE OF KILLING ANIMALS AT CROSSING IS QUESTION FOR JURY.—If a railroad locomotive runs over and kills a colt at a highway crossing, without having given the signals required by statute, the question as to whether such omission was the cause of the accident or not is one for the jury.

W. R. Duxbury, for the appellant.

E. H. Smalley, for the respondent.

³²¹ **START, C. J.** Action to recover the value of a colt killed at a highway crossing in the town of Hokah, Houston county, on the night of September 27, 1893, by being struck by defendant's railway train. Verdict for the plaintiff, and from an order denying its motion for a new trial the defendant appealed. The assignments of error may be included in two general questions: 1. Was the colt unlawfully at large upon the highway when killed? 2. Is the verdict sustained by the evidence?

1. It is practically conceded that the colt was killed by being struck by a locomotive in charge of the defendant's servants, at a ³²² highway crossing in the town of Hokah, wherein domestic animals were not permitted to run at large; or, in other words, the common-law rule on this subject was in force at this time at the locus in quo. The verdict establishes the fact that the statutory signals required by the General Statutes of 1894, section 6637, were not given by such servants or any of them.

It is claimed by the defendant that the colt was unlawfully upon the highway, and a trespasser on its track, and therefore it owed no duty of care as to the safety of the colt, and was not required to comply with the statute as to ringing the bell and blowing the whistle, until it was actually discovered on or near the track. If it is true that the colt was unlawfully on the highway where the railway crossed it, the conclusion claimed by defendant necessarily follows, under the rule established by the repeated decisions of this court; but whether or not the colt was lawfully on the highway, as against the defendant, means nothing more than that it was there under such circumstances as entitled its owner, the plaintiff, to have the required signals given, and the

observance of due care in the premises on the part of the defendant's servants in the management of the railway train.

Whether or not domestic animals, where they are not permitted by vote or by law of the town to go at large are unlawfully on the highway, so as to exonerate railway companies from liability to the owners for their injury at highway crossings by the negligence of the servants of the railway companies in not seasonably discovering and averting the peril to the animals, depends upon the conduct of their owner. In its last analysis, the question is, whether or not the owner of the animals was guilty of negligence in their management, whereby they escaped and went upon the highway. If the owner of such animals has not kept them within his own inclosure, when he might have done so by proper care, he cannot recover from a railway company for running over them at a highway crossing without first showing that the train was carelessly managed, or some statutory duty was omitted after the animals were discovered upon or near the track, whereby they were injured.

In such a case, the animals are unlawfully at large by reason of the fault of their owner, and the duty of the railway company to exercise care as to their safety does not commence until they are ³²³ actually discovered. But, on the other hand, where such animals escape from their inclosure through no fault of their owner and go upon the highway, whatever may be their status as to the public, they are, as to the duty of the railroad company to exercise care in the running of its trains over the highway crossing, to be regarded as lawfully upon the highway, and not as trespassers. There is a clear distinction as to the measure of care which the railway company owes to the owner of domestic animals who voluntarily permits them to go at large and one who uses due diligence to restrain them. It is the general duty of a railway company to observe due care in the movement of its trains over a highway crossing, and to give the statutory signals in order to secure, so far as may be done by the exercise of ordinary care, the safety of domestic animals lawfully upon the highway: *Fritz v. First Division etc. R. R. Co.*, 22 Minn. 404; *Palmer v. St. Paul etc. R. R. Co.*, 38 Minn. 415.

Now, to place the owner of such animals, where they escape from his control through no fault of his own, outside of this rule and the pale of the law, and make his misfortune the justification of the railway company for its negligence and disregard of the laws of the state, would violate the simplest principles of justice and morality. A brief reference to the authorities will in-

dicates that, if the plaintiff exercised ordinary care in keeping his colt within his custody and control, he did all that the law required him to do, and was guilty of no fault which could affect his right to recover in this case, and that, as to the conduct of the defendant in the management of its train, his colt must be regarded as having been lawfully in the highway. It is only where the owner suffers or permits his animals to go at large that as to him they may be treated as trespassers upon the highway.

In the case of *Locke v. First Division etc. Ry. Co.*, 15 Minn. 283 (350), the plaintiff allowed or suffered his cow to go at large, and she was killed by the defendant's locomotive at a crossing, and it was held that the cow was unlawfully at large, and that the burden was upon the owner to show that the train was carelessly managed after the cow was discovered upon or near the track, and the court expressly says that this rule applies to an owner who has not kept his animals within his own inclosure when he might have done so by proper care. In all the cases which follow *Locke v. First Division etc. Ry. Co.*, 15 Minn. 283 (350), ³²⁴ the animals were at large by reason of the fault of their owners. Thus in the case of *Witherell v. Milwaukee etc. Ry. Co.*, 24 Minn. 410, the animal was on the track by the fault of the owner. Such was also the case of *Palmer v. Northern Pac. Ry. Co.*, 37 Minn. 223, 5 Am. St. Rep. 839. The horse killed was running at large and wrongfully in the highway. The horse could do no wrong, but its owner could, by permitting it to run at large in the highway. In *Stacey v. Winona etc. R. R. Co.*, 42 Minn. 158, the cattle were permitted to go into an unfenced cornfield, whence they wandered upon the highway crossing, and were killed by defendant's railway train; they were at large by the fault of their owner, and therefore wrongfully in the highway, and *Locke v. First Division etc. Ry. Co.*, 15 Minn. 283 (350), was properly followed.

On the other hand, in the case of *Palmer v. St. Paul etc. R. R. Co.*, 38 Minn. 415, so far as it appears, the animals were lawfully in the highway, and were killed by defendant's railway train at the crossing, and it was held that evidence tending to show that the statutory signals were not given was competent to show negligence on the part of the defendant. In the case of *Fawcett v. York etc. Ry. Co.*, 16 Q. B. 610, the plaintiff's horses escaped from their inclosure, and went upon the highway crossed by the defendant's railway track, and were killed by reason of the failure of the defendant to comply with the statute as to keeping certain gates closed. Plea that the horses were unlawfully upon

the highway, and it was held that, whatever may have been the case as against the public, the horses were lawfully in the highway as to the railway company. The cases of *Isbell v. New York etc. R. R. Co.*, 27 Conn. 393; 71 Am. Dec. 78, *Bulkley v. New York etc. R. R. Co.*, 27 Conn. 479, and *Towne v. Nashua etc. R. R. Co.*, 124 Mass. 101, fully sustain the proposition that, where domestic animals escape from their inclosure without the fault of their owner, they are not to be regarded as unlawfully running at large in an action against a railroad company for injuries to them by its negligence: See, also, *Parker v. Lake Shore etc. Ry. Co.*, 93 Mich. 607.

The case of *North Pennsylvania Ry. Co. v. Rehman*, 49 Pa. St. 101, 88 Am. Dec. 491, does not recognize the distinction we have suggested, and states the rule absolutely that the owner of domestic animals must, at his peril, keep them upon his own land, and, if they escape, even without ³²⁵ his fault, and go upon the highway, and are injured at a railway crossing, by the negligence of the company, he cannot recover from it, unless such injury was the result of the gross negligence or willful mischief of the company or its servants. This is a wrong application of the common-law rule that every man must, at his peril, keep his domestic animals upon his own premises; for while it is true that, if they escape and injure the person or property of another, the owner is liable for the actual damages caused by them, without reference to the fact that they escaped without fault on his part, yet, when a defendant seeks to be exonerated for an injury to them caused by its negligence, the question whether they were at large without the fault of their owner becomes material. If we are correct in this, it follows that evidence on the trial of this case tending to show that the colt escaped from its inclosure without the fault of the plaintiff was material, and that the defendant's objections thereto were properly overruled; also, that its special requests for instructions to the jury were correctly denied, because they ignored the question of the plaintiff's responsibility for the colt being upon the highway.

2. If, as claimed by the defendant, there is no evidence in the case that the defendant's alleged negligence was the proximate cause of the killing of the colt, or if the court assumed in its instructions that if it was a fact that the colt was killed by the locomotive, and the statutory signals were not given, the defendant would be liable, the verdict cannot stand. We have examined the record as to each of these points, and find that the court did not so assume, but did submit the question to the jury

whether or not the alleged acts and omissions of the defendant's servants in charge of the train caused the injury complained of. The defendant should have requested further and more specific instructions on this point, if there was any reason to apprehend that those given were not sufficiently specific. It is to be observed that the only exception to this part of the charge was in these words: "The defendant excepts to that portion of the charge of the court with reference to the giving of the signals for the crossing."

It was the duty of the engineer in charge of the locomotive in this case to give the signals at the crossing or cause them to be given. A failure to do so is a misdemeanor: Gen. Stats. 1894, sec. 6637. It is ³²⁶ not the province of the court to ingraft upon this statute any limitations not necessarily implied from the language used, and, inasmuch as the giving of such signals has a tendency in some cases to frighten animals from the railway track, we must presume that this was one of the results intended to be secured by the enactment of the law; hence an omission to comply with the statute in this case was evidence of negligence on the part of the defendant, but whether such omission was the cause of the accident or not was a question for the jury: *Palmer v. St. Paul etc. R. R. Co.*, 38 Minn. 415.

We are of the opinion that the evidence in this case, although in some particulars it was conflicting, and in others somewhat obscure, is sufficient to justify a finding by the jury to the effect that the colt was upon the highway crossing without the fault of the plaintiff, and was killed by the negligence of the defendant in the respects complained of, and that it is sufficient to sustain the verdict.

Order affirmed.

RAILROADS—KILLING ANIMALS ON TRACK.—In an action against a railroad company for damages for killing animals, a distinction is to be made, in determining whether plaintiffs' negligence would preclude his recovery, between the case of an owner whose cattle escape from his inclosure and stray upon a railroad against his will, and that of one who voluntarily permits them to go there, or to range in places where it is probable that they will do so: *Chicago etc. Ry. Co. v. Goss*, 17 Wis. 428; 84 Am. Dec. 755, and note. Compare *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; 49 Am. Dec. 239.

FULLER INSTRUCTIONS MUST BE REQUESTED: *State v. Harrison*, 66 Vt. 523; 44 Am. St. Rep. 864.

CASPER v. KLIPPEN.

[61 MINNESOTA, 353.]

EXECUTION — WRONGFUL SEIZURE — REMOTE DAMAGES.—After part of a merchant's stock of goods has been wrongfully levied upon, seized, and carried away by virtue of a writ of execution, the loss resulting to him by reason of his inability to continue business, and his being compelled to sell the remainder of his stock for less than its value, is too remote a consequence of such wrongful levy and seizure to form the basis of an assessment for damages.

EXECUTION — WRONGFUL SEIZURE — REMOTE DAMAGES—LOSS OF PROFITS.—Though part of a merchant's stock of goods is wrongfully levied upon, seized, and carried away, by virtue of a writ of execution, damages caused by the loss of future profits, occasioned by the business being broken up, are too speculative, remote, and uncertain to be allowed.

EXECUTION — MISNOMER OF DEFENDANT — AMENDMENT.—Though the true name of the defendant nowhere appears in the proceedings of an action, or judgment, or any name by which he was ever known, yet, in a collateral proceeding, his true name may be stated, and he may be connected with the judgment by proper averments.

EXECUTION — JUSTIFICATION — MISNOMER OF DEFENDANT—AMENDMENT.—If a person is sued by a wrong Christian name, by which he was never known, and his true name nowhere appears in the proceedings, though they are otherwise regular, and judgment by default is obtained, under which execution is levied, such judgment, in an action by the defendant against the sheriff and his deputy for wrongfully carrying away and converting the property, is not absolutely void. It, and all of the proceedings, may be amended by a direct proceeding for that purpose, but neither the judgment nor the execution can be used for the purpose of justification until they have been amended.

Handlan & MacGregor and Fryberger & Johanson, for the appellants.

Crocker & Crandall, for the respondent.

³⁵³ CANTY, J. This is an action against the sheriff of St. Louis county and his deputy for wrongfully carrying away and converting to their own use a part of plaintiff's stock of groceries, of the value of ninety-three dollars. It is also alleged in the complaint that plaintiff was engaged in the business of keeping a grocery store, and that, by ³⁵⁴ reason of said wrongful acts of defendants his credit was destroyed, his business broken up, and he was obliged to sell the rest of his stock for less than its value. He alleges that by reason thereof he was damaged in the sum of nine hundred dollars. On the trial before the court without a jury, the court found for plaintiff, and found "that the value of said goods so taken by said Ole J. Klippen [the deputy], as aforesaid, was the sum of ninety-three dollars, that by reason of

the taking of said goods from the store of said plaintiff, as aforesaid, the plaintiff was damaged in the sum of two hundred and ninety-three dollars," and ordered judgment for plaintiff for that sum. From an order denying their motion for a new trial, defendants appeal.

1. On the trial, plaintiff was permitted, against objection, to prove that after defendants had so taken away a part of his goods, he was, by reason thereof, unable to continue his business, and sold a portion of the balance of his goods, worth one hundred and seventy-six dollars, for ninety-nine dollars, which was the best price he could get for them, and that by reason thereof he lost seventy-seven dollars. It was error to overrule this objection and receive this evidence. Such damages are too remote to constitute the basis of recovery, and there was no proof of malice or bad faith on which punitive damages could be awarded.

2. The court allowed plaintiff, against objection, to prove loss of future profits, caused by the business being broken up, as he claims, by the taking and carrying away of said ninety-nine dollars' worth of goods out of a stock worth three hundred and twenty-four dollars. This was error. It is well settled that damages for the loss of such future profits are too speculative, remote, and uncertain to be allowed: *Simmer v. St. Paul*, 23 Minn. 408; *Cushing v. Seymour*, 30 Minn. 301; *O'Neill v. Johnson*, 53 Minn. 439; 39 Am. St. Rep. 615; *Williams v. Wood*, 55 Minn. 323. There may be cases where a mercantile business is so well established, its profits so uniform and certain and subject to so few contingencies, that the doctrine of *Goebel v. Hough*, 26 Minn. 252, will apply, but they are rare. This is not such a case.

3. Defendants sought to justify the taking of plaintiff's goods under an execution issued out of the municipal court of Duluth against Charles Casper, whom they alleged to be the same person as this plaintiff. It appears by the evidence that one Messick and ³⁵⁵ one Macauley, intending to bring an action in said municipal court against this plaintiff, served on him a summons and complaint, in which the name of the defendant was written "Charles" Casper, while his true name is "Christian" Casper. Thereafter, judgment was entered in that action against him as Christian Casper, by default, for the recovery of the sum of seventeen dollars and sixty-four cents, and execution was issued thereon against him by the same name, under which defendants made said levy and took said goods. On the trial of this action, Casper admitted that said summons was personally served on him, and that he was indebted to Messick and Macauley in a

small amount, but he denies that the amount is as much as they claimed in that action. He did not appear in that action, and his true name is nowhere stated in the proceedings. The court, in effect, found that he was never known by the name of Charles Casper. On the authority of *Atwood v. Landis*, 22 Minn. 558, the court held that the execution, and all the proceedings in that action, were null and void, and no protection to these defendants.

The case of *Atwood v. Landis*, 22 Minn. 558, is opposed to the great weight of authority, by which it is held that such a judgment is valid, and that in all future litigation the true name of the defendant may be stated, and he may be connected with the judgment by proper averments: *Crawford v. Satchwell*, 2 Strange, 1218; *Oakley v. Giles*, 3 East, 167; *Smith v. Patten*, 6 Taunt. 115; *Fitzgerald v. Salentine*, 10 Met. 436; *Parry v. Woodson*, 33 Mo. 347; 84 Am. Dec. 51; *First Nat. Bank v. Jagers*, 31 Md. 38; 100 Am. Dec. 53; *Lafayette Ins. Co. v. French*, 18 How. 404; *Waldrop v. Leonard*, 22 S. C. 118; *Bloomfield Ry. Co. v. Burress*, 82 Ind. 83; *Guinard v. Heysinger*, 15 Ill. 288; *Pond v. Ennis*, 69 Ill. 341; *Welsh v. Kirkpatrick*, 30 Cal. 203; 89 Am. Dec. 85; *Sutter v. Cox*, 6 Cal. 415; 1 Black on Judgments, sec. 213. Outside of a few supreme court cases in New York, and the case of *Cole v. Hindson*, 6 Term Rep. 234, *Atwood v. Landis*, 22 Minn. 558, is supported by but little authority. Besides, it is not sound in principle. There are many other defects in process and proceedings just as radical as that of a misnomer of the defendant which are held to be amendable. At the same time, such a misnomer often has a tendency to mislead the defendant, which no other defect in the process would be likely to have; and when it appears in such a case that the defendant has been misled, the court might abuse its discretion by ordering an amendment, after default ^{and} entry of judgment, without giving the defendant leave to answer and defend.

While, in our opinion, the doctrine is not sound which holds that such a judgment is absolutely void, and cannot be amended, neither, in our opinion, is the doctrine sound which holds that such a judgment is in all respects valid, and needs no amendment. It is held by the great weight of authority that, though the true name of the defendant nowhere appears in the proceedings or judgment, or any name by which he was ever known, yet in a collateral proceeding his true name may be stated, and he connected with the judgment by proper averments.

Speaking for myself, it seems to me that in principle this is

attacking collaterally the judgment which appears to exist, and proving by parol evidence a judgment which exists only in parol. In the summons and return of service of the same the name of the defendant is John Brown. In a collateral proceeding, you contradict the summons and return, and show that the service was in fact made on John Smith, and he is the man who is intended by the name "John Brown" in the summons, although he never was known by that name. If the record imports absolute verity, how can you do this? Even where the record, on its face, affirmatively shows want of jurisdiction, it is held that it imports absolute verity, and in a collateral proceeding cannot be contradicted by showing facts which would establish jurisdiction: *Freeman on Judgments*, sec. 125; *Ainge v. Corby*, 70 Mo. 257; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742. We are all of the opinion that *Atwood v. Landis*, 22 Minn. 558, should be overruled. *

But while we are of the opinion that the court in fact had jurisdiction in the action in which the judgment here in question was rendered, yet that judgment, and all of the proceedings in that action, were so defective that the judgment was abortive, and could not be put in evidence in this action to justify the seizure of Casper's property until the judgment, execution, and all of the proceedings in that action were amended by a direct proceeding for that purpose. For this reason, the court below did not err in holding that the judgment in question was no justification. Neither the judgment nor execution could be used for the purpose of justification until they had been amended.

The order appealed from is reversed, and a new trial granted.

EXECUTION—WRONGFUL SEIZURE—DAMAGES.—In trespass by an officer in the execution of a writ, where the wrong consists in the taking or destruction of personal property, without fraud, malice, or other aggravating circumstances, the measure of damages is compensation for the plaintiff's loss, which is, as a rule, the value of the property, with such incidental damage as is shown to be the natural and proximate result of the act charged: *Murray v. Mace*, 41 Neb. 60; 43 Am. St. Rep. 664, and note.

MISNOMER OF DEFENDANT—AMENDMENT—JUSTIFICATION.—That a party is sued by a wrong name is matter of defense in abatement, and is waived by a failure so to plead the misnomer, whether the defendant appears or makes default: *First Nat. Bank v. Jaggars*, 31 Md. 38; 100 Am. Dec. 53. Service of process upon a party who is sued and served by his wrong Christian name will not support a judgment against him: *Note to Enewold v. Olsen*, 42 Am. St. Rep. 562; and void process is no justification to a sheriff for acts committed by virtue of it, though voidable process is: *Note to Townsly-Myrick etc. Co. v. Fuller*, 41 Am. St. Rep. 104. All voidable process can be made perfect by proper amendments, but void process

cannot be: *Durham v. Heaton*, 28 Ill. 264; 81 Am. Dec. 275. An execution which can be identified with the judgment may be amended: *Dewey v. Peeler*, 161 Mass. 135; 42 Am. St. Rep. 399. Notwithstanding the misnomer of a defendant, if the writ is served on the party intended to be sued, and he fails to appear and plead in abatement, and suffers judgment by default, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments: *First Nat. Bank v. Jagers*, 31 Md. 38; 100 Am. Dec. 53.

FUNK v. ST. PAUL CITY RAILWAY COMPANY.

[61 MINNESOTA, 435.]

STATUTES—INTENTION, HOW COLLECTED.—If the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view.

STATUTES—CONSTRUCTION—INTENTION.—If the language of a statute is in any manner obscure or of doubtful meaning, the court construing it may recur to the history of the time when it was enacted, and seek in that history for the mischief and defect which the statute was intended to remedy.

THE WORDS "RAILROAD" AND "RAILWAY" are synonymous.

RAILROADS.—A "STREET RAILWAY" is not a "railroad." and the term "railroad" does not include "street railway." The distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers and not of freight.

RAILROADS—STATUTES—NEGLIGENCE OF FELLOW-SERVANT.—A statute, passed at a time when there were no cable or electric street railways in existence in the state, and providing that every railroad corporation owning and operating a railroad in the state should be liable for damages sustained by an agent or servant by reason of the negligence of any other agent or servant, but not broad enough in words to include unknown things, is not applicable to a street railway corporation, although its line is operated by cable.

APPEAL—SUFFICIENCY OF GENERAL VERDICT—ERRONEOUS INSTRUCTION.—A general verdict cannot be upheld, where several issues were tried, if the court gave the jury an erroneous instruction upon any one of the issues.

Action for injury causing death. There was a verdict for the plaintiff, and the defendant appealed from an order denying a motion for a new trial.

Munn, Boyesen & Thygeson, for the appellant.

George C. Lambert and S. P. Crosby, for the respondent.

435 BUCK, J. A material and difficult question for us to determine is whether the laws of 1887, chapter 13 (Gen. Stats. 1894, sec. 2701), in regard to damages arising by reason of a fellow-servant, is applicable to the case under consideration. That law reads as follows: "Every railroad corporation owning or operating a railroad in this state shall be liable for all dam-

ages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part, when sustained within this state."

The defendant is the St. Paul City Railway Company, and in the complaint it is described as the owner of the Seventh street cable line in the city of St. Paul, which said line of cable railway extends ⁴³⁷ from Wabasha street eastward to a point on Dayton's Bluff in said city, and that the cars and grip-cars running thereon are operated by means of a cable, which cable runs in a conduit underneath the tracks of the car line. It is also alleged that the plaintiff's intestate was a plasterer by trade, and employed by the defendant to plaster the inner walls of the conduit through which the cable runs, and that while so engaged he was killed, solely through the negligence of the defendant. The jury returned a verdict in favor of the plaintiff for the sum of two thousand five hundred dollars, and the defendant appeals.

The defendant is a street railway corporation, but whether it is included in the term "railroad," as used in the law of 1887, is a debatable question. The common understanding of a railroad is that it is a graded road or way on which rails of iron or steel are laid for the wheels of cars to run upon, carrying heavy loads, usually propelled by steam. Railroads in a rude form were in use as early as 1676, but it was not until 1829, when successful experiments in the use of locomotives were made, that they first began to be extensively constructed; and it is only within recent years that another class of railroads, namely, those laid down in the streets of towns and cities, have become very numerous: 2 Bouvier's Law Dictionary, tit. "Railroads."

Judge Robertson, in Louisville etc. R. R. Co. v. Louisville City Ry. Co., 2 Duval, 175, says: "A railroad is for the use of the universal public in the transportation of all persons, baggage, and other freight. A street railway is dedicated to the more limited use of the local public, for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad. . . . A 'railroad' and a 'street railroad,' or way, are, in both their technical and popular import, as distinct and different things as a road and a street, or as a bridge and a railroad bridge; and it has been authoritatively adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase 'railroad bridge' means a viaduct constructed for the exclusive use of railroad transportation." This decision was made

in 1865, and involved the construction to be given to a provision in a railroad charter which provided that no other railroad should be constructed between two named points in a city, the court holding that such ⁴³⁸ provision did not prohibit the construction of a street railway between the points named.

Perhaps it may be conceded that, technically speaking, the term "railroad" would include a street railway, so far as its road-bed is made of iron or steel rails for wheels of cars to run upon; but where there is doubt about the true meaning of the word or term used in the law, the legislative intent is not to be determined from that particular expression, but from the general legislation upon the same subject matter.

It is claimed by the appellant's counsel, and not denied by the counsel for the respondent, and such we believe to be fact, that on February 24, 1887, when the general law of that year was passed, there were no cable or electric street railways in existence in this state. If so, what was the legislative intent in using the word "railroad" in the law of 1887, to be deduced from the whole and every part of the statute taken together, upon the subject of railroads? "When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view": Potter's Dwarries on Statutes, 194, note 13. What was the mischief felt which resulted in the passage of this law? Was it a danger known, or one unknown? Was it a danger then felt and realized, or one that might possibly arise in the future? We must assume that it was dealing with, and acting upon, existing facts within its knowledge. Of course, if the language used was entirely free from ambiguity, and broad enough to include unknown things which might spring into existence in the future, they would be deemed to come within, and be subject to, the evident meaning of the terms used.

Following this line of thought, we quote the case of Bridge Proprietors v. Hoboken Co., 1 Wall. 116, in which Mr. Justice Miller uses this language: "It does not follow that when a newly invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. . . . The track upon which the steam-cars now transport the traveler or his property is called a road, sometimes, perhaps generally, a railroad. The term "road" is applied to it, no doubt, because in some sense it is used ⁴³⁹ for the same purpose that the roads had been used. But until the thing was made and seen,

no imagination, even the most fertile, could have pictured it from any previous use of the word "road." Some call the inclosure in which passengers travel on a railroad a coach, but it is more like a house than a coach, and is less like a coach than are several other vehicles which are rarely, if ever, called coaches. It does not, therefore, follow that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day."

And where the language of a statute is in any manner obscure or of doubtful meaning, we may recur to the history of the time when it was enacted, and seek in that history for the mischief and defect which the statute was intended to remedy. In the case of *United States v. Union Pac. R. R. Co.*, 91 U. S. 72, the court said: "Courts, in construing a statute, may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason, as well as the meaning, of particular provisions in it": See, also, *Smith v. Townsend*, 148 U. S. 490; *Aldridge v. Williams*, 3 How. 9; *Preston v. Browder*, 1 Wheat. 115.

But if we assume that, at the time of the passage of the law of 1887, the history of street-cars was generally known, and their use, method of operation, and dangers therefrom well understood, can it be fairly and reasonably held that it was the legislative intent to apply the term "railroad" to street railways? It is a matter of common knowledge that street-cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. Street-cars are generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the roadbeds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do street railways carry freight. The greatest railroad hazard and danger of personal injury to railroad employes arises from operating freight trains. There is no such danger in operating street railways, whatever may be the motive power, because they do not carry freight. Especially is the danger in coupling freight-cars⁴⁴⁰ entirely absent. They get their business from the street, usually in populous cities, where passenger travel is the only business carried on. Street-cars do not usually run beyond the city limits, and none run beyond the state boundary.

The words in the law of 1887 making a railroad corporation operating a railroad in this state liable for damages "when sustained within this state," were undoubtedly aimed at the railroads operated by steam, where their lines extended beyond the jurisdiction of the state. It is true these restrictive words would include railroads operated by steam wholly within the state, but they were inserted to prevent the bringing of suits where the injury was sustained upon railroads outside of this state, but where the lines of the same railroad come within the boundary of our own state. Hence the words "when sustained within this state" evidently refer to railroads operated by locomotives, and it was such railroads the legislature had in contemplation when this term was used.

Through our territorial and state legislation, the term "railroad" has acquired a definite and well-understood meaning, and it has never been understood to include street railways. It is usually applied to the ordinary steam railroad of commerce; and, when there has been legislation in regard to street railways, they have been so designated. In Elliott on Roads and Streets, page 557, it is said that: "The distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers and not of freight. As we employ the term and desire it to be understood, it excludes the idea of the carriage of freight, for we do not believe that a railroad over which heavily laden freight trains are drawn can be considered a street railway."

We consider the words "railroad" and "railway" as synonymous and that they are generally used interchangeably, as this court has heretofore decided in *State v. Brin*, 30 Minn. 522. If, in the future, street railways shall be used for carrying freight, as they undoubtedly will be, with all of its attendant hazards and dangers, it will be within the province and discretion of the legislature to make the law of 1887 applicable to street railways. Or if, before that time, it considers the application of that law to the present method of operating street railways a necessary, wise, and judicious one, it ⁴⁴¹ can do so by such specific and definite terms that there can be no need of construction or interpretation.

If we were to hold that the term "railroad" in the law of 1887 applied to street railways, because the word is broad enough to cover all roads constructed of iron or steel rails for wheels of cars to run upon, we see no reason why it should not be so construed whenever found in the other legislation of this state. This would

require street railways to build depots and waitingrooms for passengers, for there is just as much reason to make the word "rail road" applicable in this respect as to personal injury cases. This is but one of the very many instances where, by the use of the word "railroad," the company is required to perform certain duties, in respect to which it cannot reasonably be said that the meaning of such words includes street railways. To so construe it in such instances would lead to confusion, and be a palpable violation of the legislative intent.

The respondent claims that there was sufficient evidence to justify the finding of the jury, without reference to the fellow-servant act of 1887. The verdict was a general one, and this court cannot say whether the jury based its finding upon the ground that the death of Henry Funk was caused by the negligence of a fellow-servant or not. It may be that the jury founded their verdict upon the erroneous instructions of the court that the defendant would be liable for the negligence of a fellow-servant under the law of 1887. There were several issues tried, and, where there was such an erroneous instruction in regard to a vital one, it cannot be disregarded by this court upon the ground that possibly the jury might have founded their verdict upon some other issue.

As to whether the defendant was guilty of negligence in operating its railroad we express no opinion. That issue can be determined in the new trial, which must be granted by reason of the erroneous ruling of the court below upon the question we have discussed.

The order appealed from is reversed.

STATUTES—CONSTRUCTION.—Laws must be executed according to the sense and meaning which they import at the time of passage: *Commonwealth v. Erie etc. R. R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471; and, in interpreting a statute, the words used should be construed with reference to the subject matter: *Cardenas v. Miller*, 108 Cal. 250; 49 Am. St. Rep. 84. When the legislature has used a term, without defining it, which has a well-settled meaning in law, it must be given such meaning in construing the statute: *Harris v. Reynolds*, 13 Cal. 514; 73 Am. Dec. 600; *Buckner v. Real Estate Bank*, 5 Ark. 536; 41 Am. Dec. 105; but, in construing an act, the court ought to examine the history of the times so as to relieve from the mischief and accomplish the purpose of the act. The legislative intention, as collected from the whole act, must prevail over the literal import of particular terms, and control the strict letter of a statute, where an adherence to the strict letter would lead to absurdity, injustice, or contradictory provisions: *State v. Roby*, 142 Ind. 168; *Connecticut Mut. Life Ins. Co. v. Talbott*, 113 Ind. 373; 3 Am. St. Rep. 655.

RAILROADS—STREET RAILWAYS.—When the word "railroad"

is used in statutes, there is no definite rule of construction as to whether it includes street railroads, as it may or may not include them. The meaning of the word must depend upon the context, and the general intent of the statute in which it is used. The word "railroad," in its broadest signification, includes a street railroad. The terms "railway" and "railroad" are synonymous, and have no distinct and independent meaning in themselves. Hence, general authority to railroad companies to lease their property and franchises includes street railway, as well as steam railroad, companies: *Bloxham v. Consumers' etc. R. R. Co.*, 36 Fla. 519; 51 Am. St. Rep. 44. and note.

SHERWOOD v. POWELL.

[61 MINNESOTA, 479.]

LIBEL—PLEADING IN JUDICIAL PROCEEDING—PRIVILEGED COMMUNICATION.—In an action for libel, based on an allegation in a pleading in another action, the defendant cannot justify the defamatory allegation as a privileged communication, where it is apparent that it was wholly gratuitous, irrelevant, and immaterial; and it is alleged that it was well known by the defendant to be false and untrue, and that it was published without cause or justification, and with express malice.

Action for libel, based upon an answer by the defendant in a former action between the same parties. In the former action, the complaint was for money collected after a mutual dissolution of a copartnership under an agreement that the defendant therein should collect all moneys and pay over half to the plaintiff. The dissolution and agreement were admitted by the answer, but it also set forth alleged libelous matter as follows: "That plaintiff failed utterly to perform his contract of partnership with the defendant, but during the time aforesaid spent his time in consorting with idlers and people of abandoned character, and used the office of the partnership as a place of assignation in business hours during the temporary absence of defendant from said office."

Roger S. Powell, appellant pro se.

J. B. Arnold and Edmund Sherwood, for the respondent.

⁴⁸⁰ **COLLINS, J.** Appeal from an order overruling a general demurrer to a complaint in an action for libel. The language complained of was set forth, used, and published of and concerning this plaintiff in an answer interposed by defendant in a former action between these same parties.

Appellant contends that the alleged libelous matter was an absolutely privileged publication, because it was set forth and pub-

lished in a pleading in a judicial proceeding, and that the rule of law is, that under no circumstances can defamatory words published or spoken of a party in the course of such a proceeding be made ⁴⁸¹ the basis of an action for libel or slander. An efficient administration of justice requires that in the use of language much latitude must be given in legal proceedings, but we cannot indorse so broad a rule, although it is not without support in the books.

It seems to be well established in the English courts that counsel, parties, and witnesses are given free rein in pending litigation, and are absolutely exempted from liability to an action for defamatory words spoken or published of a party in the course of legal proceedings. A rule which tolerates and encourages gratuitous, immaterial, and malicious attacks upon a litigant, and excuses and justifies them, simply affords an opportunity for evil-disposed persons to vilify and calumniate, under the guise of an honest effort to secure the proper administration of justice. The doctrine which prevails abroad has not commended itself to the judiciary of this country, and it has been qualified by the American courts so that statements, verbal or written, made in the course of judicial proceedings, must at least be pertinent and material to the case, to be privileged: *Hoar v. Wood*, 3 Met. 193. This qualified rule was subsequently approved in *Rice v. Coolidge*, 121 Mass. 393; 23 Am. Rep. 279; *McLaughlin v. Cowley*, 127 Mass. 316. See, also, *White v. Nicholls*, 3 How. 266; *Gilbert v. People*, 1 Denio, 41; 43 Am. Dec. 646; *Hyde v. McCabe*, 100 Mo. 412; *Whitney v. Allen*, 62 Ill. 472.

Referring to some expressions in the cases last cited, as to the effect of a bona fide belief, based on reasonable grounds, in the pertinency and materiality of a statement or allegation in an affidavit or pleading, it is well to say that we are now considering a demurrer to a complaint from which it is apparent that the alleged libel was wholly gratuitous, irrelevant, and immaterial, and in which complaint it is averred that the libelous matter was well known by defendant to be false and untrue, that it was published without cause or justification, and with express malice toward this plaintiff. We have stated that the allegation or paragraph in the answer complained of was irrelevant and immaterial. The statements did not relate or pertain to any matter in issue between the parties, and, although purporting to be pleaded as a counterclaim, it utterly failed to state even the substance of a cause of action against the plaintiff.

Order affirmed.

LIBEL—ACCUSATIONS IN PLEADING—PRIVILEGED COMMUNICATION.—Parties to an action are privileged from suit for accusations made in their pleadings: Note to *Gardemal v. McWilliams*, 26 Am. St. Rep. 198; *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. 174.

HALE v. LIFE INDEMNITY & INVESTMENT COMPANY.

[61 MINNESOTA, 516.]

EVIDENCE—PRESUMPTION—SUICIDE.—The love of life is ordinarily a sufficient inducement for its preservation, and, in the absence of proof that death resulted from other than natural causes, suicide will not be presumed.

EVIDENCE—PRESUMPTION—SUICIDE.—When death may have resulted from accident, mistake, or suicide, it should not be presumed to be on account of suicide, but rather from accident or mistake.

INSURANCE, LIFE—DEATH BY SUICIDE—EVIDENCE.—In an action upon a life insurance policy, it is reversible error for the court to take from the jury the question of death by suicide, upon the ground that there is not sufficient evidence to go to the jury upon that issue, where it is shown that, up to the time of taking morphine, the deceased was in perfect health, that he was in the prime of life, that he died suddenly, and that his life was insured for a large amount, and in which his creditor claimed an insurable interest. The jury should also consider, as bearing upon this question, the financial condition of the deceased, the business in which he was engaged, and whether there was any reason for his taking his own life, if he did do so.

INSURANCE, LIFE—DEATH AS QUESTION FOR JURY.—If there is any evidence showing that the death of an insured person may have resulted from negligence, accident, or suicide, it is for the jury to say how it occurred.

INSURANCE, LIFE—DEFENSE OF SUICIDE—BURDEN OF PROOF.—If the defense of suicide is set up to an action on a policy of life insurance, the burden of proving it is upon the defendant, especially where there is no concession on the part of the plaintiff that the insured came to his death by any other than a natural cause.

Action upon a life insurance policy. The plaintiff obtained a verdict for ten thousand four hundred and ninety dollars, and from a judgment thereon the defendant appealed.

James O. Pierce, for the appellant.

Larrabee & Gammons, for the respondent.

518 BUCK, J. This action is brought upon a life insurance policy issued by the defendant to James B. Rouse, and in which the plaintiff claimed an interest. The policy contained this warranty on the part of the insured, viz: "I warrant and agree that I will not die by my own voluntary act during the said period of two years." One defense was, that the insured did, within said

period, die by his own voluntary act, by taking internally sufficient morphine to cause his death, with intent so to do. The policy was issued to Rouse on September 7, 1892, and he died November 25, 1893. He was thirty-two years of age at the time of the insurance, and was the general agent of the Hartford Life & Annuity Insurance Company residing at Minneapolis.

The only material question which we deem it necessary to discuss, and that briefly, is what the defendant denominates the "main issue of the case," viz., the question of the voluntary self-destruction of Rouse. When the parties rested, the court took from the jury this question of death by suicide, and held that there was not sufficient evidence to go to the jury upon that issue. In this we are of the opinion that the court below erred.

The defendant contends that the evidence is conclusive that death ⁵¹⁹ was caused solely by morphine poisoning, while the respondent contends that "Rouse was suffering from the early stages of meningitis, then came the morphine, and the two together produced death." There is strong evidence tending to prove that Rouse died solely from the effect of morphine poisoning. But, if this is true, in order that the defendant can succeed, it must also show that Rouse took the poison with suicidal intent. The love of life is ordinarily a sufficient inducement for its preservation, and, in the absence of proof that death resulted from other than natural causes, suicide will not be presumed. "When the dead body of the assured is found under such circumstances, and with such injuries, that the death may have resulted from negligence, accident, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind—a gross moral turpitude, not to be presumed in a sane man; and whether it was from one or the other, if there is any evidence bearing upon the point, it is for the jury, as, for instance, whether the taking of an overdose of laudanum was intentional, or by mistake": 1 May on Insurance, sec. 325. The rule is not whether there is a preponderance of evidence one way or the other, but whether there is any evidence fairly and reasonably tending to break the presumption against suicide.

In this case, there was sufficient evidence to go to the jury as to whether Rouse took the morphine as a relief against physical suffering or sickness, or with suicidal intent. Its weight, under proper instructions from the court, was for the jury. As bearing in a greater or less degree upon this question, they should have been permitted to consider the fact that up to the time of taking the morphine he was in perfect health, that he was in the

prime of life (only thirty-three years old), that he died suddenly, his financial condition, that his life was insured for a large amount, in which his creditor claimed an insurable interest, and to consider the business in which he was engaged, and also consider the question of whether there was any reason for his taking his own life, if he did so.

We think that it is a presumption of law that when death may have resulted from accident, mistake, or suicide, it should not be presumed to be on account of suicide, but rather from accident or mistake, and that in this case the character of the evidence is such that the defendant should not have been debarred from submitting ⁵²⁰ it to the jury upon the question of suicide by Rouse. Of course, as the suicide is set up by the defendant, the burden of proving it as a defense rests upon it, especially as there is no concession on the part of the plaintiff that Rouse came to his death by any other than a natural cause.

The order denying the motion for a new trial is reversed.

INSURANCE, LIFE—SUICIDE—EVIDENCE.—Nothing appearing to the contrary, the legal presumption is, that a man died from a natural cause, and not from an act of self-destruction. An insurer who sets up the cause of death as suicide has the burden of proof to show that death was an act of self-destruction: See monographic note to *Meadows v. Pacific Mut. Life Ins. Co.*, 50 Am. St. Rep. 441, on evidence of cause of death in accident insurance; *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189; 49 Am. St. Rep. 348. Where it appears, from the facts, that death resulted either from accident or suicide, the legal presumption is against suicide: Note to *Streeter v. Western Ins. Co.*, 8 Am. St. Rep. 885; note to *Meadows v. Pacific Mut. Life Ins. Co.*, 50 Am. St. Rep. 441. If suicide is relied upon as a defense to an action to recover on a life insurance policy, and circumstantial evidence alone is relied upon, it must be of such character as to exclude, with reasonable certainty, any other cause of death: *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189; 49 Am. St. Rep. 348.

BAMKA v. CHICAGO ST. PAUL, MINNEAPOLIS AND OMAHA R. R. COMPANY.

[61 MINNESOTA, 549.]

ESTOPPEL—JUDGMENT.—To make a judgment a technical bar, it must appear to have been between the same parties.

JUDGMENT—RES JUDICATA—RULE AS TO SAME PARTIES.—The general rule that the judgment of a court having jurisdiction of the subject matter, of the parties, and the process, and rendered directly upon the point in question, is conclusive between the same parties, is not applicable when the same person, though a party in both suits, is such in different capacities, occupying in one a

distinctively representative position, such as an administrator, or general guardian, or guardian ad litem, and in the other a position as an individual.

JUDGMENT—RES JUDICATA—ACTION BY FATHER FOR INJURIES TO CHILD.—A judgment for defendant, in an action by a father to recover in his own name damages for an injury to his minor child, does not bar the father's right to maintain an action, in his individual right, to recover for loss of services, for expenses incurred, and for compensation for care and trouble sustained, by him, growing out of injuries to his minor son, alleged to have been the result of defendant's carelessness and negligence, as the former action is solely for the benefit of the child, and damages sustained by a parent by reason of the injuries, such as loss of services, are not recoverable in such an action.

Action to recover for loss of services. The defendant objected to the introduction of evidence on the ground that the matters involved in, and the subject matter of, the action had been determined and adjudicated in a former action. This objection was sustained by the court, and the action was dismissed. The defendant appealed from an order granting the plaintiff's motion for a new trial.

J. L. Washburn, Thomas Wilson, and S. L. Perrin, for the appellant.

J. W. Reynolds, for the respondent.

551 **COLLINS, J.** Plaintiff brought this action to recover for loss of services, for expenses incurred by him in procuring medical attendance, and for compensation for the care and trouble sustained by him, growing out of certain injuries to his minor son, alleged to have been the result of the carelessness and negligence of defendant's servants when operating one of its trains. Prior to its commencement he had brought suit against defendant, under the provisions of the General Statutes of 1894, section 5164, to recover for the injuries sustained by the minor; the case had been brought to trial; a verdict rendered for defendant, on which a judgment had been duly entered and docketed; and no appeal had been taken therefrom. The single question is, whether the judgment in the first action is a bar to plaintiff's right of recovery in this.

The statute under which the former action was brought authorizes a father, or a mother, in certain contingencies, to maintain an action to recover damages for injuries sustained by a minor child. Damages sustained by a parent by reason of the injuries, such as loss of services, are not recoverable in such an action: *Gardner v. Kellogg*, 23 Minn. 463. The action is solely for the benefit of the child, and the plaintiff parent has no in-

terest in the amount recovered. Such plaintiff simply holds the amount of the recovery in trust; and for the purpose of protecting the real party in interest, and that the trust may be enforced, the equitable powers of the court are ample, and, if necessary, will be exercised. The judgment in such an action is a bar to any subsequent proceedings by the child, or in its interest: *Lathrop v. Schutte*, 61 Minn. 196.

To make a judgment pleaded in bar a technical bar, it must appear to have been between the same parties. And the general rule that the judgment of a court having jurisdiction of the subject matter, ⁵⁵² of the parties, and the process, and rendered directly upon the point in question, is conclusive between the same parties, is not applicable when the same person, though a party in both suits, is such in different capacities—in the one, occupying a distinctively representative position, such as an administrator, or as a general guardian, or as a guardian ad litem; in the other, as an individual. For in an action brought by a person as an administrator, or as a guardian, general or special, he is not a party, properly speaking, although he is nominally. The real party is the estate he may represent as administrator, or the minor in whose behalf he as guardian prosecutes the action. In another suit brought to enforce an individual demand or right, he, in contemplation of law, is a distinct person, and a stranger to the prior proceedings and judgment: 1 *Hermann on Estoppel*, sec. 94, and cases cited; *Furlong v. Banta*, 80 Hun, 248; 29 N. Y. Supp. 985; *Guy v. Lumber Co.*, 93 Tenn. 213; *Wilton v. Middlesex R. R. Co.*, 125 Mass. 130; *Karr v. Parks*, 44 Cal. 46; *Bradley v. Andrews*, 51 Vt. 525; *McNamara v. Logan*, 100 Ala. 187. No real distinction in respect to the representative capacity in which actions are brought by administrators, general guardians, or guardians ad litem, and by parents in the interest of their minor children, can be pointed out. The judgment against the plaintiff in the former action, brought under the statute, was not a bar to a recovery in this.

Order affirmed.

JUDGMENT—RES JUDICATA—SAME PERSON IN DIFFERENT CAPACITIES.—That a former adjudication may constitute an absolute bar to a subsequent action, there must be, as between the two actions, identity of persons, of subject matter, and of cause of action: *Wright v. Griffey*, 147 Ill. 496; 87 Am. St. Rep. 298; but as a general rule, a judgment for or against a person in one capacity is not a bar to a suit by or against him in another capacity: *Note to Stockton Bldg. etc. Assn. v. Chalmers*, 7 Am. St. Rep. 178.

JUDGMENT—RES JUDICATA—ACTION BY FATHER FOR INJURIES TO CHILD.—For a negligent injury to a minor child, the

father may maintain an action for loss of services, expenses incurred etc., though the right of action for the personal injury remains in the child: *Note to Lawyer v. Fritcher*, 27 Am. St. Rep. 528; *Horgan v. Pacific Mills*, 85 Am. St. Rep. 506; *Rogers v. Smith*, 17 Ind. 323; 79 Am. Dec. 483. The respective rights of action of the father and child are entirely distinct, and a recovery by the child is no bar to a subsequent action by the father for his loss of service. On the other hand, a recovery by the parent for loss of service during minority is no bar to a subsequent action by the child for his own loss after majority, where the disability continues. For the personal injury and suffering of a child occasioned by a tort committed upon it, the father cannot recover any damages, but the child must sue therefor by his guardian or next friend: See monographic note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 624, on actions for injuries to relatives. Even where such injury results in death, a recovery by the father for loss of service of his son before death, and expenses, is no bar to his action as administrator for the injury caused by the death: *Note to Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 637.

ACTION BY PARENT FOR INJURY TO MINOR CHILD.—A statute authorizing a father to maintain an action in his own name to recover damages for an injury to his minor child, in all cases where at common law such an action may be maintained in behalf of such minor, does not violate the fourteenth amendment to the constitution of the United States, as it deprives neither the defendant nor the minor child of his property. The Minnesota statute simply authorizes the father, or, in case of his death or desertion of his family, the mother, as the natural guardian of the child, to bring the action for its benefit. Whatever is recovered, if anything, belongs to the child, and the father holds it in trust for him. "The equitable powers of the court are ample for the protection of the child and the enforcement of the trust, and, in cases where there is reason to believe that the trust will not be faithfully executed, it may require security from the father before any money is paid to him. The judgment in such action by the parent is a bar to any subsequent action for the same cause prosecuted by the minor, by his guardian, general or ad litem, or by himself, when he reaches his majority": *Lathrop v. Schutte*, 61 Minn. 196, per *Start, C. J.*

CASES
IN THE
SUPREME COURT
OF
MISSOURI

HAMILTON BROWN SHOE COMPANY v. SAXBY.

[181 MISSOURI, 212.]

STRIKES—INJUNCTION AGAINST.—Persons may be prevented by injunction from attempting, by intimidation and threats of violence, to coerce employes to leave their work and join a strike. They may also be restrained from assembling for that purpose in the vicinity of the place where such employes work.

INJUNCTIONS—IRREPARABLE INJURY—VIOLATION OF CRIMINAL LAW.—If an act complained of threatens an irreparable injury to the property of an individual, its commission may be enjoined, although a violation of criminal law.

STRIKES—INJUNCTION AGAINST—TRIAL BY JURY.—An injunction may issue to restrain persons from attempting, by unlawful means, to compel employes to quit work and join in a strike, although the acts sought to be restrained, if committed, constitute a crime. The granting of such injunction does not take away the constitutional right of trial by jury.

John F. McDermott, for the appellants.

Silas B. Jones, for the respondent.

215 PER CURIAM. This is an appeal from the final judgment of the circuit court of the city of St. Louis on a demurrer to the plaintiff's petition, which is as follows: "Plaintiff states that it is a corporation duly organized under the laws of the state of Missouri, and is engaged in the manufacture of shoes in the city of St. Louis, Missouri, at Twenty-first and Locust streets in said city, at which place its factory for the purpose of its said manufacturing business is located. And ²¹⁶ plaintiff says that it has in its employ in said manufacturing business, in its factory

as aforesaid, between eight and nine hundred persons; that all of these persons are at work as operatives in some department or other of said factory; that of these employés, as aforesaid, a large number, to wit, about two or three hundred, are women and girls, and a large number, to wit, about two or three hundred are young persons, many of them not being of age, and the balance of said operatives are adult men; that all of these persons are engaged in earning a livelihood at the business of this plaintiff aforesaid, and, on the other hand, this plaintiff requires the service of these persons to successfully carry on its business of manufacturing shoes as aforesaid. Plaintiff further states that all of these employés now in the employ of this plaintiff are desirous of continuing in the service of the plaintiff in its said business as aforesaid. Plaintiff further states that ten or fifteen days ago some of its employés, including all the defendants herein, except the defendants Thomas Beaty and P. J. McGarry, went out of the employ of this plaintiff on what is commonly called a 'strike,' claiming to have some grievance against this plaintiff, and which this plaintiff says was without any reasonable ground to rest upon, and thereupon attempted to inaugurate among the employés of this plaintiff what is commonly called a 'strike'; that thereupon the said defendants, lately employés of this plaintiff, together with the defendants Beaty and McGarry and divers other persons, unlawfully and wrongfully combined and confederated together to terrorize, and thereby, by intimidation and threats, to prevent the other employés of this plaintiff from peaceably or otherwise prosecuting their work in plaintiff's factory; that thereupon all of the defendants hereto, together with their associates and confederates,²¹⁷ whose names are at this moment unknown to this plaintiff, began and have constantly pursued a course of threats of personal violence and intimidation and persuasion, for the purpose, by means of such intimidation and threats and fear, to prevent the other employés of this plaintiff from peaceably or otherwise prosecuting their work in plaintiff's factory; that all of the said defendants thereto, together with divers and sundry other persons, who are their associates and confederates, have constantly hung about the plaintiff's said factory at the place aforesaid, and upon the streets in close proximity, for the purpose of picketing the premises of this plaintiff, and, by putting the employés of this plaintiff in fear of bodily injury, to thereby keep them from continuing their employment with this plaintiff, and also for the purpose of preventing other persons from entering the employ of the plaintiff; and the said defendants and their associates and confederates, as

a part of their policy of threats and intimidation, and for the purpose of carrying on their unlawful combination, have gone to the homes of divers of the employes of this plaintiff at night-time, and then and there undertaken to induce, by persuasion and by intimidation and threats, the employes of this plaintiff from further prosecuting their work in plaintiff's said factory. And the plaintiff charges that the said defendants therein named, and their associates and confederates, have now been for a number of days, and are now, by the use of threats of personal violence, intimidation, and other unlawful means, have been, and are now, undertaking to prevent the employes of this plaintiff from prosecuting their ordinary work, and are endeavoring to induce them, by the unlawful means aforesaid, to quit the employment of this plaintiff. And plaintiff says that by reason of the fact that a great many of its employes are women and girls and young persons, that the ²¹⁸ defendants aforesaid and their associates and confederates have succeeded in exciting in the minds of the plaintiff's said employes, or many of them, fear for their bodily safety, to such an extent that they cannot happily, as they have a right to do, prosecute their ordinary work; and plaintiff says, by reason of the premises, it cannot peaceably and successfully prosecute its said business. And plaintiff says it is without remedy at law, and can only be fully protected and relieved in a court of equity. Plaintiff therefore prays that the defendants, their associates and confederates, be enjoined by a temporary order of injunction, to be made final upon the hearing of this cause, issued out of this court, from in any manner interfering with the employes of this plaintiff now in the employ of the plaintiff, and from and in any manner interfering with any person who may desire to enter the employ of this plaintiff, by the use of threats, personal violence, intimidation, or other means calculated to terrorize or alarm the plaintiff's employes, in any manner or form whatever, and that said defendants and their associates and confederates aforesaid be restrained by the order of this court from undertaking by the use of the means aforesaid, to induce or to cause any of the employes of this plaintiff to quit the employment of this plaintiff, and that the defendants aforesaid, and their associates and confederates, be enjoined from congregating or loitering about the premises of this plaintiff at the place aforesaid, and that they be required by the injunction of this court to go about their ordinary business, and to abstain from in any way interfering with the business of this plaintiff, and for such other and further and general relief as may to the court appear proper in the premises." ²¹⁹ The case was tried before the Hon. L. B.

Valliant, one of the judges of that court, who, on overruling the demurrer, delivered the following opinion:

"The amended petition states in substance that the plaintiff conducts a large shoe manufactory in this city, and has in its employ some eight or nine hundred persons, all of whom are earning their living in plaintiff's employment, and are desirous of so continuing; that the defendants, except two of them, were lately in plaintiff's employ, but have gone out of the same, on a strike, and are now, with the other two defendants, engaged in an attempt to force the other employes of plaintiff to quit their work and join in the strike, and that, to accomplish this purpose, they are intimidating them with threats of personal violence; that among the plaintiff's employes who are thus threatened are about three hundred women and girls and two or three hundred other young persons; that the effect of all this on the plaintiff's business, if the defendants are allowed to proceed, would be to inflict incalculable damage. Upon filing this amended petition, and the plaintiff's giving bond as required by law, a temporary injunction issued, restraining the defendants from attempting to force the plaintiff's employes to leave their work by intimidation and threats of violence, or from assembling for that purpose in the vicinity of plaintiff's factory. The defendants have appeared by their counsel, and, by their demurrer filed, admit that all the statements of the amended petition are true; but they take the position that, even if they are doing the unlawful acts that they are charged with doing, still this court has no right to interfere with them, because they say that what they are doing is a crime, by the state law of this state, and that for the commission of a crime they ²²⁰ can only be tried by a jury in a court having criminal jurisdiction. It will be observed that the defendants do not claim to have the right to do what the injunction forbids them doing. Their learned counsel even quotes the statute to show that it is a crime to do so. But he contends that the constitution of the United States and the constitution of the state of Missouri guarantee them the right to commit crime, with only this limitation, to wit, that they shall answer for the crime, when committed, in a criminal court, before a jury, and that to restrain them from committing crime is to rob them of their constitutional right of trial by jury. If that position be correct, then there can be no valid statute to prevent crime. But that position is contrary to all reason. The right of trial by jury does not arise until the party is accused of having already committed the crime. If you see a man advancing upon another with murderous demeanor and a deadly weapon, and you arrest

him—disarm him—you have perhaps prevented an act which would have brought about a trial by jury, but can you be said to have deprived him of his constitutional right of trial by jury? The train of thought put in motion by the argument of the learned counsel for defendants on this point leads only to this end, to wit, that the constitution guarantees to every man the right to commit crime, so that he may enjoy the inestimable right of trial by jury.

“Passing now to the question relating to the particular jurisdiction of a court of equity, we are brought to face the proposition that a court of equity has no criminal jurisdiction, and will not interfere by injunction to prevent the commission of a crime. These two propositions are firmly established; and as to the first, that a court of equity has no criminal jurisdiction, ²²¹ there is no exception. As to the second, that a court of equity will not interfere by injunction to prevent the commission of a crime, that, too, is perhaps without exception, when properly interpreted, but it is sometimes misinterpreted. When we say that a court of equity will never interfere by injunction to prevent the commission of a crime, we mean that it will not do so simply for the purpose of preventing a violation of a criminal law. But when the act complained of threatens an irreparable injury to the property of an individual, a court of equity will interfere to prevent that injury, notwithstanding the act may also be a violation of a criminal law. In such case, the court does not interfere to prevent the commission of a crime, although that may incidentally result, but it exerts its force to protect the individual's property from destruction, and ignores entirely the criminal portion of the act. There can be no doubt of the jurisdiction of a court of equity in such a case. On this question, counsel have cited cases in which courts of equity have been denied jurisdiction to enjoin the publication of a libel, and in those opinions are to be found the general statement of the proposition above mentioned. But the law of libel is peculiar, and those cases turn upon that peculiarity. The freedom of the press has been so jealously guarded, both in England and in this country, that our law of libel is like no other law on the books. Our constitution provides that a man may say, write, and publish ‘whatever he will,’ being answerable only for the ‘abuse of liberty.’ Libel is the only act injurious to the rights of another which a man cannot, under proper conditions, be restrained from committing; and that is so because the constitution says he shall be allowed to do it, and answer for it afterward. ²²² Equity will not interfere when there is an adequate remedy at law. But

what remedy does the law afford that would be adequate to the plaintiff's injury? How would their damages be estimated? How compensated? The defendants' learned counsel cites us to the criminal statute, but how will that remedy the plaintiff's injury? A criminal prosecution does not propose to remedy a private wrong. And, even if there was a statute giving a legal remedy to plaintiff, it would not oust the equity jurisdiction. The legal remedy that closes the door of a court of equity is a common-law remedy. Where equity had jurisdiction because the common law affords no adequate remedy, that jurisdiction is not affected by a statute providing a legal remedy. What a humiliating thought it would be if these defendants were really attempting to do what the amended petition charges, and what their demurrer confesses—that is, to destroy the business of these plaintiffs, and to force the eight or nine hundred men, women, boys and girls who are earning their livings in the plaintiff's employ to quit their work against their will—and yet there is no law in the land to protect them. The injunction in this case does not hinder the defendants doing anything that they claim they have a right to do. They are free men, and have a right to quit the employ of plaintiffs whenever they see fit to do so, and no one can prevent them; and whether their act of quitting is wise or unwise, just or unjust, it is nobody's business but their own. And they have a right to use fair persuasion to induce others to join them in their quitting. But when fair persuasion is exhausted, they have no right to resort to force or threats of violence. The law will protect their freedom and their rights, but it will not permit them to destroy the freedom and rights of others. The same law which ²³³ guarantees the defendants in their right to quit the employment of the plaintiffs at their own will and pleasure also guarantees the other employes the right to remain at their will and pleasure. These defendants are their own masters, but they are not the masters of the other employes, and not only are they not the masters of the other employes, but they are not even their guardians. There is a maxim of our law to the effect that one may exercise his own right as he pleases, provided that he does not thereby prevent another exercising his right as he pleases. This maxim or rule of law comes nearer than any other rule in our law to the Golden Rule of Divine authority: 'That which you would have another do unto you, do you even so unto them.' Whilst the strict enforcement of the Golden Rule is beyond the mandate of a human tribunal, yet courts of equity, by injunction, do restrain men who are so disposed from so exer-

cising their own rights as to destroy the rights of others. The demurrer to the amended petition is overruled."

The law applicable to the case is so clearly stated in this opinion of the learned judge that to add anything to it would be a work of supererogation. We adopt it as the opinion of this court, and affirm the judgment.

All concur.

INJUNCTIONS AGAINST STRIKES.—Discharged union workmen will be restrained by injunction from gathering about their former employer's place of business, and from following to and from their work nonunion workmen subsequently employed by him, and from gathering about the boarding-house of such workmen, or in any manner interfering with them by means of threats, menaces, intimidation, ridicule, or annoyance on account of their working for such employer: *Murdock v. Walker*, 152 Pa. St. 595; 34 Am. St. Rep. 678: An injunction will issue to prevent the making and carrying of banners in front of complainant's place of business for the purpose of preventing workmen from entering into or continuing in his employ: *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689, and note. See, also, the case of *Longshore Printing Co. v. Howell*, 26 Or. 527; 46 Am. St. Rep. 640.

INJUNCTIONS AGAINST CRIMINAL ACTS.—The fact that an act complained of has been made criminal by statute does not deprive a court of equity of the power to enjoin its commission or continuance: *People's Gas Co. v. Tyner*, 131 Ind. 277; 31 Am. St. Rep. 433. This question is the subject of the monographic note to *Creighton v. Dahmer*, 35 Am. St. Rep. 670-681.

SCHUFELDT v. SMITH.

[131 MISSOURI, 280.]

CORPORATIONS—OFFICERS—LOANS BY—RIGHT TO SECURE.—Directors or officers of a corporation may loan it money or indorse for it, and have the same right to collect the debt or secure themselves as is accorded to other creditors of the corporation.

CORPORATIONS, INSOLVENT—PREFERENCES BY, TO OFFICERS.—A corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another, and may so prefer its stockholders and officers who are bona fide creditors.

CORPORATIONS INSOLVENT—PREFERENCES TO OFFICERS—PRESUMPTION—BURDEN OF PROOF.—The act of the directors of an insolvent corporation, or of a corporation in failing circumstances, in voting themselves preferences, is prima facie fraudulent, and the burden of proof is upon them to show that their debt is bona fide.

Huston & Parrish, S. S. Brown, and H. K. White, for the appellants.

Dowe, Johnson & Rusk, Stauber & Crandall, W. P. Hall, and V. Pike, for the respondents.

²⁸³ MACFARLANE, J. This suit is to set aside a certain deed of trust, executed on the eighteenth day of March, 1893, by the James Walsh Mercantile Company, a business corporation, to defendant J. Francis Smith, as trustee, to secure its creditors in the order therein named. The deed was executed in pursuance of this resolution of the board of directors: ²⁸⁴ "Whereas, this corporation is unable to meet its obligations as they fall due, though its assets are much more than its liabilities, resolved, that, in order to more economically dispose of such portion of its assets as may be necessary to pay its debts than could be done if legal proceedings should be instituted, the corporation convey all its property, real, personal, and mixed, to J. Francis Smith, as trustee, with powers of sale and collection, and that such trustee pay: 1. Costs of the trust; 2. Debts preferred by the state laws of Missouri; 3. Obligations for borrowed money not secured by collateral; 4. Balance due on notes for borrowed money secured by collateral after application of collateral and their proceeds, and notes of other parties discounted by the company, after due attempt to collect from makers; 5. Other indebtedness of the company not disputed." The deed of trust was drawn in accordance with the resolution. The creditors of the various classes, with the amounts due each, were specified, and directions were given the trustee to pay the debts in the order named. The debts of the third class, as specified in the mortgage, aggregated about thirty-five thousand dollars, and those of the fourth class about fifty-six thousand dollars. The fifth class of creditors secured were the general mercantile creditors of the corporation. The debts of this class aggregated about thirty thousand dollars. Creditors of this class prosecute this suit. Pending the suit, defendant Smith was appointed receiver. The face value of the assets amounted to about three hundred thousand dollars, but, on account of depreciation, it was thought by the receiver that not more than one hundred thousand dollars could be realized on them. There would be, therefore, but little, if anything, to apply on the fifth class of debts. Under the deed of trust, power of sale ²⁸⁵ was given the trustee, as also authority to collect the debts due the company. It was charged in the petition "that certain of the indebtedness in preferred classes 3 and 4 is the individual indebtedness of the officers and directors of said corporation, and was contracted for the purpose of protecting the individual liability of said officers and directors." Defendant Smith, by answer, admitted the execution and delivery of the deed of trust, and that, by virtue of the powers thereby conferred, he took into his possession all the property so assigned to

him, with a view of administering the same. The other allegations of the petition were in substance denied. The only evidence offered on the trial was directed to the question of the solvency of the corporation at the time the deed of trust was made. The records of the corporation showed that James Walsh was its president, Charles McGinn, vice-president, and John F. Byrne, secretary. It also appears that these were the only directors who passed the resolution. The deed of trust was signed by James Walsh, as president, and attested by John F. Byrne, as secretary. One note, placed in class 3, as described in the deed of trust, was dated January 25, 1883, and was "executed by the former firm of James Walsh & Co. in the sum of twelve thousand dollars, payable to Ferdinand Lutz, of St. Joseph, Missouri, payment of which has been assumed by said party of the first part." Another note of the same character, dated in 1889, for two thousand dollars, was also described in the deed of trust. In the same class were two notes by the corporation to James Walsh, as administrator of the Conrad estate. It was not shown by the evidence that the creditor James Walsh was the same person as James Walsh ²⁸⁶ the president and director of the corporation; nor was any evidence offered explanatory of the assumption by the corporation of the note of James Walsh & Co. The case was argued by counsel on both sides, and the identity of James Walsh in each capacity has been assumed. No evidence was offered tending to prove actual bad faith, either in the execution of the deed, or in creating the debts secured by it. The court found that on the eighteenth day of March, 1893 (the date of the deed of trust), the defendant James Walsh Mercantile Company was insolvent, and from that date "ceased to be a going concern." Upon this finding, a decree was entered setting aside the deed of trust, from which defendants appealed.

Most of the questions involved in this record have in some recent cases in this court been given careful and exhaustive consideration. The investigations given the subject have been more labored and thorough on account of apparent want of harmony in some of the previous decisions of this court, as well as on account of the diversity of opinion in other jurisdictions. The conclusions reached by each of the divisions, which received the concurrence of all the members, may be briefly given in the language of the syllabi prepared by the judge who wrote one of the opinions, as follows: "A corporation in failing circumstances may prefer one creditor to another, in discharging its obligations, if such preference is made in good faith, while the property of the company remains in its possession, unaffected by liens or by

process of law. Mere insolvency of a corporation does not of itself transform its assets into a trust fund for the equal benefit of all its creditors": *Alberger v. National Bank*, 123 Mo. 313; *Slavens v. Cook Drug Co.*, 128 Mo. 341; ²⁸⁷ *Waggoner-Gates Milling Co. v. Ziegler-Zaiss Commission Co.*, 128 Mo. 473. In the case last cited, which was decided by Division Two of this court, it was also held that preference in the same circumstances may be given to a creditor of a corporation who is secured by the indorsement of some of its directors. It would seem to follow logically from these decisions that a preference may be made to a director for a debt directly due him from the corporation, unless it would be defeated by his own act in voting himself the preference.

But it is insisted with much earnestness, and argued with great ability, that the directors had no power to bind the corporation to an agreement made with themselves, and in which they had a personal interest, and that, therefore, the resolution of the board of directors authorizing preferences to be given the members thereof, over other creditors, and the deed of trust executed in pursuance thereof, were absolutely void. This contention must rest upon one of two theories—either that the directors of a corporation are trustees for its creditors, and its assets constitute a trust fund which they must apply ratably toward the satisfaction of all the debts, or that such a transaction is, upon its face, constructively fraudulent. As has been seen, the so-called "trust fund theory," as applied to a corporation, while dominion over its property is retained, is not recognized in this state as being sound. Nothing additional need be said on that subject. The board of directors are undoubtedly trustees for the corporation and stockholders, and when acting for them, are bound to exercise the utmost good faith. Any attempt in dealing with its property or affairs to secure themselves personal advantages over other stockholders ²⁸⁸ should, at least, be subject to the most rigorous scrutiny: *Hill v. Rich Hill etc. Co.*, 119 Mo. 9, and cases cited.

But it cannot be said, as a correct proposition of law, that officers of a corporation cannot themselves and in their own names contract with it. To so hold would virtually deny to corporations the credit upon which so much of the business of the country is transacted, and which is so essential to success. If the stockholders and officers of corporations are not permitted to advance money to them, or to indorse for them, without subjecting themselves to such disadvantages, they would be deprived of their most valuable source of credit. A corporation naturally looks to those interested in its affairs for accommodations. If directors can lend the corporation money, or indorse for it, they should

certainly have the same right to collect the debts or secure themselves as is accorded to other creditors. The cases cited abundantly show that a corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another. A mortgage, then, giving such preference, is not constructively fraudulent. Neither the corporation nor the other stockholders are injured by the preference given. To defeat them, actual fraud should be shown. The honest debts all stand, and should stand, on equal footing. All the creditors should have equal rights to enter in the race of diligence. The fact that the race may be unequal should not deprive the winner of his reward. An individual debtor can prefer his family, his neighbors, and his friends. If the preferred debt is honest, the preference cannot be impeached, though the wife of the debtor secure the advantage: *Hart v. Leete*, 104 Mo. 338; *Riley v. Vaughan*, 116 Mo. 176; 38 Am. St. Rep. 586. No reason can be seen ²⁸⁹ why a corporation may not also prefer its friends. There is no more equity in allowing an individual debtor to prefer his creditor, wife, or children than in allowing a corporation to prefer its stockholders and officers. To permit equities to control would defeat all preferences. While the owner of property retains the power of its disposal, he may apply it to the payment of any honest debt, is the rule upon which the right to make preferences among creditors rests. The rule should apply as well to corporations as to individuals, and any change should be made by the legislature, and not by the courts. If the debt is an honest one, and the corporation had the power to contract it, it has the right to pay or secure it, and no fraud can be imputed to it from the fact that it is paid or secured in preference to another. "It may be conceded," said Judge Taft in a recent case, "that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny; and places the burden upon the preferred director of showing, beyond question, that he had a bona fide debt against the corporation; but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go by favor. And, as an individual may prefer among his creditors his friends and relatives, so a corporation may prefer its friends": *Brown v. Grand Rapids etc. Furniture Co.*, 58 Fed. Rep. 292. See, also, *Worthen v. Griffith*, 59 Ark. 562, 43 Am. St. Rep. 50, and cases cited.

We do not think, therefore, that the deed of trust is construc-

tively fraudulent for the reason that it gives preferences to a director of the corporation. When the ²⁹⁰ right of the corporation to give preferences to any of its creditors is conceded, the logical conclusion follows that it can give them to any creditor who holds an honest debt against it, though he be an officer or stockholder. This conclusion is in accord with the declaration of Sherwood, J., in a recent case. He says: "A corporation, within the scope of the purposes for which it was incorporated, may do any act in furtherance of those purposes which an individual in similar circumstances might do, and, though insolvent, may prefer some creditors to others, even though such creditors are among the directors of the corporation": *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 87. While the directors of a corporation do not sustain the strict relation of trustees for its creditors, yet their duties to them and their relation to the corporation itself are such as impose upon them some of the obligations of trustees. In dealing with the corporation, they deal with themselves. They determine the liability of the corporation to themselves. They should, therefore, be required, in case they give themselves a preference over other creditors, to show that all their secured debts are fair, honest, and justly due them. This burden properly rests upon them. From this record it appears that the invalidity of the deed of trust in question was declared to result from the mere insolvency of the corporation at the time it was executed. The question of the bona fides of the debts of directors, who were given preferences, was not gone into on the trial. The act of the directors in voting themselves preferences would make the deed of trust prima facie fraudulent in fact, but not conclusively so as a matter of law. The court evidently did not decide the case upon the presumption of fact that the deed was fraudulent, which it might have indulged. ²⁹¹ We therefore reverse the judgment and remand the cause for a new trial.

Brace, P. J., and Barclay and Robinson, JJ., concur.

CORPORATIONS—INSOLVENT—PREFERENCES TO OFFICERS OR STOCKHOLDERS.—A corporation having the right to prefer its creditor by assignment may thus prefer a just debt due one of its directors: *Worthen v. Griffith*, 59 Ark. 562; 43 Am. St. Rep. 50, and note. A member of the governing body of an insolvent corporation, of which he is an unsecured creditor, cannot be made a preferred creditor in the disposition of its assets, but such assets must be distributed pro rata among all the unsecured creditors, unless valid liens have been created in favor of such member and then supervening insolvency cannot destroy or impair them: *Corey v. Wadsworth*, 99 Ala. 68; 42 Am. St. Rep. 29, and note. The assets of an insolvent corporation are trust funds for the benefit of all of its creditors in so far as to prohibit the disposition of its assets toward the pay-

ment of debts due its officers, or by securing such debts by creating liens so as to thereby give them a preference over other creditors: *La Grange Butter Tub Co. v. National Bank*, 122 Mo. 154; 43 Am. St. Rep. 558. This subject is fully discussed in the extended notes to *Conover v. Hull*, 45 Am. St. Rep. 833-835, *Beach v. Miller*, 17 Am. St. Rep. 800, and *Garrett v. Burlington Plow Co.*, 59 Am. Rep. 468-471.

BERBERET v. BERBERET.

[1st MISSOURI, 899.]

WILLS—WITNESSES—ATTESTATION.—Under a statute requiring a will to be attested by two or more competent witnesses, subscribing their names thereto in the presence of the testator, the signature of the witnesses in the proper and usual place, but without any attestation clause, is sufficient.

WILLS—EXECUTION.—A will dictated by a single woman of requisite age and sound mind, signed by her in the presence of two witnesses who subscribe their names in her presence, is legally and properly executed.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—The presumption in favor of the validity of a will is not overcome by the fact of unjust discrimination in favor of a son who is both a devisee and executor under the will and is shown to have had great influence over the testator in her business affairs, nor do these facts cast the burden of proof upon him to establish the validity of the will.

WILLS—UNJUST DISCRIMINATION.—A testator, having sufficient mental capacity, may make an unreasonable, unjust, and injudicious will; and a jury has no right to alter the disposition thus made of his property merely because justice is not done to his family connections.

L. Dawson and J. W. Ennis, for the appellants.

O. D. Jones, for the respondent.

⁴⁰¹ **BURGESS, J.** This is a suit to set aside the will of Eva Catharine Berberet, late of Knox county. For grounds for setting aside the will the petition alleges: 1. That the instrument of writing admitted to probate is not the last will of the deceased, Eva Catharine Berberet, for the reason that it is not signed, published, and declared by two attesting witnesses, upon its face or anywhere upon it, in writing, to be such will, and that it is not executed and attested by at least two witnesses, according to law; 2. That any or all proofs to show that the will was signed, attested, published, and declared in the presence of at least two attesting witnesses, and that they, at her request and in her presence, subscribed said writing as such witnesses, and intended so to do at the time, and that the said deceased was then of sound and disposing mind, was and is all within the statute of frauds and

perjuries, for the reason that it is not stated, in whole or in part, upon or in said writing; 3. That said writing was not understood by the deceased, that its provisions or terms were not of her framing or choosing, and that it was never explained or understood by her, and that she never so published or declared it to two or more attesting witnesses, etc; ⁴⁰² 4. That the said instrument of writing, purporting to be the will of the deceased, is in the handwriting of the executor therein appointed, who is alleged to be the principal devisee under its terms; that said writing was composed and framed by him, and the signature of said deceased procured thereto when she did not understand it, by reason of his undue influence over her. The petition then concludes with the usual prayer, asking to have the writing declared to be not the last will of the deceased, Eva Catharine Berberet. The answer of the defendants, after admitting the formal allegations of the petition as to the relation of the parties to the testatrix, denies that the proof necessary to establish said will is or was within the statute of frauds and perjuries, as alleged in the petition; denies that the instrument in question was dictated and framed by the executor therein named; denies that the deceased did not understand the provisions of said instrument; denies that the said executor therein named dictated, advised, or counseled the making of said will; but avers that the executor therein named wrote said will at the request of the deceased, who dictated every clause and provision thereof; that deceased was at the time of sound and disposing mind, and that she clearly understood the nature of the business in which she was engaged, and that the instrument of writing in question is the last will and testament of Eva Catharine Berberet, deceased, and that she understood the instrument in all its parts and provisions. A trial was had on the issues thus joined at the June term of the circuit court, which resulted in a verdict for the contestant. Defendants then filed motions for new trial and in arrest, which being overruled, they appealed.

⁴⁰⁸ The will bears date January 19, 1893, and Mrs. Berberet died the eighth day of February, 1894. She was at the time of her decease about seventy-two years of age, and was the mother and grandmother of the defendants, her children and grandchildren, eleven in all. The property disposed of by the will was of the value of about seven thousand dollars. Her husband died January 8, 1877, leaving an estate worth twenty thousand dollars, and she and her son Enos were executors of his will, Enos having the principal charge and management of the business. The estate was still unsettled at the time of her death. Enos and

Johanna, her daughter, testified that their mother requested him to write the will, and that he came to her house in Edina, where she had been living and keeping house with Johanna, to write it. Enos testified that it was written five or six weeks before it was taken by her to Joseph Hirner, Atlay J. Steffen, and Thomas Burk to get them to sign it as witnesses to its execution. He and Johanna also testified that the will was dictated by their mother, and explained by them to her. It was also shown by Johanna that, three weeks before the will was written, her mother insisted that she should write her will, that she declined to do so, and that she then asked Enos two or three times to write it before he consented. Mrs. Berberet could not read written English, but could printed. She could read written German, and spoke it fluently. The will was written by Enos, and admitted to be in his handwriting. It was signed by Mrs. Berberet in German, and Hirner and Steffen signed it, in her presence and at her request, as witnesses thereto. On behalf of contestant, it was shown that Mrs. Berberet and Enos, as executors of the estate of Enos Berberet, deceased, were entitled to commissions as such executors amounting to about sixteen hundred dollars, ⁴⁰⁴ which she had given to her said son by her will. Evidence was also introduced tending to show that Enos had influence over his mother in matters of business.

The writing in contest is as follows:

"In the name of the Lord my God, Amen. Know all men by these presents, that I, Eva Catharine Berberet, of the city of Edina, in the county of Knox, state of Missouri, being of sound and disposing mind, do make and publish this my last will and testament, hereby revoking all other wills.

"First. I desire that my funeral expenses and the services of a requiem mass and all debts that I may be owing be first paid, and a neat tombstone be placed over my grave, of the value of not less than seventy-five dollars and not more than one hundred and twenty-five dollars. The said one hundred and twenty-five dollars for a tombstone shall include a small tombstone to be erected over my sister Susan Fox's grave, now lying in the Catholic cemetery in Edina, Knox county, Missouri. The cost of said Susan Fox's tombstone is not to exceed over twenty-five dollars.

"Second. I give and bequeath the sum of fifty dollars to the person officiating as pastor of the St. Joseph Catholic Church, of Edina, Knox county, Missouri, to be used and applied to the benefit of said church—the money to be paid to the pastor of St. Joseph Church as soon as my executors may conveniently receive the same.

"Third. I desire that my said executors shall have masses read for the said Eva Catharine Berberet to the amount of seventy-five dollars—thirty-five dollars for high masses and forty dollars for low masses; the high masses to be said, one each year, on the day of each years of my death, and the low masses to be said one at the end of every four months. ⁴⁰⁵ My executors shall notify said parish priest of St. Joseph Church when to be read, and shall pay for same when each mass is read, in case of my death. If there can be a final settlement made before the amount of masses read, then, in the event, the money for said masses shall be paid over to my executors, to be used for said above masses.

"Fourth. I desire that my executors shall pay to my daughter Johanna G. C. Berberet the amount of two dollars per week for her services and attention given at my last sickness, to be paid to her as conveniently as my executor may receive the same.

"Fifth. I give and bequeath to each of my following named children the sum of sixty dollars each: To Nicholas J. Berberet, E. B. Berberet, Johanna G. Berberet, Emma McBride, wife of John McBride, Florence T. Miller, wife of John Miller—said amount to be paid as soon after my death as my executors may conveniently receive the same, as the above amounts has been made to me as presents heretofore from each.

"Sixth. I give and bequeath to my daughter Johanna G. C. Berberet all my wearing apparel, all my household and kitchen furniture, beds and bedding, all provisions and wood that I may depart this life possessed; and it is my desire that my said daughter Johanna G. C. Berberet shall take immediate possession of all of said property named in this clause after my death, and the same shall not be included in the inventory of my estate.

"Seventh. I give and bequeath to my son John W. Berberet the sum of fifty dollars, to be paid to him by my executor when a final settlement can be made of my estate, both real and personal. If the whereabouts of my son John W. Berberet cannot be found at the time of my final settlement, then the said fifty dollars shall be paid equally to his children. The said ⁴⁰⁶ sum of fifty dollars shall be the full and complete share of my said son, John W. Berberet, in and to all my estate, both real and personal.

"Eighth. I give and bequeath to my son Michael J. Berberet the sum of one hundred dollars, to be paid to him by my executors when a final settlement can be made of my estate. Said sum, one hundred dollars, shall be the full and complete share of my said son, Michael J. Berberet, in and to all my estate, both real and personal.

"Ninth. I give and bequeath to my son George W. Berberet the sum of one hundred dollars, to be paid to him by my executors when a final settlement can be made of my estate. Said sum, one hundred dollars, shall be the full and complete share of my said son, George W. Berberet, in and to all my estate, both real and personal.

"Tenth. I give and bequeath to the heirs of Elizabeth J. Reis, my daughter, now deceased, the sum of forty dollars, to be paid to them by my executors when a final settlement can be made of my estate. Said sum of forty dollars shall be the full and complete share of my said daughter, Elizabeth Reis, now deceased, in and to all my estate, both real and personal.

"Eleventh. I give and bequeath to the heirs of Mary C. Reis, my daughter, now deceased, the sum of forty dollars, to be paid to them by my executor when a final settlement can be made of my estate. Said sum of forty dollars shall be the full and complete share of my said daughter, Mary C. Reis, now deceased, in and to all my estate, both real and personal.

"Twelfth. I give and bequeath to my son E. B. Berberet all fees and commissions arising out of and due me, at present and future, by reason of my being coexecutor, with my son E. B. Berberet, of my late husband, Enos Berberet, deceased, estate; and I ⁴⁰⁷ further agree that, in case there has been, or may hereafter be, any losses of money or property in the administration of the estate of Enos Berberet, deceased, by myself and my said son, E. B. Berberet, the whole of the same shall be paid out of my money or property belonging to my estate, so that my said son, E. B. Berberet, shall not lose or be compelled to pay any part of the same, and the remainder of my said estate, not herein and before distributed, shall all be held subject to the payment of any such deficiency.

"Thirteenth. I give and bequeath to my children, Nicholas J. Berberet, E. B. Berberet, Franklin J. Berberet, Johanna G. C. Berberet, and Emma A. McBride, wife of John McBride, and Florence T. Miller, wife of John Miller, in equal parts, share and share alike, all the balance of my real and personal property, of my estate, of which I may depart my life possessed of; subject, however, as to the several legacies and sums and conditions herein and before mentioned and described in the above will.

"Fourteenth. This includes all clauses in said will. It is my strict request, if any of my said children or heirs shall decline or refuse to abide under my said will and testament, then, in that event, they shall receive only the sum of five dollars, and shall

thereafter be excluded from my said will and my real and personal property.

"I hereby appoint my son E. B. Berberet my executor to execute and carry out the intention of this my last will and testament.

"In witness whereof, I hereby set my hand and affix my seal, this 19th day of January, 1893.

"[In German.] EVA CATHARINE BERBERET. [Seal]

"Joseph Hirner. [Seal]

"Atlay J. Steffen. [Seal]

"Thomas Burk. [Seal]"

⁴⁰⁸ Plaintiff's insistence is, that the writing in contest is not the will of Eva Catharine Berberet, and was improperly admitted to probate as such, because not executed according to law, in that it has no attesting clause, and does not show on its face the character in which Steffen and Hirner signed it, whether or not as attesting witnesses, within the meaning of section 8870 of the Revised Statutes of 1889, in regard to the manner in which such instruments are required to be executed. That section reads as follows: "Every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator." The statute says the will shall be "attested by two or more competent witnesses subscribing their names thereto." It does not say that the word "Attest" shall be written on, or at the conclusion of, the will, or that there shall be written thereon anything whatever other than the names of the attesting witnesses. At common law, attestation of a will was not necessary. That requirement in order to its execution is purely statutory. Under a statute of Massachusetts, which requires a will to "be attested and subscribed in the presence of the testator by three or more competent witnesses" it was held, by the supreme court of that state, in a case where the subscribing witnesses had signed their names in the usual place for the signatures of witnesses, but without any attestation clause, to be a compliance with the statute: *Ela v. Edwards*, 16 Gray, 91. The court says: "The single requirement of the statute is, that the instrument 'be attested and subscribed in the presence of the testator by three or more witnesses.' Even as to this, though it be essential that the facts be so established by the ⁴⁰⁹ evidence, yet neither the statute nor the decisions of the courts require that it be recited in the form of an attestation clause." In *Roberts v. Phillips*, 4 El. & B. 450,

it is said: "It never has been held that a testimonium clause is necessary under this statute, or that the witnesses should be described as witnesses on the face of the will. Nothing more is required than that the will should be attested by the witnesses, i. e., that they should be present as witnesses, and see it signed by the testator, and that it should be subscribed by the witnesses in the presence of the testator, i. e., that they should subscribe their names upon the will in his presence." In the case of Fry's Will, 2 R. I. 88, there was no attestation clause other than the word, "Witness." One of the subscribing witnesses having died, upon proof being made of the handwriting of the subscribing witness and of the testator, it was held to be prima facie evidence that all the requirements of the statute had been complied with. To the same effect is *Jackson v. Christman*, 4 Wend. 277. The evidence conclusively showed that the paper was drawn up by Enos Berberet, one of the sons of the testatrix, at her request; that she dictated it; that it was then explained to her by him; that she went to A. J. Steffen and asked him if he should sign her will and testament, and he told her that he would; that she then went off, and in about three weeks came again into his store and asked him to sign it; that she then went out and came back with Mr. Hirner, and signed the will in their presence—she signing it first, Hirner next, and the witness last, all in the presence of each other. Joseph Hirner testified that she called on him, in his store, in the winter, and asked him if he would come up to Mr. Steffen's and witness her will; that he told her, "All right," and went along with her; that, when ⁴¹⁰ they got there, she signed the will before witness and Mr. Steffen, and in their presence; and that they signed it in her presence and in the presence of each other. After the will was signed, she again took charge of it. All that was done in respect to procuring the signatures of the witnesses was done by the testatrix herself. She knew the character of the instrument, because she dictated it and requested the witnesses to witness it as her will. In addition to all this, she was single at the time of the execution of the instrument, over the requisite age, and of sound mind. We must, therefore, hold that the will was properly executed.

Now, as to the instructions given by the court on behalf of the plaintiff. The first and second have, in effect, already been disposed of by what was said in the preceding paragraph of this opinion. As to the third, there was no evidence to justify it, and, even if there had been, it is vicious, in that it tells the jury that, if they believe, from the facts admitted (to wit, that the writing in contest was written by Enos B. Berberet, one of the

devises, and he is also appointed executor in the will, that he is the son of the testatrix, and that she could not read English), and the other evidence in the cause, that he had great influence over the mind of his mother, and that advantage is given him by the terms of the will, then the burden was cast upon him to show that the will was fairly obtained, etc. The presumption is in favor of the validity of the will, and the fact of unjust discrimination in its provisions, if such be the case, and the other facts before stated, did not shift the burden of establishing its validity on the defendant. There must have been undue influence exercised in the procurement of the will: *McFadin v. Catron*, 120 Mo. 252; *Maddox v. Maddox*, 114 Mo. 35; 35 Am. St. Rep. 734. It is not enough that Enos B. Berberet had great influence over his mother, in respect of her business ⁴¹¹ affairs alone, in order to shift the burden to him in explanation of such discrimination; but it must be shown that he procured the execution of the will by the exercise of such influence, and thereby gained an unfair advantage. A testator having sufficient mental capacity has the right "to make an unreasonable, unjust, injudicious will; and his neighbors have no right, sitting on a jury, to alter the disposition of his property simply because they may think the testator did not do justice to his family connection": *Boylan v. Meeker*, 15 N. J. Eq. 310, quoted with approval in *Maddox v. Maddox*, 114 Mo. 35; 35 Am. St. Rep. 734. See, also, *Mackall v. Mackall*, 135 U. S. 171, and cases cited; *Smith v. Smith*, 48 N. J. Eq. 591; *Jackson v. Hardin*, 83 Mo. 185; *Farmer v. Farmer*, 129 Mo. 530. Mrs. Berberet was shown by the evidence to be a woman of more than ordinary intelligence and business capacity, and the execution of her will entirely free from fraud or undue influence. Not even a suspicion of fraud attended its procurement or execution; and to sustain the verdict of the jury, under the facts in proof as disclosed by the record, would be to, in effect, say that no person, however intelligent, however free from fraud or undue influence, could dispose of his property by will unless he do so according to the ideas of fairness and justice of some jury who may possibly have to pass on it after his death.

The judgment is reversed, and the cause remanded, with directions to the court below to enter up judgment for the proponents of the will, defendants herein.

Gantt, P. J., and Sherwood, J., concur.

WILLS—ATTESTATION.—Witnesses need not subscribe any formal clause of attestation: *Robinson v. Brewster*, 140 Ill. 649; 33 Am.

AM. ST. REP., VOL. LII.—41

St. Rep. 235. See, also, the extended note to *Chafee v. Baptist Missionary Convention*, 40 Am. Dec. 231.

WILLS—UNDUE INFLUENCE.—An unequal distribution of his property by a testator, or his omission entirely from his bequests of some of his next of kin, is not, in the absence of mental incapacity or undue influence, evidence to show either testamentary incapacity or undue influence: *Burney v. Torrey*, 100 Ala. 157; 46 Am. St. Rep. 53, and note. A testator may make an unreasonable, unjust, and injudicious will, and it will still be valid if he is possessed of mental capacity and acts as a free agent at the time of its execution: *Maddox v. Maddox*, 114 Mo. 35; 35 Am. St. Rep. 734. See the extended note to *In re Hess' Will*, 31 Am. St. Rep. 670-691.

SNELL v. HARRISON.

[131 MISSOURI, 495.]

JUDGMENTS—SUSPENSION OF STATUTE OF LIMITATIONS.—A judgment in ejectment in favor of one cotenant against another claiming by adverse possession, suspends the statute of limitation from the time of commencement of the action; and such suspension continues during the life of the judgment, although no writ of restitution is issued, nor is possession taken under the judgment.

PARTITION—PARTIES.—A trustee of an express trust holding the legal title to land may maintain a partition suit in his own name; and the fact that he joins minor cestuis que trust as coplaintiffs does not militate against his right to maintain the action.

PARTITION—EJECTMENT—RENTS AND PROFITS.—A judgment for rents and profits in ejectment by one cotenant against another may be charged against the share of the latter in a subsequent proceeding between them for partition.

C. E. Morrow and A. B. Logan, for the appellants.

J. W. Sudduth and Fyke, Yates & Fyke, for the respondents.

⁴⁹⁷ **BRACE, C. J.** This is an action in partition by the devisees and heirs at law of John Snell, deceased, against Brunetta Harrison and George W. Harrison, her husband, and the administrator of Harvey Harrison, deceased, in which the plaintiffs obtained judgment and order of sale, and the defendants appeal.

⁴⁹⁸ The land sought to be divided is one hundred and sixty acres situate in section 13, township 45, range 24, in said county, particularly described in the petition, in which it is alleged that the plaintiff John R. Snell acquired the legal title to the shares therein claimed by him and his coplaintiffs as executors of the estate of the said John Snell, deceased, and that he holds the same as tenant in common with the said Brunetta, in trust for the benefit of said estate and of the devisees of said testator.

1. This land has been in litigation for nearly twenty years, in the course of which time two of the suits have reached this court,

and are reported, the first in 83 Mo. 651, and the other in 104 Mo. 158, where a full statement and history of the transactions of the parties may be found. This last suit was ejectment by John R. Snell against the Harrisons, in which the defendants set up their title, and asked for equitable relief, and in which the respective rights and interests of the parties were finally adjudicated and settled; this court holding that the plaintiff, Snell, was entitled to recover the undivided seven-tenths of the south eighty acres of said tract, and that Brunetta Harrison was entitled to the other undivided three-tenths of said south eighty, and that said plaintiff Snell was entitled to the undivided seven-thirtieths and the said Brunetta Harrison to the undivided twenty-three thirtieths of the north eighty of said tract; and remanding the cause to the circuit court, with directions to enter judgment accordingly, after taking an account of the rents and profits. Under this mandate, on the 18th of September, 1891, final judgment was rendered in the circuit court in favor of the said plaintiff, John R. Snell, for the recovery of his said interest in said real estate, and for sixteen hundred and fifty dollars, the rents and profits thereof from June 1, ~~1880~~ 1880, "and that he have a writ of restitution for said real estate, and execution for said sums of money found as rents and profits, and for costs." Afterward, to wit, on the sixth day of August, 1892, this suit was instituted in the circuit court of Johnson county, in which the court found the respective rights and interests of the parties to be as declared by this court in its decision aforesaid, and further found that the said undivided three-tenths of the said Brunetta Harrison in the south eighty was subject to a mortgage in favor of the estate of Harvey Harrison, amounting to the sum of six hundred and seven dollars and twenty-eight cents and interest; that the said Brunetta has, to the exclusion of the plaintiffs, received all rents and profits from all of said real estate, amounting to the sum of one thousand three hundred and sixty-four dollars; that plaintiffs are entitled to partition of the premises, and that the same is not susceptible of division in kind without great prejudice to the interests of the parties, and decreed that the said real estate be sold, and the proceeds be distributed as follows: "1. To the payment of costs and expenses of this proceeding; 2. That seven-tenths (7-10) of the proceeds arising from the sale of the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter, and seven-thirtieths (7-30) of the proceeds arising from the sale of the northwest quarter of the southwest quarter and the northwest quarter of the southeast quarter, all in said section 13, aforesaid, be paid to plaintiffs, to

be divided among them according to their interests as set forth in the petition; 3. That out of three-tenths of the proceeds arising from the sale of the said southeast quarter of the southwest quarter of the southeast quarter of said section 13 there to be paid to J. W. Harrison, administrator of the estate of Harvey Harrison, said mortgage debt, to wit, the sum of six hundred and seven dollars and twenty-eight cents, with interest thereon at ten per cent from the fifth day of April, 1893, ⁵⁰⁰ if three-tenths (3-10) of the proceeds arising from the sale of the two last-described forties be sufficient to pay the same; 4. That out of the remaining proceeds of the sale of Brunetta Harrison's interest in all said lands be paid the plaintiffs the sum of thirteen hundred and sixty-four dollars, the rents aforesaid, which is hereby declared to be a lien and charge upon the interest of said Brunetta Harrison. That the balance of the proceeds of such sale, after paying and satisfying the disbursements and distributive shares of plaintiffs, hereinbefore set out be paid to Brunetta Harrison."

The defendant Brunetta Harrison, in her answer, denied plaintiff's ownership and tenancy in common with her of the premises sought to be divided, and pleaded adverse possession for more than ten years, and now insists that her plea ought to have been sustained, and the refusal of the circuit court to do so presents the controlling question in the case. The undisputed facts are, that the said Brunetta Harrison and her husband have been in the actual and exclusive possession of the premises ever since the plaintiff trustee acquired title in 1878, claiming title thereto under the several fraudulent conveyances described in, and set aside and annulled in, the foregoing suits in pursuance of the judgment of this court, and the plaintiff John R. Snell has been continually striving through the courts to have these conveyances set aside, and the true state of the title disclosed, and to obtain for the estate of his father whatever interest therein he might be entitled to. These efforts culminated in the final judgment of September 18, 1891, rendered in pursuance of the mandate of this court, by which, for the first time, the respective rights and interests of the parties were finally and definitely ascertained and settled, and the right of the said plaintiff ⁵⁰¹ to be put in possession of his undivided share in the premises established. It seems that the writ of restitution awarded in that judgment was not in fact issued or executed, but, instead, this proceeding in partition was instituted, as hereinbefore stated, within less than a year from the date of that judgment, to have said plaintiffs' share, thus ascertained, set off to them. The suit in which the judgment in ejectment was rendered was commenced on the

twenty-second day of May, 1885, and prosecuted uninterruptedly to judgment, and the only ground upon which it can be held that the defendants' possession was not interrupted thereby, so as to prevent the running of the statute of limitations in their favor, is the technical one that, under and by virtue of that judgment, the plaintiff was not put in actual possession of the premises before beginning the present action in partition; and counsel insist that we must so hold, on the authority of *Mabary v. Dollarhide*, 98 Mo. 198; 14 Am. St. Rep. 639. The point ruled in that case was, "that the mere fact that the defendants in an ejectment suit dismissed their appeal after judgment against them does not amount to an abandonment of all adverse claims to the land," in reaching which conclusion the learned judge who wrote the opinion deemed it necessary to inquire "whether a judgment in ejectment, not followed up by a writ, or by taking possession under it, will break the adverse possession of those against whom it is rendered," cited two cases from which an affirmative answer might be drawn, viz., *Brolaskey v. McClain*, 61 Pa. St. 146, and *Gower v. Quinlan*, 40 Mich. 572, and three for a negative answer to the question, viz., *Smith v. Trabue*, 1 McLean, 87; *Doe v. Reynolds*, 27 Ala. 364; and *Jackson v. Haviland*, 13 Johns. (N. Y.) 229, and said: "We are not aware of any decision of this ⁵⁰² court having any direct bearing upon the question. We cannot see how the mere recovery of a judgment in an action of ejectment can suspend the running of the statute of limitations. To have that effect, there must be possession under it, or something done to make the defendant's possession subordinate to the plaintiff's title." This language must, of course, be read in connection with the point ruled, and with reference to the facts of that particular case, in respect of which the learned judge further said: "We do not say that it was necessary to sue out a writ, and turn the defendants in the ejectment suit out of possession." As to the cases cited in that opinion in support of the proposition that a mere recovery of a judgment in an action of ejectment cannot suspend the running of the statute of limitations, it is only necessary to say that in *Smith v. Trabue*, 1 McLean, 87, the court says: "Judgment was obtained in the ejectment at November term, 1818, and the writ of possession under which Evans was turned out of possession did not issue until the 17th of November, 1829. Here was a lapse of eleven years, being four years more than the limitation fixed by the statute." And in the other two cases (*Doe v. Reynolds*, 27 Ala. 364, and *Jackson v. Haviland*, 13 Johns. 229), which were judgments on declarations in ejectment as at

common law, the term of the demise had expired, and it was upon that fact the rulings were predicated; in each case the court citing as authority the dicta of Lord Mansfield in *Aslin v. Parkin*, 2 Burr. 667, that "a judgment in ejectment, like all others, only concludes the parties as to the subject matter of it, therefore, beyond the time laid in the demise, it proves nothing at all." In these cases, the judgments had, by the lapse of time after their rendition, lost their force and effect, and the defendant's possession was not subordinate to them. ⁵⁰³ But such is not the case in hand.

We have here a valid, subsisting judgment in ejectment, operating directly upon the right of defendant's possession, and capable of being enforced at the time this suit in partition was begun. The defendants' peaceable possession of the premises was interrupted, and the running of the statute of limitations in their favor suspended, when the action of ejectment was commenced, in 1885, continued to be suspended up to the date of judgment, in 1891, and must continue so to be suspended during the life of that judgment. Of course, if the plaintiff had failed in his action of ejectment, or having succeeded, the judgment had expired, or ceased for any reason to have operative force, the possession would remain the same as if the suit had never been commenced. But it cannot cease to be operative upon the possession so long as it lives, simply because it has not yet been executed. In fact, in cases like the one in hand, in which a tenant in common recovers an undivided share from his cotenant in possession, the only practical way of executing the judgment is by proceeding in partition, as was done in this case, and, in order to commence such action, it was not necessary to go through the empty form of issuing a writ and putting the plaintiff in possession of the premises, which he could only hold in common with his antagonist, either to save his rights as against the defendants' possession or to authorize him to sue as a tenant in common. The plaintiff trustee in this litigation has pursued the course marked out for one in his situation by this court in *Lambert v. Blumenthal*, 26 Mo. 471, in which it was said: "Where one is in the adverse possession of land, claiming it exclusively against all others, one claiming title and out of possession cannot maintain a suit for partition. He must first try his right in an ⁵⁰⁴ action of ejectment, and, after that is established, he may institute his proceedings for partition"—and cannot now be deprived of the fruits of his labor for so many years, in pursuit of the just rights of his estate, by such barren technicalities as are invoked in this

case to defeat his action. The court committed no error in refusing to sustain the demurrer to the evidence and defendants' plea of the statute of limitations.

So far as the case of *Mabary v. Dollarhide*, 98 Mo. 198, 44 Am. St. Rep. 639, may be in conflict with this ruling, the same ought to be, and is, overruled.

2. The legal title to the premises was in John R. Snell, and the fact that one or more of his cestuisque trust, who were made coplaintiffs with him in the proceeding may not have attained the age of twenty-one years at the time the suit was instituted, militates nothing against his right to maintain the action. He was the trustee of an express trust, and, so far as defendants are concerned, could have maintained the action in his own name, representing, as he did, all his cestuis que trust.

3. The rents and profits were a proper charge against the share of Brunetta Harrison. The amount thereof was adjudicated in the ejectment suit, the judgment in which was given in evidence by the plaintiffs, and they might well have insisted that Mrs. Harrison's share should be charged with the amount ascertained by that judgment, plus the value of subsequent rents and profits. This, however, they did not insist upon, and the court took a new account and found several hundred dollars less than was awarded the plaintiff in the ejectment judgment. If this was error, it was error in favor of the defendants, of which they cannot complain. ⁵⁰⁵ On the whole record, we find no reversible error.

The judgment and order of sale are affirmed, and the proceedings, up to the time when this appeal was taken, are approved. The cause will be remanded to the circuit court for further proceedings to final judgment, which judgment shall be taken to be in full satisfaction also of the judgment for rents and profits recovered in the ejectment suit. The costs of this appeal will be taxed against the appellants.

All concur.

Barclay, J., concurring in the result.

PARTITION—PARTIES.—Administrators have no authority to institute or maintain proceedings for the partition of land in which their intestates were interested: *Terrell v. Weymouth*, 32 Fla. 255; 37 Am. St. Rep. 94, and note; but a trustee, who has a power of sale and reinvestment under the trust deed, is a proper, though not a necessary, party to an action to partition the land among the beneficiaries: *Welch v. Agar*, 84 Ga. 583; 20 Am. St. Rep. 380.

JUDGMENT IN EJECTMENT AS SUSPENDING STATUTE OF LIMITATIONS.—The authorities, so far as any exist, are decidedly opposed to the doctrine laid down in the principal case. The court

in that case, in expressly overruling the prior case of *Mabary v. Dollarhide*, 98 Mo. 198, 14 Am. St. Rep. 639, runs counter to the cases therein cited, as well as nearly every other case upon the subject. The rule maintained by the authorities is, that a judgment in ejectment, although it establishes a right to possession, does not create a new estate nor vest a new title in the plaintiff, so as to interrupt the running of the statute of limitations. The running of the limitation can be interrupted or suspended only by an actual entry: *Carpenter v. Natoma etc. Co.*, 63 Cal. 616; *Aslin v. Parkin*, 2 Burr. 665; *Smith v. Hornback*, 4 Litt. 232; 14 Am. Dec. 122; *Jackson v. Haviland*, 18 Johns. 229; *Smith v. Trabue*, 1 McLean, 87; *Kennedy v. Reynolds*, 27 Ala. 364; *Barrell v. Title etc. Co.*, 27 Or. 77; *Elder v. McClaskey*, 70 Fed. Rep. 554. In the case of *Mabary v. Dollarhide*, 98 Mo. 204, 14 Am. St. Rep. 639, the court expressly said: "We cannot see how the mere recovery of a judgment in an action of ejectment can suspend the running of the statute of limitations. To have that effect there must be possession under it, or something done to make the defendant's possession subordinate to the plaintiff's title." Again, in *Smith v. Trabue*, 1 McLean, 88, the court said: "A judgment in an action of ejectment against a defendant who holds adversely, does not, of itself, suspend the statute of limitations. To do this, there must be a change of possession. It is true, the judgment fixes the right of entry in the lessor of the plaintiff, if he can make entry without force. But if he fail to make his entry, either with or without a writ of possession, the statute of limitations will continue to operate against the right. A mere entry, while the tenant remains in possession, will not oust him, but he must be turned out of possession, or acknowledge the right of the lessor of the plaintiff by consenting to hold under him. Nothing short of this will stop the statute." The only case opposed to this doctrine is that of *Brohasky v. McChain*, 61 Pa. St. 146-166, in which the court said, without the citation of any authority, that the recovery of a judgment in ejectment stopped the running of the statute of limitations, even though the judgment defendant continued to remain in adverse possession. In the case of *Barrell v. Title Guarantee Co.*, 27 Or. 77, it was held that the commencement of an action of ejectment that eventually ripens into judgment and possession thereunder stops the running of the statute of limitations, regardless of whether such entry is made before or after the expiration of the statutory period. The matter that stops the continuity of the statute is the commencement of the action, and not the date of the final judgment or the time of the entry. This being true, that it is the beginning the action that interrupts the statute, it must necessarily follow that an entry made under the judgment obtained in such action has the effect of continuing such interruption from the time that the action is commenced until the entry is made. Although the mere rendition of the judgment in ejectment, without possession gained thereunder or thereafter, does not stop the running of the statute, although it is interrupted from the commencement of the action, we apprehend that a writ of entry issued upon and possession gained under the judgment effectually stops the running of the statute. Such is the implication gathered from all the authorities cited in this note. In *Barrell v. Title Guarantee Co.*, 27 Or. 91, this view is approved, and the court said, in effect, that the commencement of the action interrupted the running of the statute of limitations from that date, and that the plaintiff, "having prosecuted it with effect, obtained his judgment, and by virtue of process issued thereon, placed in possession his successor in interest, the time which elapsed between the date of the commencement of that action and the date of plaintiff's entry cannot be taken into account in computing the period of defendant's adverse possession."

MACKE v. BYRD.

[131 MISSOURI, 632.]

HOMESTEADS—JUDGMENT LIENS AGAINST.—As between a judgment creditor and his debtor in possession of a homestead within the statutory size and value, the judgment, on a debt created since the record of the homestead, creates no lien on the homestead property.

HOMESTEADS—EXCESS—JUDGMENT LIENS AGAINST.—As against the homestead debtor, a judgment reaches the excess of quantity or value of the homestead beyond the statutory maximum only after an ascertainment and setting out, of the part to which the exemption applies. Until such excess is defined and set apart, it cannot be subjected to execution.

HOMESTEADS—REINVESTMENT OF PROCEEDS.—A judgment debtor may sell his homestead and invest the proceeds in another, and carry the exemption of the first homestead into the one subsequently acquired, even as against debts created before the acquisition of the latter.

HOMESTEADS—EXCESS—JUDGMENT LIENS.—If, after land has been set apart as a homestead to an execution defendant, another judgment is obtained against him, and he then sells the homestead for a sum in excess of the statutory limit of homestead exemption, the lien of the last judgment does not attach to such excess as against the purchaser, in the absence of an ascertainment of such excess and a setting apart of the homestead before the sale.

R. B. Oliver and J. W. Limbaugh, for the appellants.

Wilson Cramer and W. H. Miller, for the respondent.

⁶³⁵ **BARCLAY, J.** This is a suit to charge certain real property in Cape Girardeau county with the lien of a judgment, and to have part of the land, in excess of the homestead value, set apart and subjected to sale to satisfy the lien, although the land is owned by other parties than the judgment debtor. On the other side, it is claimed that the property ⁶³⁶ is free from the judgment lien, by virtue of the homestead law. The facts that control the result were admitted by the pleadings of at the trial. Mr. Ranney was in possession in May, 1876, when the tract in question, consisting of nearly one hundred and five acres, was set apart to him as a homestead, by appraisers, appointed by the sheriff, under two executions in favor of Mr. Houck, as administrator, plaintiff, against Ranney and another. The sheriff's report of sale in that matter, including a report of the appraisers, who set apart the homestead, was confirmed by the court from which the executions issued. Ranney had occupied the place as a homestead for himself and family for many years prior to any of the dates in this record, and continued in such occupancy until the conveyance to Mrs. Byrd. After the homestead had been so set apart, the present plaintiff, Mr. Macke, obtained in 1883 a

judgment against Ranney and another for seven hundred and thirty-nine dollars and eighty cents, on a note executed by them in March, 1876. In July, 1885, Ranney and Mr. A. R. Byrd made a contract by which the former agreed to sell a piece of land, which we shall call the homestead, for the price of two thousand six hundred dollars. Before the sale was consummated Macke sued out an execution on his judgment, and garnished Mr. Byrd. Thereupon Ranney refused to make a deed. Upon a trial of the garnishment case, there was a finding for defendants, and Mr. Byrd was discharged as garnishee. But after the garnishment was served, Mrs. Byrd, wife of this Mr. Byrd, purchased the property for the same price agreed upon in the former contract of sale. The homestead was conveyed to her, through an intermediary, August 6, 1885. The consideration was ⁶⁸⁷ drawn from the proceeds of sale of some other land belonging to the wife. After this purchase, Mr. and Mrs. Byrd entered into possession, and Ranney moved out of the state. In 1886, plaintiff sued out a writ of scire facias to revive his judgment, making Mr. and Mrs. Byrd parties, as well as the original defendants. The court ultimately discharged the former as unnecessary parties, but entered judgment of revivor against Ranney upon a service by publication as to him. Then followed the present suit, in 1888, by the judgment creditor, Macke, against Mr. and Mrs. Byrd, to cause the homestead to be reassigned, and that part of it in excess of fifteen hundred dollars in value to be subjected to the plaintiff's demand as embodied in the judgment. The trial court found for plaintiff, and appointed commissioners to set off the homestead, which they afterward did, by a particular description; and the court adjudged the rest, a considerable part, of the original homestead tract to be subject to plaintiff's judgment, notwithstanding the original debtor, Ranney, had meantime parted with his title as above described. The defendants took the pending writ of error after the customary motions and exceptions to preserve for review the questions submitted here.

1. The Ranney homestead was set apart to him in 1876, as exempt from the executions then outstanding against him. The main question raised by the case at bar is whether or not the lien of the judgment subsequently obtained against Ranney by Macke reached the excess in value, above the statutory limit, which the allotted homestead appears to have afterward acquired.

The lien of a judgment upon realty in Missouri is founded on statute. By the terms of its creation, the lien impresses "lands, tenements, and hereditaments, ⁶⁸⁸ liable to be sold upon execution": Rev. Stats. 1889, sec. 6048, same as Rev. Stats. 1879, sec. 2767.

The effect of the section cited is to limit the force of the words "real estate," in section 6011 of the Revised Statutes of 1889, to a narrower meaning than they would otherwise bear through the aid of section 6570. But the last-named section is only applicable where the construction it furnishes is not plainly repugnant to the intent of the legislature or of the context of the statute to be construed. But, in regard to judgment liens, section 6048 supplies context which qualifies the broad meaning that section 6011 might be construed to have without such context. The homestead act declares that real property coming within its protection is "exempt from attachment and execution," subject to certain exceptions as to prior debts not relevant to the pending controversy: Rev. Stats. 1889, sec. 5435. It is evident from the language of that section that, as between a judgment creditor and his debtor in possession of a homestead within the statutory size and value, the judgment, on a debt created since the record of the homestead deed, creates no lien on the homestead property: *Harrington v. Utterback*, (1874), 57 Mo. 519; *Holland v. Kreider* (1885), 86 Mo. 59; *Biffle v. Pullam* (1893), 114 Mo. 50.

But does the lien touch or hold the surplus of size or value of the homestead? The Missouri law provides a mode to set out a homestead of statutory amount from a larger tract of which it forms part. The provisions of that law give the judgment debtor in an execution, levied on the excess, a right to choose what part of the homestead estate, within the limits of value and size, shall be protected by the exemption. If he declines to choose, it is otherwise selected, "and the sheriff shall then ~~see~~ proceed with the levy of such execution upon the residue of such real estate": Rev. Stats. 1879, sec. 2690, same as Rev. Stats. 1889, sec. 5436. This right of selection, as well as other provisions of the homestead law, mentioned later, cannot be reconciled with the idea that, as against the debtor, the judgment lien reaches the excess of quantity or value of the homestead beyond the statutory maximum, before an ascertainment and setting out of the part to which the exemption shall apply. As was said by the supreme court of Vermont, in construing a section of their law (Vt. Rev. Laws. 1880, sec. 1895) which is substantially, and almost literally, the same as our section 5436 of the Revised Statutes of 1889: "According to these provisions, the homestead must be set out from the residue before the residue can be set out on the execution": *Fairbanks v. Devereaux* (1876), 48 Vt. 552. Our homestead statute was in great part transplanted from Vermont. Rulings in that state

upon language embodied in our own law are entitled to, and have justly been accepted as having at least very persuasive, and sometimes authoritative, force here: *Skouten v. Wood* (1874), 57 Mo. 380; *Shindler v. Givens* (1876), 63 Mo. 394.

Under Missouri law, the debtor having a homestead may sell it, invest the proceeds in another homestead, and carry the exemption of the first homestead into the one subsequently acquired, even as against debts created before the acquisition of the latter: Rev. Stats. 1879, sec. 2696, same as Rev. Stats. 1889, sec. 5442. To make that right of sale effective and complete, it is essential to give such a construction to other parts of the statute as will not embarrass the exercise of that right, so far as that may be done without violence to their own clear intent and terms. ⁶⁹⁰ All provisions of law on one topic should be considered in determining the meaning of any particular portion thereof (*State v. Pitts* (1872), 51 Mo. 133), and such a construction should be given to the latter as will keep all the provisions of law on the same subject in harmony, and give effect to all, when possible. The rights of selection and of exchange of homesteads, as given to judgment debtors by sections 5436 and 5442, could not be fully enjoyed if it were held that the lien of a judgment reached and secured to the creditor an uncertain part of the homestead property, without an ascertainment of the surplus to which the lien could attach, as provided by law. The Missouri homestead may be moved about, under the protection of section 5442. It cannot be fastened to one spot by a judgment lien, which would be the consequence of permitting it to be sold on execution, subject to the homestead right. In contemplation of section 5436, the surplus above the statutory measure is not available on execution until ascertained and determined by the location of the true homestead itself, in the manner prescribed.

The homestead in dispute in the present case was fixed and defined by the action of appraisers, the sheriff, and the court, under the Houck executions, in 1876, and the debtor had the right to all the privileges of a homestead owner as to that property, so set off, including the right to sell it, until some creditor should, by proper steps, attack the former allotment of the homestead as to quantity or value. This might be done at any time by proceeding under sections 5436 or 5444, but, until that course was taken by some one, the debtor was entitled to the full enjoyment of all his rights in and to the homestead property, including the ⁶⁹¹ power of disposal, of which he took advantage in this case. The fact that Ranney realized by his sale more than the statutory amount to which the homestead is limited is of

no concern, as against the purchaser of it from him, in such an action as this by the judgment creditor. If, as we hold, the lien of judgment did not attach to the surplus in value until ascertained by an admeasurement of the proper homestead, then the lien of judgment was no impediment to a sale of the homestead by the debtor, as the statute permits.

2. These views, we regret to say, are not in harmony with some utterances found in the Missouri reports of recent years, especially in *Crisp v. Crisp* (1885), 86 Mo. 630; *Thompson v. Newberry* (1887), 93 Mo. 18; and *Schaeffer v. Beldsmeier* (1891), 107 Mo. 314. But we believe the conclusion we have reached is supported by principles declared in a number of other decisions, which we regard as establishing a sound construction of the homestead law: *Vogler v. Montgomery* (1874), 54 Mo. 577; *Perkins v. Quigley* (1876), 62 Mo. 498; *Beckmann v. Meyer* (1882), 75 Mo. 333; *Holland v. Kreider* (1885), 86 Mo. 59; *Grimes v. Portman* (1889), 99 Mo. 229; *Bank of Versailles v. Guthrey* (1895), 127 Mo. 189; 48 Am. St. Rep. 621. The Missouri law on this subject is, unfortunately, not a model of clearness of purpose in some of its features, though its general design is plain enough. It prescribes rules of conduct, some of which are applicable to the homestead owner and to his obligations and rights during his lifetime, and others of which govern the rights of his widow and children in or to the homestead after his death.

⁶⁹² 3. It is scarcely necessary to say, though we do so out of abundant caution, that our comments are intended to apply only to a case involving the interests and rights of the homesteader, his vendees, and his judgment creditors, but not of his widow or children, after his death. The case in hand does not involve an inquiry into the nature of the estate of the widow and children of the homesteader, and our rulings should be understood as applying strictly to the facts now in judgment.

It results that the judgment is reversed, and the cause remanded, with directions to dismiss the proceeding.

Brace, C. J., and Gantt, Macfarlane, Sherwood, Burgess, and Robinson, JJ., concur.

HOMESTEADS—JUDGMENTS—LIENS AGAINST.—Land settled on by the head of a family, and of less value than the statutory homestead amount, is his homestead and exempt from a judgment lien: *Ketchin v. McCarley*, 26 S. C. 1; 4 Am. St. Rep. 674, and note. A homestead is not subject to a judgment lien, unless such lien existed before the homestead right was acquired: *Freiberg v. Walzem*, 85 Tex. 264; 34 Am. St. Rep. 808, and extended note. See, also, the notes to *Pipkin v. Williams*, 38 Am. St. Rep. 247, and *Blue v. Blue*, 87 Am. Dec. 278.

HOMESTEAD—JUDGMENT LIEN AGAINST EXCESS.—A judgment lien may be enforced against any excess in the value of a homestead over the amount allowed by the statute: *McDonald v. Crandall*, 48 Ill. 231; 92 Am. Dec. 112, and note. See, also, the extended note to *Vanstory v. Thornton*, 34 Am. St. Rep. 505.

HOMESTEADS.—PROCEEDS OF, WHETHER EXEMPT: See the extended notes to *Morgan v. Rountree*, 45 Am. St. Rep. 237-239, and *Vanstory v. Thornton*, 34 Am. St. Rep. 505.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

STATE v. GLEIM.

[17 MONTANA, 17.]

INDICTMENT—ACCESSORIES.—An indictment, first charging the guilt of the principal and then setting out the facts which constitute the defendant an accessory, is sufficient and not prejudicial to the defendant, although the common-law distinctions between accessories before the fact and principals are abolished by statute.

ACCESSORIES—EVIDENCE.—On the trial of a person indicted as an accessory before the fact, the record of the prior conviction of the principal is admissible against the defendant, as prima facie evidence of the guilt of the principal of the crime charged.

WITNESSES—ATTORNEYS AS—ARGUMENT TO JURY. Under a rule of court providing that if an attorney offers himself as a witness in behalf of his client, and gives evidence on the merits, he shall not argue the case, unless by permission of the court, the refusal of the court to allow such attorney to argue is not error, if, before he testifies, he does not explain his position and ask permission to argue the case.

INSTRUCTIONS—REASONABLE DOUBT.—An instruction in a criminal case that, in order to warrant a conviction, the jury need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, and that it is sufficient if, taking all the testimony together, they are satisfied beyond a reasonable doubt that the defendant is guilty, is erroneous, and prejudicial to his rights. If circumstantial evidence alone is relied upon, each fact and circumstance to complete the chain must be proved beyond a reasonable doubt.

INSTRUCTIONS—WEIGHT OF EVIDENCE.—The jury being the sole judges of the weight of the testimony in a criminal case, it is error to instruct that admissions made by the defendant are entitled to great weight.

WITNESSES—CROSS-EXAMINATION.—It is error to permit cross-examination of defendant in a criminal case by questions

calculated to degrade him before the jury, and which are not cross-examination of his evidence given in chief, and do not legitimately tend to impair his credibility as a witness.

JURORS—COMPETENCY.—A juror who has formed a fixed opinion as to the guilt or innocence of the person charged to be the principal offender is not competent to sit upon the trial of the person charged as an accessory.

WITNESSES—CROSS-EXAMINATION.—A witness cannot be asked on cross-examination, for the purpose of affecting her credibility, whether or not she is addicted to the morphine habit, unless it is proposed to show that the witness was under the influence of the drug at the time the events happened about which she testifies, or unless she is under its influence at the time she is testifying, or unless it is made to appear that her powers of recollection are impaired by the habitual or excessive use of the drug.

INSTRUCTIONS—REASONABLE DOUBT.—MORAL CERTAINTY is that degree of conviction from the evidence of the truth of the fact sought to be proved that the juror himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests.

Toole & Wallace, for the appellant.

H. J. Haskell, attorney general, and T. C. Marshall, for the state.

²² **HUNT, J.** Patrick Mason, Mary Gleim, and William Reed were jointly indicted for an assault, with intent to commit murder, upon one Burns. Appellant, Mary Gleim, was separately tried after Mason had been convicted. She was found guilty, and sentenced to the penitentiary for fourteen years.

1. Appellant contends that the indictment will not support a verdict and judgment of guilty, "because it nowhere charges that said Mary Gleim committed the crime of assault with intent to murder." The material charging parts of the indictment are as follows: "That one Patrick Mason, late of the county of Missoula, state of Montana, on or about the thirteenth day of February, A. D. 1894, at the county of Missoula, in the state of Montana, did feloniously, deliberately, premeditatedly, and of his malice aforethought, make an assault in and upon one C. P. Burns, and certain giant powder and other highly explosive substance, a more particular description of which is to said jurors unknown, in, upon, around, and under the house where the said C. P. Burns was then and there present and sleeping, did feloniously, deliberately, premeditatedly, and of his malice aforethought, put and lay, and the same did then and there, feloniously, deliberately, premeditatedly, and of his malice aforethought, explode, and cause to be exploded, with intent in him, the said Patrick Mason, to kill and murder the said C. P. Burns. And that before the commission of the said felony, at the time and place aforesaid, one Mary Gleim and William Reed did fe-

loniously counsel, aid, incite, and procure the said Patrick Mason to commit, in manner and form aforesaid, the said felony. All of which is contrary to the form of the statute," etc.

The indictment is substantially a common-law charge against Mason as principal and Mary Gleim as an accessory before the fact. It follows the precedents of Wharton (1 Wharton on Indictments, sec. 97) and of Archbold (Archbold's Criminal Practice and Pleading, 67, 77). Bishop on Criminal Procedure, volume 2, section 8, quoting Chitty on Criminal Law, lays down the course to be, first, to state the guilt of the principal, as if he alone had been concerned; and then, in case of accessories before the fact, to ²³ aver that the procurer, "before the committing of the said felony, in form aforesaid, to wit, on, etc., with force and arms, etc., did maliciously and feloniously incite, move, procure, aid, and abet (or counsel, hire, and command) the said principal felon to do and commit the said felony, in manner aforesaid, against the peace, etc."

The statutes (Criminal Practice Act 1887, secs. 176, 177) provide that:

"Sec. 176. Any person who counsels, aids, or abets in the commission of any offense, may be charged, tried, and convicted, in the same manner as if he were a principal.

"Sec. 177. An accessory before the fact, to the commission of a felony, may be indicted, tried, and punished; though the principal be neither indicted nor tried."

By chapter 2, section 12, page 502, of the Compiled Statutes of 1887, it is provided: "Any person who stands by, and aids, abets, or assists, or who, not being present, hath advised and encouraged the commission of a crime, shall be deemed a principal offender, and shall be punished accordingly."

It is plain that the old distinctions between accessories before the fact and principals are abolished by these statutes: *State v. King*, 9 Mont. 445; but, we see no objection to the form of an information charging a person as an accessory rather than as a principal. To so charge is to the advantage of a defendant, because it notifies him of the attitude which the state will assume when the case is brought to trial, by setting out the facts constituting the offense with greater certainty than is requisite where an accessory is indicted as a principal.

This point was directly raised in *People v. Rozelle*, 78 Cal. 84, where the court held that an information stating facts sufficient to constitute a defendant an accessory at common law charges him with guilt as principal under the statutes, and that to allege such facts as would have been sufficient against him as an

accessory at common law is charging him as principal under the statute. We are of opinion that the rights of the defendant were not prejudiced by the form ²⁴ of the charge: *State v. Lattell*, 45 La. Ann. 655; *Territory v. Guthrie*, 2 Idaho, 398.

2. On the trial of the appellant, Gleim, the court, over the objection of the defendant, permitted the record of the conviction of Mason, the principal actor, to be introduced, and after having fully instructed the jury that it was essential, in order to convict the defendant, Gleim, that they should find that Mason was guilty of having committed the crime charged, instructed as follows: "That the record of the trial and conviction of Patrick Mason was introduced in the trial of this case, for the purpose of establishing as a fact, *prima facie*, the guilt of said Mason. The record is *prima facie* evidence of the guilt of said Mason, but it is not conclusive evidence. It, however, remains *prima facie* evidence of the fact which it was introduced to prove, unless you believe from the evidence in this case that the defendant Mary Gleim has introduced evidence in this case which raises in your minds a reasonable doubt (as explained in these instructions) of the guilt of said Mason; but, if such testimony raises in your minds such reasonable doubt of the guilt of Mason, then you should find the defendant Gleim not guilty. But unless the evidence introduced by the defendant Gleim does raise in your minds a reasonable doubt (as explained in these instructions) of the guilt of the said defendant Mason, you should receive such record of trial and conviction as evidence establishing the guilt of said Patrick James Mason. But, in determining the question of the guilt or innocence of the said Patrick James Mason, you are not confined to the record of trial and conviction introduced in this case, but you should carefully consider all of the evidence introduced in this case tending to prove or disprove the guilt of said Mason; and after a full and careful consideration of all the evidence in the case, in connection with the record in evidence, you have a reasonable doubt of the defendant Mason's guilt, you should find the defendant Gleim not guilty."

While it is true that the statute makes an accessory before the fact a principal, yet the evidentiary facts by which the accessory is to be incriminated may materially differ from those ²⁵ which are necessary and sufficient to convict the principal. In this case, for instance, to incriminate the appellant, Gleim, at all, under the theory of the state, as charged and contended for, it was not only necessary to prove the guilt of Mason, as alleged,

but to go further, and to demonstrate beyond a reasonable doubt that the appellant, Gleim, counseled, aided, and abetted Mason in the perpetration of the crime charged. Therefore, although the accessory might be deemed a principal under the statute, and was indicted with the principal, it became impossible for the state to convict appellant upon the same evidence applicable to the principal, because the agency of the accessory in the perpetration of the crime charged operated by a radically different method from the principal's. The statute, in simplifying the procedure, has obliterated old distinctions between principals and accessories, but the object of the simplification is largely to enable a guilty accessory to be punished without making his guilt depend upon the conviction of the principal. The facts, however, that the principal offense was committed, and that the principal who was charged to have committed it was guilty, were among the essential elements upon which must be predicated the guilt of the accessory Gleim. And right here is to be observed an important distinction between proof of a charge against a principal, and an accessory made principal by the statute alone, (but indicted with the principal, as in this case), and proof of a charge against several persons, ordinarily jointly indicted as simple codefendants, and who are in fact principals. In the one instance, the accessory before the fact being confessedly absent at the time of the commission of the principal offense, there can be no conviction without proof of the guilt of the principal; while, in the other case, whether or not any defendant other than the one on trial participated in the criminal act is immaterial, and forms no essential part of the case against the defendant on trial. Where, therefore, as in this case, the guilt of the principal must be proved as part of the case against the accessory, we cannot think that it is necessary for the state, where the principal has been convicted, to do ²⁶ more on its prima facie case than to offer the record of conviction of the principal as prima facie evidence of his guilt of the crime charged against him. We do not think that the fact that the principal has been convicted is proof of the guilt of the accessory. But it does make out a prima facie case of the principal's guilt, and unless rebutted by evidence of the accessory, as it may be, is competent to prove that material element of the crime charged against the accessory and upon the truth of which must depend the guilt of the accessory; namely, the commission of the crime of the principal, for which she is held responsible in law, provided she procured or aided and abetted the principal to commit the same. Although there are

some cases holding a contrary view, we are satisfied with the reasoning of the authorities which permit the introduction of the record of the conviction of the principal: *Maybee v. Avery*, 18 Johns. 352; *People v. Buckland*, 13 Wend. 593; *Levy v. People*, 80 N. Y. 327; *State v. Mosley*, 31 Kan. 355; *Commonwealth v. Knapp*, 10 Pick. 477; 20 Am. Dec. 534; *Abbott's Trial Brief*, Criminal Causes, sec. 624; *Anderson v. State*, 63 Ga. 675; *Roscoe's Criminal Evidence*, 171; 1 *Russell on Crimes*, 67; *Archbold's Criminal Practice and Pleading*, 83; *Commonwealth v. York*, 9 Met. 93; 43 Am. Dec. 373; *Studsill v. State*, 7 Ga. 2.

3. Joseph K. Wood, Esq., of counsel for appellant, was a witness in defendant's behalf upon the trial. He desired to participate in the argument for the defense. The court refused to permit him to do so, under a rule of court which provides that if the attorney of either party offers himself as a witness in behalf of his client, and gives evidence on the merits of the trial, he shall not argue the case or sum it up to the jury, unless by permission of the court. It does not appear by the record that, before the counsel testified, he explained to the court his position, and asked permission to argue the case. Under the circumstances, we cannot think that the enforcement of the rule was erroneous or even harsh.

4. The defendant asked the court to instruct the jury upon the law of circumstantial evidence, as follows: "The testimony in this case is wholly circumstantial. And while it is ²⁷ not necessary, in order to warrant a conviction on a criminal charge, for the state to prove the commission of the act by an eyewitness or by direct testimony, and while the guilt of the defendant may be established by circumstantial evidence, still, in order to support a conviction upon circumstantial evidence alone, each fact and circumstance necessary to complete the chain to fasten the guilt upon the defendant must itself be distinctly and independently proven by competent evidence beyond a reasonable doubt; and all the facts and circumstances, when so proven, must not only be sufficient in themselves to satisfy the mind of the guilt of the accused beyond a reasonable doubt, but they must exclude every other reasonable supposition except that of his guilt."

The court modified the instruction offered, and gave another upon the subject of circumstantial evidence, so that the jury were instructed as follows: "The testimony in this case is wholly circumstantial. And while it is not necessary, in order to warrant a conviction on a criminal charge, for the state to prove

the commission of the act by eyewitnesses or by direct testimony, and while the guilt of the defendant may be established by circumstantial evidence, still, in order to support a conviction upon circumstantial evidence alone, each fact and circumstance necessary to complete the chain to fasten the guilt upon the defendant must itself be independently proven by competent evidence; and all the facts and circumstances, when so proven, must not only be sufficient in themselves to satisfy the mind of the guilt of the accused beyond a reasonable doubt, but they must exclude every other reasonable supposition except that of his guilt."

"That the law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking all of the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty."

The charge that, in order to warrant a conviction, the jury ²⁸ must not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, but that it is sufficient if, taking all the testimony together, they are satisfied beyond a reasonable doubt that the defendant is guilty, is erroneous and prejudicial to the rights of the defendant. This identical instruction was reviewed by the supreme court of Colorado in the recent and somewhat celebrated Dr. Graves murder case: *Graves v. People*, 18 Cal. 170. The court there condemn the instruction upon principle, as tending to confuse a jury, and well express our views by saying that "the jury are quite as likely to have applied that portion of the instruction referring to the links to those facts which the law requires to be established beyond a reasonable doubt to warrant conviction as to those evidentiary matters which go to prove such facts, and one or more of which may fail, while the ultimate fact might still be sufficiently established."

An Illinois case (*Bressler v. People*, 117 Ill. 422) has approved of the instructions here complained of, but the reasoning supporting the conclusion of the court is not sound. "It involves," says Thompson on Trials, volume 2, section 2514, "the solecism that, although the circumstances do arrange themselves in the form of the links of a chain, yet that, when one link of the chain is broken, the chain itself may still remain entire; ignoring the obvious conception that no chain can be stronger than its weakest link." The authorities disapproving of these instructions are collected in the Colorado decision to which we have referred.

We believe it to be correct that the prosecution need not prove beyond a reasonable doubt every circumstance offered in evidence which tends to establish the ultimate circumstances or facts on which it relies for a conviction, but if the metaphor of a chain is used, and each circumstance relied upon forms a link, the link becomes a necessary part of the whole chain, and must, therefore, be proved beyond a reasonable doubt.

The cable metaphor, as approved by the Colorado supreme court in *Clare v. People*, 9 Col. 122, illustrates ²⁹ the force of circumstantial evidence more clearly, perhaps, than does the chain comparison. In the cable simile the circumstances which tend to establish the ultimate circumstances or facts are aptly compared with the strands of a cable. All such evidentiary matters going to prove such ultimate circumstances or facts need not be established beyond a reasonable doubt, and still each ultimate fact or circumstance must be proved beyond a reasonable doubt; just as a few strands of the cable may part, and yet it still remains so strong "that there is scarcely a possibility of its breaking." We, therefore, think that, if the chain metaphor is to be used, the instruction, as offered, correctly stated the law, and that it is necessary for the state to prove each fact and circumstance necessary to complete the chain, . . . by competent evidence, beyond a reasonable doubt, etc., and that it was reversible error to charge to the contrary: *Territory v. McAndrews*, 3 Mont. 158.

There are other errors complained of by the appellant. The respondent contends that they are not properly before us for review, but, as the case must be tried again, we will briefly refer to them.

1. Error is assigned upon the following instruction: "That parol evidence of the verbal admissions of a defendant may be evidence of a most satisfactory character. If the jury can see, from the evidence, that the alleged admissions of the crime charged in the indictment were clearly and understandingly made by the defendant, and that they were precisely identified, and the language correctly and accurately repeated by the witness, then such testimony is entitled to great weight." It was error in the court to instruct the jury that testimony of admissions of defendant was entitled to great weight. The jury being the sole judges of the weight to be given to the testimony, the court should not tell them what particular weight to give to any portion of the testimony: *State v. Sullivan*, 9 Mont. 174; 2 Thompson on Trials, sec. 2287.

2. Upon the trial, the counsel for the state, on the cross-ex-

amination ³⁰ of the appellant, propounded a great many questions calculated to degrade the defendant before the jury. The inquiry took a wide and varied range. She was asked if she had not rented houses for purposes of prostitution at various places in Montana: whether she had not been "a kind of a backer for the prostitution of female persons in Missoula and Hamilton"; whether she had not had a fight with a priest; whether she had not hugged and kissed a juryman after she had been found not guilty of some misdemeanor upon one occasion; whether she had not had a fight with a French prostitute at some time; and whether, at another time, she had not "run a young gentleman through a saloon"; whether she had not been drunk when she was in jail; and, finally, if her picture did not hang in the Rogue's Gallery in the city of New York. We cannot conceive upon what theory of the law this line of testimony was allowed. It was not cross-examination of what appears by the record to have been the appellant's evidence in chief, nor did it legitimately tend to impair the credibility of the defendant as a witness. Its effect must have been highly injurious and prejudicial to the defendant in the minds of the jury. Most of the matters involved in the questions were wholly remote from the question of her guilt or innocence of the crime for which she was on trial, and the investigation seems to have drifted to a rambling assault upon the general character of the defendant, extending not only to all of the offenses with which she may have ever been at any time charged, or even suspected, whether rightfully or not, but likewise to cases where she was acquitted, and to her infirmities of habit, her obscurity of speech, and general depravity of life. Such an examination we most earnestly disapprove of. It was oppressive and unjust, no matter how wicked or degraded the defendant may have been by common report. We find a well-considered decision, censuring such an examination of a defendant, in the recent case of *People v. Un Dong*, 106 Cal. 83.

3. It does not appear whether or not any of the jurors who sat upon the trial of this case had stated upon their voir ³¹ dire that they had fixed opinions as to the guilt of Patrick Mason, the principal, but the appellant's counsel implies that they did, and argues the point in his brief. A juror who has formed a fixed opinion as to the guilt or innocence of the person charged to be the principal offender ought not to sit upon the trial of the person charged as an accessory: *Arnold v. State*, 9 Tex. App. 435.

4. We see no error in refusing to permit a witness to be asked, on cross-examination, for the purpose of affecting her credibility,

whether or not she is addicted to the morphine habit (State v. White, 8 Wash. 230), unless it is proposed to show that the witness was under the influence of the drug at the time the events happened about which she testified, or unless she is under the influence of morphine at the time she is testifying, or unless it is made to appear that her powers of recollection are impaired by the habitual or excessive use of the drug.

5. The court defined a reasonable doubt in substantially the exact language of Webster v. Commonwealth, 5 Cush. 320, 5 Am. Dec. 711, and which was expressly approved of in Territory v. McAndrews, 3 Mont. 158. As part of the definition, however, of a moral certainty, the court charged that "moral certainty may be said to bear the same relation to matters relating to human conduct that absolute certainty does to mathematical subjects. It is a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it. It is not only what men in general will unhesitatingly believe to be true, but what they will be willing to act upon." If the definition of moral certainty is to be given at all, "to be thoroughly impressive it should be carried one step further. . . . Is the juror so convinced by the evidence of the truth of the fact sought to be proved that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests? If this be so, he may declare himself morally certain": Territory v. McAndrews, 3 Mont. 158.

The condition of the record in this case is faulty. The ³² transcript recites that the instructions given by the court are as follows. Then follow what, doubtless, were the instructions read to the jury. At the conclusion of many such instructions, however, we find the word "Given," and, at the conclusion of others, "Given as modified," without specifying what the instruction given was.

The error of the court in charging as it did upon circumstantial evidence is properly presented, and upon that point the case is reversed, and a new trial ordered.

Pemberton, C. J., and De Witt, J., concur.

ACCESSORIES—INDICTMENT.—An accessory before the fact may be indicted as a principal when the statute under which he is prosecuted provides that every person abetting, or in any way assisting in, certain specified acts, shall be deemed a principal: *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652, and note. Accessories before the fact in the commission of a felony may be indicted and convicted as principals under the New York statute: *People v. Bliven*, 112 N. Y. 79; 8 Am. St. Rep. 701, and note.

ACCESSORIES—GUILT OF PRINCIPAL.—An indictment for the crime of accessory before the fact to the commission of a felony cannot be sustained, unless the guilt of the principal felon be established, as well as the guilt of the defendant as accessory: *Ogden v. State*, 12 Wis. 532; 78 Am. Dec. 754; *McCarty v. State*, 44 Ind. 214; 15 Am. Rep. 232.

WITNESSES—ATTORNEY AS.—An attorney who has opened a case and examined witnesses is a competent witness for his client: *Follansbee v. Walker*, 72 Pa. St. 228; 13 Am. Rep. 671.

WITNESSES—CROSS-EXAMINATION OF DEFENDANT IN CRIMINAL PROSECUTIONS.—In order to entitle the prosecution to cross-examine a defendant in a criminal prosecution, who has offered himself as a witness in his own behalf, about matters which are irrelevant to the main issue and calculated to prejudice him with the jury, they must at least be such as clearly go to impeach his general moral character and his credibility as a witness, and a sound discretion will never sanction inquiries the sole object of which is to disgrace the witness: Extended notes to *State v. Duncan*, 38 Am. St. Rep. 897. See, also, the extended notes to *Commonwealth v. Nichols*, 19 Am. Rep. 349, and *State v. White*, 27 Am. Rep. 141.

TRIAL—JURORS—COMPETENCY—FIXED OPINION.—An opinion which disqualifies a juror in a criminal case is of that fixed character which repels the presumption of innocence of the accused who is already condemned in the juror's mind: *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501, and note; but see *State v. Sheerin*, 12 Mont. 539; 33 Am. St. Rep. 600, and note.

INSTRUCTIONS—"MORAL CERTAINTY"—"REASONABLE DOUBT."—The two phrases, "proof beyond a reasonable doubt," and proof "to a moral certainty" are synonymous and equivalent, and each signifies such proof as satisfies the judgment and conscience of the jury as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible: *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 846. See the extended note to *Rippey v. Miller*, 62 Am. Dec. 183.

INSTRUCTIONS.—Definitions of reasonable doubt are the subject of the monographic note to *Burt v. State*, 48 Am. St. Rep. 566-579.

INSTRUCTIONS UPON THE WEIGHT OF EVIDENCE are erroneous: *Harkey v. State*, 83 Tex. Cr. Rep. 100; 47 Am. St. Rep. 19, and note.

FITZGERALD v. CLARK.

[17 MONTANA, 100.]

MINES AND MINING—RIGHT TO FOLLOW DIP.—Under section 2322 of the United States Revised Statutes, providing that locators of mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and also the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from the perpendicular in their course downward, as to extend outside the vertical side lines of such surface location, the

miner who has the apex in his location is entitled to as much length of the vein on the strike, no matter how deep he may go in the dip, as he has length of apex within his surface lines, whether that apex reaches the surface or is found beneath, within the planes of his exterior boundary lines extending downward perpendicularly.

MINES AND MINING—LOCATION ON APEX.—The loss which a miner must suffer, who has the apex of the vein in his location, but is obliged to make his location before he can trace the apex and strike of the vein for its whole distance, and thus makes his location irregularly, is of so much of the vein on the strike by his irregular location as he has failed to obtain of length on the apex.

MINES AND MINING—LOCATION ON APEX OF VEIN—RIGHT TO FOLLOW DIP.—The locator of a mining claim on the apex of a vein, which enters on the end line, and passes out on the side line, is entitled to so much of the strike of the vein on the dip extending beyond the side line as is embraced between a vertical plane dropped into the ground through such end line extended and a parallel vertical plane dropped through the point of intersection of the apex and the side line.

MINES AND MINING—CONTINUOUS VEIN.—In an action to recover the value of ore taken from a portion of a vein lying within defendant's claim, with its apex in plaintiff's claim, the defendant claiming that a continuous vein with the apex thereof entirely upon his ground connects with the ore bodies, such connection can only be made by following a continuous streak or body of quartz or ore or by passing through vein matter, and it cannot be made by following such material or indication as a practical miner would follow with the expectation of finding ore.

INSTRUCTIONS—BURDEN OF PROOF.—An instruction that, "plaintiffs having the burden of proof, they must establish the material allegations of their complaint by a preponderance of evidence," is not erroneous as assuming that either party has established a right to recover.

MINES AND MINING—INSTRUCTIONS—MARKET VALUE OF ORE.—An instruction that the basis for finding the value of ore extracted from a mining claim is the market value of the ore on the dump, after deducting the cost of mining and hoisting, in effect allows the party liable the reasonable expense of smelting and reducing the ore.

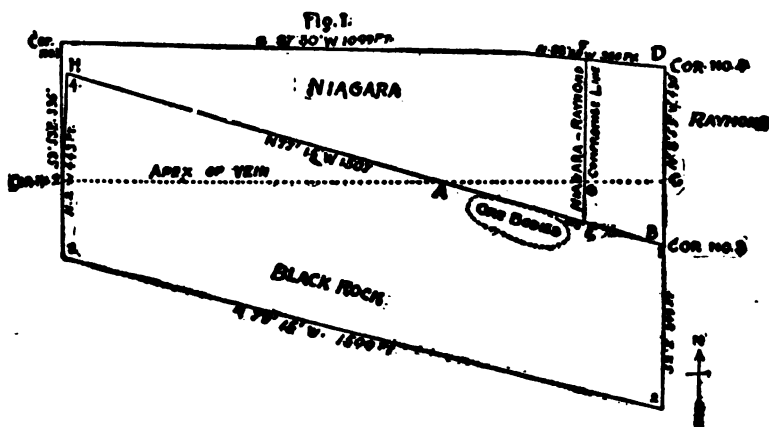
MINES AND MINING—FAULT IN VEIN—EVIDENCE.—The existence of a fault in one vein of ore is not shown by proof that there are other and disconnected faults in another vein, claimed to be a continuity of the vein under consideration, without showing any continuity in the fault.

TRIAL.—THE ACCIDENTAL ABSENCE OF COUNSEL WHEN THE VERDICT IS RECEIVED, if not due to any action on the part of the court, or of the opposing counsel or parties, is not ground for the reversal of the judgment.

TRIAL.—A JUROR'S AFFIDAVIT IMPEACHING his verdict in an equity case is properly disregarded, when the verdict is merely advisory.

The appellants own the Black Rock quartz lode mining claim, and the appellant Clark owns a one-third undivided interest in the Niagara quartz lode mining claim. The respondents own the remaining two-thirds interest in the latter claim, and by this action seek to recover ore taken from their claim. The surface

relations of the two claims are shown by the following diagram, marked Figure 1.



The statement which follows was made by court delivering the opinion. "The north side line of the Black Rock claim is the south side line of the Niagara claim. We do not purport to exactly indicate on the diagram the position of the apex of the vein as it traverses the two claims. The dotted line simply indicates the general course of the vein, and, as far as the purposes of this decision are concerned, is correct. The apex moves across the Black Rock claim from west to east, and crosses the boundary line between the two claims at a point marked A on the diagram, which is, as the jury found, five hundred and thirteen feet westerly from the northeast corner of the Black Rock, which corner is marked B on the diagram. The east line of the Niagara was originally at the place marked BD. In some controversy between the Niagara and the Raymond claim to the east, a compromise was made, by which the boundary between these two claims was placed at a point about two hundred and twenty-four feet westerly from the original Niagara east end line. This was called the "compromise line," and would be at about the place as marked on the diagram EF. This, however, is not important in the present suit. The parallelism of the end lines of the Niagara was not disturbed by the Raymond compromise. The apex and the strike of the vein, having crossed into the Niagara ground at the point marked A, continue easterly, and pass wholly out of the Niagara ground through the easterly end line thereof. It is immaterial whether that end line is the line BD or EF. The strike and apex pass through each of them. The vein dips to the south. The portion of the apex which is repre-

sented by the line AG is wholly within the Niagara surface lines. The portion of the vein below this part of the apex, in its downward course into the earth—that is to say, on its dip to the south—passes under the line HB, which is the north side line of the Black Rock, and the south side line of the Niagara. We call this line a side line at present simply for convenience, and not as a prestatement of our views as to whether it must be considered a side line or an end line. On this portion of the vein on the dip lying under the apex AG, the ore was found marked on the diagram “ore bodies,” which was the subject of this action. The defendant, the Black Rock owner, entered upon this portion of the vein, and extracted the ore from the place as marked on the diagram. There was a contention in the case that these ore bodies were upon a vein other than that which apexed (if we may invent this verb) at AG; that is to say, upon another vein, the apex of which was on the Black Rock ground. But the findings were adverse to the Black Rock in this matter. We will not review that contention. For the purposes of this decision, the ore bodies in question were upon the vein, the apex of which is indicated by the line AG, which lies wholly within the Niagara surface lines. The plaintiffs, being the owners of an undivided two-thirds interest in the Niagara, brought this action against the defendants to recover the two-thirds value of the ores so taken from the place above described. Plaintiffs obtained judgment for twenty-seven thousand two hundred and forty-two dollars and fifty-four cents. The jury also found that the apex of the vein in controversy passed entirely within the lines of the Niagara lode at the point marked A. Judgment was to this effect, as well as for the amount of money named above. A motion for a new trial was denied. The Black Rock people appeal from the judgment and from the order denying the new trial.”

Smith & Word, and G. Haldorn, for the appellants.

J. F. Forbis, for the respondent.

¹¹¹ DE WITT, J. This case was tried in the district court after the decision of *King v. Amy & Silversmith Min. Co.*, 9 Mont. 543, and before the reversal of that decision on appeal to the United States supreme court: *King v. Amy & Silversmith Min. Co.*, 152 U. S. 222. The case was tried upon the assumption that the law as attempted to be declared in 9 Montana was correct. The district court instructed the jury upon this theory, and the judgment gave to the Niagara people the two-thirds value of the ore taken by the Black Rock east of the point where

the apex of the vein passed entirely into the Niagara ground, namely, point A on the diagram. No exceptions to these instructions were preserved or specified so that they can now be reviewed. But since the trial of the case at bar, and perfecting the appeal to this court, the United States supreme court has reversed our decision in the Amy & Silversmith case.

The Black Rock people argue that, although they are not now in a position to urge error in the instructions (that is to say, that which they now claim to be error by reason of the United States supreme court decision of the Amy & Silversmith case), still they can raise the same point upon the ground that the pleadings do not support the judgment. Their argument to this effect is, that the pleadings, alleging the facts as detailed in the statement above, do not warrant the judgment ¹¹² under the law as decided by the United States supreme court in the Amy & Silversmith case. In other words, the Black Rock contends that, under that decision, if the Niagara apex leaves the Niagara claim through a side line, as it does, the Niagara is limited, in following down the dip of the vein, to a perpendicular plane drawn downward through that side line—the line H B on the diagram; whereas the district court did not so limit them, but held in its judgment that the Niagara could take the ore on the dip of the vein under the apex A G, and east of the point A, although such vein on its dip extended southward under the Black Rock north side line. That is to say, the district court gave judgment in accordance with the law of the Amy & Silversmith case, in 9 Montana, which was declared not to be the law in the Amy & Silversmith case, in 152 United States. We will concede to the Black Rock that this question is raised by the pleadings, and we shall proceed to determine whether the Niagara or the Black Rock owns the ore in dispute taken from the place marked "Ore Bodies" on the diagram.

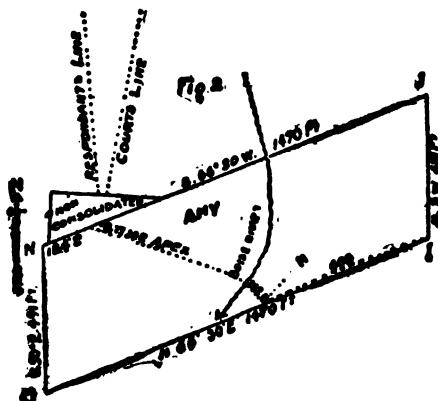
We shall not renew the discussion of the cases upon this question decided by the United States supreme court prior to May 21, 1890, the date of our decision of the Amy & Silversmith case. Our best construction of those decisions is found in our opinion in that case. We there met the problem which had for years engaged the earnest attention of lawyers who had to do with mining litigation—i. e., the preservation of the intent of the mining statutes when they are applied to a location in which exploration has demonstrated that the apex or strike of the vein do not pass through both end lines of the location. We gave our best endeavor and research to that decision, and arrived at a re-

sult which we were willing to concede was not wholly in accord with the decisions of the United States supreme court upon that subject, but which we believed could, with a very little effort, be reconciled with those decisions, and which we were wholly satisfied was the only practicable working solution of the problem in all its phases, and which we were also wholly satisfied was fully within the intent ¹¹³ of the United States mining laws. Even with the profound respect which we, in common with all courts, entertain for the decisions of the United States supreme court, we think that there is no impropriety in saying, and that it is due to ourselves to say, that the longer we observe the daily operation of the mining laws in practical affairs, the more satisfied are we that our decision of the Amy & Silversmith case was correct. We are strengthened in this opinion by the views of other courts, to which we shall hereinafter refer. But the United States supreme court is the court of last resort upon this subject, and our opinions, as a rule of decision, must be abandoned if they are in conflict with the declarations of the superior tribunal. If that court had given no further utterance upon this subject since its decision of the Amy & Silversmith case, we should feel that we must, however reluctantly, desert the principle which we sought to maintain in that case. But, as will be seen in the review of the cases below, that distinguished tribunal has given a hint that it is willing to reconsider the principle involved. Upon that hint, we feel that we are justified in approaching the subject much as if it were *res integra*, and without subjecting ourselves to the criticism of judicial insubordination.

But to the subject in hand. As noted above, we shall not go to the decisions back of our Amy & Silversmith opinion in 9 Mont. 543. We are satisfied with that discussion of the subject, and the review of the authorities up to that date. We shall take up the subject as it has been developed since our decision in that case. The history of the discussion is found, chronologically, in the following cases: *King v. Amy & Silversmith Con. Min. Co.* (May 21, 1890), 9 Mont. 543; *Tyler Min. Co. v. Sweeney* (Jan. 16, 1893), 54 Fed. Rep. 284; *King v. Amy & Silversmith Min. Co.* (March 5, 1894), 152 U. S. 222; *Last Chance Min. Co. v. Tyler Min. Co.* (April 9, 1894), 61 Fed. Rep. 557; *Consolidated etc. Min. Co. v. Champion Min. Co.*, 63 Fed. Rep. 540; *Del Monte Min. etc. Co. v. New York etc. Min. Co.* (March 13, ¹¹⁴ 1895), 66 Fed. Rep. 212; *Last Chance Min. Co. v. Tyler Min. Co.* (April 15, 1895), 157 U. S. 683.

The cases cited above in 54 Fed. Rep., 61 Fed. Rep., and 157

U. S., are different appeals and discussions of the same case. In the Amy & Silversmith case, the apex of the vein crossed the claim as indicated in the diagram used in that opinion, and which is reproduced here, marked "Figure 2":



The vein dipped to the north. We held that the right of the Amy & Silversmith to follow the vein on the dip was bounded by a perpendicular plane extending into the earth at the point where the apex crossed the Amy & Silversmith north side line, the point marked e on the diagram, Figure 2, and which plane was parallel to the end lines of the Amy & Silversmith claim, and extending north of the Amy & Silversmith north side line. We quoted section 2322 of the Revised Statutes of the United States, which is as follows: "The locators of all mining locations . . . shall have the exclusive right of possession and enjoyment of all . . . veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession ¹¹⁵ to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes, drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

We then said: "As said by Mr. Justice Field (Iron Silver Min. Co. v. Elgin Min. etc. Co., 118 U. S. 206, this section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. . . . The difficulty arising from the

section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein.' We may add to these words that further difficulties arise when we are obliged to apply the statute to facts not wholly within its contemplation. If a mining location be made regularly—made so that the strike of the vein crosses the location from end line to end line, and at right angles to said end lines—there is nothing in the statute to construe or interpret: *Mining Co. v. Tarbet*, 98 U. S. 469; *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 205; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 485. "There is no patent or latent ambiguity.' But when veins or their strikes cross the side lines, or a side line and end line, at all conceivable angles, difficulties confront the courts that can be best met by legislative aid. Until such aid is invoked, the courts must follow the statute and previous construction as closely as the varying facts will permit: *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 208. The history of mining has proven that the law of May 10, 1872, and amendments thereto, do not afford clear, adequate, and simple solution for some of the practical conditions that arise in the development of the mining industry. The case at bar is a notable instance. It is a first impression in this court, and all other appellate courts."

After stating what we understood to be the meaning of the words "dip," "strike," etc., as used by miners and in the ¹¹⁶ decisions, we further said: "The United States mineral law gives to the miner the whole of every vein the apex of which lies within his surface exterior boundaries, or which lies within perpendicular planes drawn downward indefinitely on the lines of those boundaries. The miner may follow the dip . . . wherever it goes, provided he has the apex as a basis of operation, and that he does not cross the vertical planes of the end lines. The intent of the statute is to give the miner a section or block of the vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location, and of a depth as far as he desires, or is able to work downward; and at the most remote depth attained he shall have the same number of feet on the strike as he had at the apex: *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 205.

We have always been of the opinion that this is the keynote of the interpretation of section 2322 of the Revised Statutes of the United States; that is to say, if the miner has the apex in his lo-

cation, he is to have the vein, and he has as much length of the vein on the strike, no matter how deep he may go in the dip, as he has length of apex within his surface lines, whether that apex reaches the surface or is found beneath the same, within the planes of his exterior boundary lines extending down perpendicularly. This, in our opinion, is what section 2322 says in plain language.

Continuing further in the *Amy & Silversmith* case, we said: "It seems that such grant by the statute to the miner, in view of the geological facts and history of veins, and particularly their almost universal tendency to depart from a perpendicular in their course downward, was deemed to secure to him a more satisfactory title than he would obtain if he were compelled to locate a parallelogram on the surface of the earth, as under the Spanish mining law, and take all and only that portion of the solid contents of the earth included in a parallelopipedon formed by dropping vertical planes downward on the line of each side of such parallelogram; and the intent of the ¹¹⁷ statutory grant of section 2322 is that the miner may follow his vein on the dip, but not on the strike, if he departs from the parallelopipedon indicated. Therefore, if the miner locates his claim regularly—that is, as the statute contemplates that he will—he has all that the statute intends to give him: See cases cited *supra*. If he 'will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences': *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 207; that is, he takes less of the apex and strike than he would obtain by a regular location, and consequently less of the dip."

We are still of the opinion that the loss which a miner should suffer if he is obliged to make his location before he can trace the apex and strike of the vein for its whole distance, and thus makes his location irregularly, should be the loss of so much length of the vein on the strike as by his irregular location he has failed to obtain of length on the apex. If this be the consequence which he is to suffer by reason of his irregular location, he loses simply that which he failed to locate, and he does not lose the vein of which he has located the apex. That he is to have the vein when he has the apex, we believe is the intent of the mining law: U. S. Rev. Stats., sec. 2322.

We said further in the *Amy & Silversmith* case: "But in order for the miner to make his location in exact conformity with the

intent of the law, he must know, when he fixes his exterior boundaries, what the true strike of the vein is. If he knows this, he will locate so that the strike shall pass through the middle of each end line, leaving three hundred feet of surface on each side of the vein. But the true strike is often ascertainable only after immense sums of money are expended in development. He has twenty days, under our statute, to determine this important matter, which may take years to fully demonstrate. If, in this helpless condition, the prospector commits an error of geological judgment, and upon such error he expends the toil of years, and that toil has wrought its reward, we are of opinion that the statute should be so construed as ¹¹⁸ will come the nearest to giving to him that whole section or block of the vein which we have above indicated that it is the intent that he shall have, as is consistent with the amount of apex which he has happened to secure by his surface lines, and their planes extended downward."

We then proceeded to review the contentions of counsel in the case, and to discuss, as we understood them, the three leading cases in the United States supreme court, namely; Mining Co. v. Tarbet (the Flagstaff case, 98 U. S. 463; Iron Silver Min. Co. v. Elgin Min. etc. Co. (the Horseshoe case), 118 U. S. 196; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478.

We then offered the following solution of the problem, and decided the case upon the principle, as found on page 575 of 9 Montana, as follows: "These three United States cases have compelled that court to endeavor to cast into the Procrustean bed of the statute individuals that strained the mold into which they were forced. But we believe that we may legitimately conclude from those cases that, in the facts now before us, the principle is, that the north side line of the Amy terminates the strike of the vein, and that the dip must be controlled by the planes of the original end lines. The Amy people may follow their dip north of their north side line, but only as it lies between the planes of their end lines, as below considered. The object of parallelism in the end lines is, that the locator may have his full section of the lode in its entire depth. But the determination of the strike of the Amy at a point on the side line deprives them of the dip northwest of that point, because the dip, in that portion, lies under the apex of the Non-Consolidated. The law intends that the plane of the end line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end line, as in a regular location, the bounding plane would there operate upon the dip. If

the strike, by reason of its going out of a side line, falls short of reaching the original end line plane, that plane must take effect where the strike in fact ends; that is, at a point on the ¹¹⁹ side line (point e Figure 2), and, if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east end line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any readjustment according to subsequent developments. The parallelism of the end line planes is fixed by location, and never varies. The point of departure of the strike from the surface lines fixes the point where the end line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line. Complications are soluble upon this theory. The intent of the statute seems to be secured."

As noted in the *Amy & Silversmith case*, the difficulties arise in applying the United States mining statutes to accidentally irregular locations; that is, locations where it is developed in time, and by explorations, that the apex and strike pass through the side lines, or a side line and an end line (as in the case at bar), or enter and pass out of the same side line. We essayed in that case a solution of this difficulty which could be applied to every irregularity, and which would secure absolute uniformity in all complications, and give to every mining location, as the statute intended and declared, the whole vein, in its whole depth, to the extent of the length of the apex which was located. We thought that we had accomplished that result. With due deference to those who have differed from us, we think so still.

The principle which we sought to maintain in the *Amy & Silversmith case* found its first approval in an appellate court in *Tyler Min. Co. v. Sweeney*, 54 Fed. Rep. 284. In that case, the United States circuit court of appeals, ninth circuit, discussed the extralateral rights of a location where the apex and strike passed through a side line and an end line. The situation differed from that of the *Amy & Silversmith case*, as in that case the apex and strike passed through both ¹²⁰ side lines. But we understand that the circuit court of appeals approved the principle of our decision in the *Amy & Silversmith case*, for the opinion by Judge Hawley, a veteran lawyer and judge in the mining regions, says: "Here the location of the Tyler was prop-

erly made in the form of a parallelogram along the course of the lode or vein. The lode extends from the northwesterly end line for a distance of nearly eleven hundred feet within the side lines of the surface location, and then so changes its course as to cross the southerly side line into the Last Chance location. The learned justice who wrote the opinion in the Horseshoe case (*Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196), when he said that the parallelism of the end lines 'is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines,' did not mean that it was essential to such right that the lode should extend in its length from one end line to the other of the location. If the lode in question, instead of extending into the Last Chance location, had abruptly broken off within the surface lines of the Tyler near the point where in fact it crossed the line, there could certainly be no question as to the right of the Tyler to follow the lode or vein in its downward course for its entire depth outside of the vertical planes drawn through the side lines. The fact that it continued its course and crossed the side lines does not in any manner change this principle. In either case, the locator is entitled to the same rights. In such cases, the end lines are not necessarily those which are marked on the ground as such. An end line may be drawn at the point where the lode abruptly terminates within the surface lines, or at the point where the apex of the lode crosses the side line of the surface location. This, upon principle, justice, and authority, it seems to us, is the only reasonable construction that can be given to the statute. Whenever, and in whatever manner, this point has been presented by any similar facts, the rulings of the courts have been substantially in accordance with the views we have expressed: *Golden Fleece etc. Min. Co. v. Cable etc. Min. Co.*, 12 Nev. 313; *Doe v. Sanger*, 83 Cal. 203; *Kahn v. Old Telegraph Min. Co.*, 2 Utah, 174; *King v. Amy & Silversmith Con. Min. Co.*, 9 Mont. 543. In the case last cited, the lode crossed the surface lines without reaching either end line as marked on the surface, and the court held that, where a lode or vein crosses the side line of a location, the strike is terminated by the plane of such side line, and the right to follow the vein on its dip is determined by a vertical plane, parallel to the end lines, drawn downward, and which takes effect at a point where the apex intersects the side line. The court, in its opinion, after reviewing the *Flagstaff* case, 98 U. S. 463, the *Argentine* case, 122 U. S. 478,

and the Horseshoe case, 118 U. S. 196, and pointing out the differences existing between them and the Amy case, and stating the various contentions of counsel, said:"

The opinion of Judge Hawley then quotes *King v. Amy & Silversmith Min. Co.*, 9 Mont. 554, as to the principle therein announced. That case went back for trial and appeared again in the circuit court of appeals as the *Last Chance Min. Co. v. Tyler Min. Co.* (April 9, 1894), 61 Fed. Rep. 557, and in the opinion the court adhered to the principle of the Amy & Silversmith case. In the mean time, the Amy & Silversmith case had been reversed by the United States supreme court, March 5, 1894: *King v. Amy & Silversmith Min. Co.*, 152 U. S. 222. But that decision is not mentioned in the *Last Chance* case (61 Fed. Rep. 557), and does not seem to have been considered by the circuit court of appeals. That court said: "The right of each party to follow the lode on its strike or true course lengthwise is terminated at the point where the lode crosses the side line of the Tyler and Last Chance locations; but each company would have the right to follow the lode, the top or apex of which is within its surface lines, on its dip, not upon its strike, upon a vertical plane drawn downward parallel to the end line, at the point where the strike of the lode ended; that is, at the point where the lode, in its lengthwise course, intersects the side lines of the claims. The Tyler would be entitled to all that portion of the lode that lies ¹²² westerly of such vertical line drawn downward, and the Last Chance would be entitled to all that portion of the lode easterly of said line."

As the United States Amy & Silversmith decision was not mentioned in *Last Chance Min. Co. v. Tyler Min. Co.*, 61 Fed. Rep. 557, although preceding it in time, we may treat the United States decision as being subsequent. In that case, after stating the facts and the contentions, the United States supreme court said: "Section 2322, cited above, declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location; and also the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface location. The surface side lines, extended downward vertically, therefore, determine the extent of the claim, except when in its descent the vein passes outside of them, and the

outside portions are to lie between vertical planes drawn downward through the end lines. The difficulty in the present case arises from the course of the vein or lode upon which the Amy location was made. It is evident that what are called side lines of the location, as shown in the diagram, are not such in fact, but are end lines. Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein. In the Amy claim the lines marked as side lines cross the course of the strike of the vein, and do not run parallel with it. They, therefore, constitute end lines. It is true the lines are not drawn with the strict care and accuracy contemplated by the statute, and which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments. But, as was said in this court in *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196, 207: 'If the first locator will not ¹²³ or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences.' The court cannot become a locator for the mining claimant, and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim, and make new side lines or end lines. Where it finds, as in this case, that what are called side lines are in fact end lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines, but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law. Acting upon this principle, there is no lateral right to the holder of the Amy claim by which he can follow its vein into the Non-Consolidated claim. Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made to ascertain, as near as possible, the course and direction of the vein. . . . 'Even then,' the court added, 'with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein; but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subjected to perpetual readjustment according to subterra-

mean developments subsequently made by mine workers. Such readjustments at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims.' Applying this doctrine to the case before us, it follows that the vein in controversy, the apex of which was within the surface lines of the Amy claim, did not carry the owner's right beyond the vertical plane drawn down through the north side line of that claim. The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side ¹²⁴ line of its claim, as that side line so called was, in fact, one of its end lines."

We understand that the United States supreme court not only reversed our judgment, but discarded as untenable the principle upon which we pronounced it. This decision was received with regret, not only by the bench and bar in the mining regions, but by both practical and scientific miners. The regret was greater in that the decision emanated from, as we said in the Amy & Silversmith case, "Mr. Justice Field, the judicial father of the mining law in the United States," a jurist who has illuminated this topic of the law by not only his profound learning, but by his practical experience in mining affairs.

As an indication of the reluctance with which courts inferior to the United States supreme court have accepted the reversal of the principle of the Amy & Silversmith case we notice the case of *Del Monte Min. etc. Co. v. New York etc. Min. Co.* (Col., March 13, 1895), 66 Fed. Rep. 212.

In that case, the court had before it the conditions of an apex and strike passing through an end line and side line. Judge Hallett, district judge, to whom courts and counsel in the mining regions are greatly indebted for his learning, which has been applied to this class of litigation, said:

"If the strike of the lode in the New York location kept its course from end to end of the location, the right to follow the lode outside the location would not be denied. As, however, it departs from its strike from the location on the east side, and not from the north end, it is said that the claim has no end lines, or, at all events, none that can be recognized as limiting the right to any part of the vein outside of the exterior lines of the claim. This is asserted as a proposition of law deducible from several decisions of the supreme court that the lines of a location crossed by the apex of a vein on its strike shall, as to such vein, be regarded as end lines, whatever their position may be; and, if this proposition be accepted, the south end line and east side line,

intersected by the outcrop of this lode, ¹²⁵ are not parallel to each other, as demanded by section 2320 of the Revised Statutes. This, however, has not been the interpretation of law in the supreme court, or in any court, so far as we are advised. It is true that in *Mining Co. v. Tarbet*, 98 U. S. 463, and recently in *King v. Amy & Silversmith Mining Co.*, 152 U. S. 222, the supreme court declared that the side lines of a location shall be end lines whenever the lode, on its strike, crosses such lines; but these decisions do not affirm that all lines of a location crossed by a lode on its strike shall be end lines. The most that can be deduced from them is, that opposite lines, parallel to each other, when crossed by the lode, shall be end lines. The case presented is not within the principle of these decisions. We have a lode extending on its strike on the general course of the location, and within its side lines a distance of one thousand and seventy feet. It is conceded that the south end line of the location is well placed, and all parts of the lode covered by the location are within the end lines as fixed by the locator. The difficulty arises from the circumstance that the location extends in a northerly direction about two hundred and eighty feet beyond the point where the lode diverges from the side line. No reason is perceived for saying that this mistake in the length of the location should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties: *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line; and, if there be magic in the word 'line,' it will be better not to use it. In this instance, as in most controversies between adjacent owners, it is necessary to ascertain what part of the lode is within the New York location, and this, according to the map, appears to be one thousand and seventy feet. At all points on the dip of the lode into the mountain westwardly we can ascertain the length of the lode within the end lines by measuring the same distance from the ¹²⁶ south end line produced. In this proceeding, there is no departure from the end lines of the New York location as fixed by the relator, and there is no new line of location drawn for any purpose whatever. We keep entirely within the end line of the location as required by the statute, and the circumstance that we are somewhat short of the

north end line does not in any way affect the principle to be followed in construing the statute. The same rule would be adopted if the lode were physically shorter than the location. Let it be assumed that upon a lode of the length of one thousand feet (which is not an extraordinary occurrence) a location shall be made of the length of fifteen hundred feet, extending two hundred and fifty feet in each direction beyond the ends of the lode. Would any one deny the right of the locator to follow the lode within his end lines, upon the ground that the lode did not come to either of such lines? I think not. The case is not different when the lode intersects one end line and not the other, but keeps within the location for a considerable distance. In that case, as in the accepted case of a lode traversing the location from end to end, the locator ought to be allowed to follow his lode into adjoining territory so far as he may within his end lines, and so far as he holds the outcrop in his location. Upon this construction of the statute, respondent is entitled to so much of the lode upon its dip as lies between the south compromise line and the point of divergence of the apex of the vein from the New York location."

It is also true that in Judge Hallett's case the facts differed from the Amy & Silversmith, in that the apex crossed a side line and an end line, instead of two side lines, as in the Amy & Silversmith case. But Judge Hallett applied the principle of the Amy & Silversmith, and he so applied it after, as we understand, the United States supreme court had repudiated it.

One month after Judge Hallett's decision—that is, on April 15, 1895—appeared the decision in the United States supreme court in *Last Chance Min. Co. v. Tyler Min. Co.*, the case which we have formerly encountered in 54 Fed. Rep. ¹²⁷ and 61 Fed. Rep. See *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683. The case was decided in the United States supreme court without it being necessary to treat the question of the apex and strike passing through an end line and a side line. But as to this matter the court said:

"Our conclusions in this respect obviate the necessity for considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that, according to the original location of the Tyler claim, the vein enters through an end, passes out through a side line, while by the amended location it passes in and out through end lines. Of course, if the latter is a valid location, the owner of the claim would unquestionably have the right to follow the vein on its

dip beyond the vertical plane of the side line. But, if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim extended downward? It has been held by this court in the cases heretofore cited that, where the course of a vein is across instead of lengthwise of the location, the side lines become the end lines, and the end the side lines; but there has been no decision as to what extraterritorial rights exist if a vein enters at an end and pass out at a side line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law that the owner of real estate owns all above and below the surface, and no more? Or may the court rely upon some equitable doctrine, and give to the owner of the vein the right to pursue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines? If the common-law rule as to real estate obtains in such a case, then, of course, on the original location the owners of the Tyler claim would have no right to follow the dip of their vein outside the vertical plane of any of its boundary lines; and, even if the amended application was perfectly valid, the question would arise whether the rights acquired under it related back to the date of the original location, or arose simply at the time of the amendment, in which case there would be no doubt of the fact that ¹²⁸ the owners of the Last Chance had by years a prior location. However, in the view we have taken of the other question, it is unnecessary to consider this."

Mr. Justice Brewer wrote the opinion. There was no dissent. We assume that Mr. Justice Field concurred. The fact that the United States supreme court said in this case (with the justice concurring who wrote the Amy & Silversmith decision) that it had never given any decision as to what extraterritorial rights exist if a vein enters at an end line and passes out at a side line, we think is a sufficient warrant to us to reopen the discussion as to what principle of decision should apply in these irregular locations.

We can see but two solutions of the difficulty presented in this case: One is to say that when the apex and strike cross a located side line, such side line becomes an end line, in accordance with what we understand to be the decision in the Flagstaff case and in the Amy & Silversmith case in the United States supreme court. The other is to apply the Amy & Silversmith doctrine as announced in 9 Montana.

We will examine what seems to us to be the legitimate results

of the first proposition. Turning again to the diagram, Fig. 1, the located east end line of the Niagara claim must still remain an end line. It was located as such, if that means anything; and the apex and strike pass through it, which fact, under any view, means everything. So this line is, and must remain, an end line. Then we have the south side line of the Niagara, also an end line, because the apex and strike pass through it. So we have two end lines not parallel to each other, but at an angle to each other not far from a right angle. But the end lines must be parallel. The result is, that the Niagara cannot follow its dip at all. But the statute says it may follow the dip. These difficulties do not come to us as a surprise. We clearly foresaw them, and pointed them out in *King v. Amy & Silver-smith Con. Min. Co.*, 9 Mont. 571. Thus we find that the Niagara claim, under these views, must be relegated to the common law. It owns downward inside of the perpendicular planes of its surface lines. But this result is not ¹²⁹ the intent of the law: U. S. Rev. Stats., sec. 2322. The intent is, that the locator shall have the right to the vein throughout its entire depth if the apex lies within its surface lines, although the vein, on its dip downward, departs from the perpendicular so as to extend outside of the side lines. By calling this side line an end line, the whole intent of the statute is destroyed, and we go back to the system of the Spanish law (*King v. Amy & Silver-smith Con. Min. Co.*, 9 Mont. 567), which was deserted in the adoption by Congress of the American mining laws.

For example, again, in this case, reverse the direction of the dip, and assume that it goes north, then the Niagara people would take all of the vein between the downward planes of the end line and side line—the lines E F and E H on the diagram. They would get a fan-shaped section of the vein, rapidly increasing in size with every foot downward. That is to say, such would be the result, unless we adhere to the common-law rule, and have no extralateral rights at all. The plain fact is, that to call the side line and end line in this case leads us into consequences that totally upset the whole intent of the law. We cannot subscribe to any such doctrine. These contemplations are not at all new to us. We pointed out these difficulties and absurdities in the *Amy & Silver-smith* case, and we then hoped that they would not again threaten the disturbance of the rights intended to be given by the mining statutes. We feel now, as we did in the *Amy & Silver-smith* case, that we are not able to take the responsibility of any such destructive construction. And

why, indeed, should a located side line be converted into an end line by a court? The locator never so intended it. He made the side line, the long line, fifteen hundred feet in length, intending it to be generally parallel to the vein. The law never intended that such a side line should be an end line. If the side line is to become an end line and the end line a side line, then the court, working this readjustment of the lines, puts the side lines at a distance from the center of the lode much greater than three hundred feet. What would be done with those lines, and this extra surface taken in by them? Shall they be left so that they will include one thousand or fifteen hundred feet in width, when ¹³⁰ the law intended the locator should have six hundred feet only, or will these judicially created side lines be drawn in, and thereby new side lines made by the court? But "the court cannot become a locator for a mining claimant": *King v. Amy & Silversmith Min. Co.*, 152 U. S. 228. The further we follow this doctrine into its details, the more untenable it appears. We shall abandon its pursuit, and leave its reconciliation to reason, law, and the intent of the statute, and practical application to others, who may be more skillful in making a reasonable construction.

As we leave this confusion, and turn to the other solution—that of the *Amy & Silversmith* case in 9 Montana—difficulties disappear, and there is light upon the whole path. We can then do as the United States supreme court said in its decision in *King v. Amy & Silversmith Min. Co.*, 152 U. S. 228: "The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants, under the statute"; that is to say, we can give to the miner, or rather the law, as we construe it, gives to the miner, as much length of strike, no matter how deep he goes upon the dip, as he has length of apex; and he loses in strike and dip only what he has failed to get in apex. That is what the district court, in this case, following *King v. Amy & Silversmith Con. Min. Co.*, 9 Mont. 543, accomplished. It gave to the Niagara the ore on the dip east of the point where the apex and strike crossed the south side line of the Niagara. This is what the circuit court of appeals did in *Tyler Min. Co. v. Sweetney*, 54 Fed. Rep. 284, and *Last Chance Min. Co. v. Tyler Min. Co.*, 61 Fed. Rep. 557. This is what the circuit court of the district of Colorado did in *Del Monte Min. Co. v. New York etc. Min. Co.*, 66 Fed. Rep. 212. This is what we understand

the United States supreme court suggested in *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, that it might do.

The language of Judge Hawley and Judge Hallett in those decisions is very apt when they suggest that, if the apex and ¹³¹ strike broke off abruptly at the side line, would anyone contend that the dip could not be followed within the end lines? And why should it not also as well be followed if the strike, instead of physically ceasing to exist at all, simply ceased to further exist within the Niagara lines? We can think of no good reason which would allow the owner to follow the vein on the dip in the supposititious cases and deny him that right in the actual case. In the *Amy & Silversmith* case we spoke of the end line plane taking effect at the point where the strike in fact ended. By this use of the words "end line," perhaps we gave opportunity for the contention that we were moving an end line, and locating it in a place other than that fixed by the locator. We endeavored to make it clear that we were not moving an end line, but we were simply giving it effect at the only point where it could operate. But, as Judge Hallett says, if there is any "magic" in the word "line," we will not use that word.

Perhaps we can more effectively describe the principle for which we contend as follows: Put one side of a square on the located east end line of the Niagara (line B D Fig. 1), and let the other end of the square be long enough to reach the point where the strike and apex leave the Niagara ground (point A, diagram); then run this square up and down the east end line (line D B, diagram), and that line extended south, and run the square all over the perpendicular plane of this line; then the successive points which the long end of the square reaches will be the points beyond which, to the west, the Niagara people may not follow the vein on the dip, and beyond which, to the east, the Black Rock people may not come. Thus the Niagara is keeping upon the dip of the vein within its end lines, and it is not following the strike of the vein outside of any line. The principle might also be further illustrated by imagining a pair of draughtsman's parallel rulers. One ruler is placed on the east end line of the Niagara (the line B D); its parallel is pushed out to the point where the apex crosses the side line (the point A), and set. The plane dropped perpendicularly from the westerly ruler would form ¹³² the boundary between the Niagara and the Black Rock on the dip of the vein.

Of course, we understand the difference between the doctrine

of the United States supreme court, which commences with the Flagstaff case, and received its last treatment in the Amy & Silversmith case, and our theory which we held in the Amy & Silversmith case. The supreme court doctrine seems to be that the side lines which are marked as such on the ground, namely, the fifteen hundred feet lines as the side lines, and the six hundred feet lines as the end lines, are not in fact the side lines and end lines; but what are the side lines and the end lines is to be determined by the subsequent demonstration of where the apex and strike cross the locator's lines. The trouble with the theory is, that it leaves the determination of the boundaries to subsequent development, which may require years, and it calls that an end line which was never located as such, and it makes the side lines six hundred feet long only, when the statute says they may be fifteen hundred feet, and makes the end lines fifteen hundred feet long when the statute says they shall not be over six hundred and it gives a surface of more than three hundred feet on each side of the center of the lode. We cannot be persuaded to think that this is the intent of the statute. As we noted in King v. Amy & Silversmith Con. Min. Co., 9 Mont. 574, the difficulties of this construction did not fully appear in the Flagstaff and Argentine cases, where, as we understand, the strike and apex of the vein were practically at right angles to the length of the location. But the theory meets great difficulty when applied to veins which have a general course lengthwise of the location, and which happen to slip out of the location by a side line before the end line is reached.

Again, we fully understand that the situation in the case at bar and the Tyler case and the Del Monte case differs slightly from that of the Amy & Silversmith case. In the Amy & Silversmith the vein passed through two side lines. In the case at bar and the other cases it passes through a side line and an end line. But we contend that the same reasoning applies to both situations; that is, that the miner shall have as much vein ¹³³ in length on the strike, at all depths to which he may go on the dip, as he has length of apex within his surface lines. We cannot too strongly emphasize our opinion, even at the expense of tiresome reiteration, that this is the intent of section 2322 of the Revised Statutes of the United States, and the true interpretation of the decisions thereunder. We believe that this doctrine should be applied to both situations. If the other doctrine is to be applied to one situation, why not to both? For it does not seem to us consistent to say that the dip of the Amy & Silversmith

must be cut off at their north side line, and that the Niagara may go beyond their south side line, simply because the Niagara vein, on its eastward course on the strike, goes out through an end line instead of a side line. But when we undertake to apply the United States Flagstaff and Amy & Silversmith doctrine to the case at bar, we find that the Niagara cannot follow its dip out of any of its lines, and it is cut down to the common-law rule of "ad coelum et ad orcum."

What we contend for is a uniform construction of the law; a construction which will give the vein on the dip to every locator who has the apex in his location, and not give it to one who has the apex, and withhold it from another who as fully has the apex; that shall give it to the Amy & Silversmith and the Niagara as well. Let us do this, and make estates in mines uniform under the law. This seems to us more reasonable than to apply a construction which will give to one locator the estate which the law contemplates and deny it to another.

The United States supreme court in *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, observing the possibility or probability of being at some time obliged to apply its Flagstaff and Amy & Silversmith rule to the situation of a vein passing through a side line and an end line, seemed to shrink from the consequences of the doctrine (consequences which we pointed out in our opinion in the Amy & Silversmith case, 9 Mont. 571), and stated that they had never decided what extralateral rights existed in such a situation. They also said: "May the court rely upon some equitable doctrine, and give to the owner of ¹³⁴ the vein the right to pursue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines?" We propose now just such an equitable doctrine, the same one that we proposed in the Amy & Silversmith case, and one wholly within the intent of section 2322 of the Revised Statutes of the United States.

We have hereinbefore, and especially in the Amy & Silversmith case, given the reasons for our belief that such a doctrine can, by a slight effort, be reconciled with the former decisions of the United States supreme court, and that, as Judge Hawley said in the Tyler case (*Tyler Min. Co. v. Sweeney*, 54 Fed. Rep. 292), "this, upon principle, justice, and authority, it seems to us, is the only reasonable construction that can be given to the statute." We now feel at liberty to follow our convictions and our belief that our view of the law is correct by reason of the indication given by the United States supreme court (*Last Chance*

Min. Co. v. Tyler Min. Co., 157 U. S. 688), that they are willing to reconsider (or, as the court puts it, consider) this important principle in the construction of section 2322 of the Revised Statutes of the United States. We shall accordingly adhere to the principle of our *Amy & Silversmith* decision, and hold in this case that the judgment of the district court was within the law when it gave to the Niagara people the ore found in the dip of the Niagara vein south of their south line, and east of the point where the apex and strike of the Niagara vein crossed the bounding side line between the Niagara and the Black Rock.

The appellants also rely upon some alleged errors in the instructions. It is contended by respondents that the errors in the instructions are not properly excepted to. Respondents cite cases from this court upon that subject. But we think the proper contention should have been as to whether the errors were specified on the motion for new trial. We are not satisfied that the specification was insufficient. We shall not, however, pass upon that question, as it has not been clearly or fully argued, and the question of practice is a delicate and troublesome one; but will proceed to an examination of the instructions. Our doing so cannot be a matter of complaint to ¹³⁵ the respondents, for our examination of the instructions has satisfied us that there is no error therein. We will briefly review them.

Appellants complain that the court instructed the jury in reference to following a vein on its dip beneath the surface, but did not in this instruction inform the jury as to the matter of the parallel end lines. If the appellants mean that the court did not instruct as to the parallelism of the end lines as located, it is sufficient to reply that no contention was made upon this point. The parallelism of the located end lines is conceded, and the court, having adopted the *Amy & Silversmith* doctrine of this court, proceeded, of course, upon the theory that the original end lines continued to be the end lines.

The Black Rock people contended upon the trial that the "ore bodies" in question were upon a vein the apex of which was wholly within the Black Rock ground. This was called the "Stoner vein." The apex of the Stoner vein, it appears, was on the Black Rock ground. One of the great contentions of fact in the case was, that the Stoner vein, from its apex down to the ore bodies, was a continuous vein. Upon this contention, as noted in the statement of the case, the Black Rock failed. It seems to have been established by the decision that the Stoner vein was not continuous to the "ore bodies."

In instructing the jury upon this contention, the court gave them the following: "If you find from the evidence that what has been called in the evidence the 'Stoner vein' is a separate and distinct vein from what is called the 'Niagara vein,' and that the apex of said Stoner vein is inside the boundaries of the Black Rock claim, and also find that said Stoner vein connects with said Niagara vein at some point below the surface of the ground, and that such connection is made by following a continuous streak or body of quartz or ore, or by passing through vein matter as defined in these instructions, *or by following such material or indications as a practical miner would follow with the expectations of finding ore*, then, in such case, defendants are entitled to, and are the owners of, all quartz, ore, and mineral bearing rock contained ¹³⁶ in such vein below the said point of intersection, and plaintiff cannot recover therefor; it being conceded that the Black Rock lode vein owned by defendants is older and was located and patented prior to the time when the Niagara claim was located or patented."

This instruction, as we have just quoted it, was that submitted. The court, in giving it, struck out the portion which is in italics. Appellants complain of error in striking out that portion. We think in this the court was correct. The question was a geological one—that is, whether the Stoner vein, in its downward course, connected with the Niagara—and the court instructed how such connection would be made; that is, by following a continuous streak or body of quartz or ore, or by passing through vein matter, as defined in the instructions. This was a question of geology and of facts in nature. It would have left it to the jury entirely too indefinitely to have told them that they could find a continuous body of ore by following such indications as a practical miner would follow with the expectation of finding ore. We do not think that this is the method by which geological facts can be established. The application of such language as this which was stricken out of the instruction must not be confused with the use of similar language in reference to finding ore sufficient to support a location of a mine. When it is said that a location may be sustained by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in the expectation of finding ore sufficiently valuable to work (*Shreve v. Copper Bell Min. Co.*, 11 Mont. 309, and cases therein reviewed), it is a very different question from telling a jury that the geological fact of the continuity of a

vein to a certain point may be determined by what a practical miner might do in looking for some hoped for continuity.

Objection is made to instruction No. 15, in that, as it is contended by counsel, the court assumed that the respondents had established a right to recover. But the court did not make this assumption. The instruction opens with the following language: "Plaintiffs having the burden of proof, they must ¹³⁷ establish the material allegations of their complaint by a preponderance of evidence."

Another instruction objected to by appellants is as follows: "In estimating the value of the ore extracted from the Niagara claim, you will take as a basis therefor the market value of such ores on the dump of the claim, after deducting the cost of mining and hoisting the same."

The objection which appellant makes to this instruction, as he states it in his brief, is that he was not a trespasser, and was entitled to his actual expenses in extracting and treating the ore, provided the expenses are reasonable, and as low as the work could be done. He cites us to a number of cases involving questions of accounting between cotenants when one tenant has made necessary improvements on premises, or has extracted ore therefrom.

We are of opinion that the instruction places the appellant upon precisely the ground which he himself claims. The court says that the basis of computation shall be the market value of the ore on the dump after deducting the cost of mining and hoisting the same. By the instruction the appellant is given credit for the cost of mining and hoisting, just as he claims should be. Furthermore, we think that the instruction, by its only reasonable construction, gives the appellant the expense of smelting and reducing the ore. The court says that the basis shall be the market value of the ore on the dump. What is market value? It is certainly that price for which the ore could reasonably be sold on the market. That market value would, in the mind of a buyer, be necessarily determined by deducting the cost of reducing the ore; that is to say, if a purchaser compute what he would give for the ore he would figure the value of the same on the dump, and then he would deduct from that value the cost of reducing the ore to bullion, and, having deducted that cost, he would make a bid for the ore, and this would constitute the market value. No one could possibly contend that the market value of crude ore was the value of fine silver in such ore. On the other hand, the market value would

be the value of fine silver, less the expense of ¹²⁸ getting such silver out of the ore. We are satisfied that the instruction was in fact precisely what the appellants claim it should be.

Appellants object to the refusal of the court to give the following instruction: "The jury are instructed that if they believe from the evidence that the side lines of the Niagara location are practically perpendicular to the vein, then the side lines of said location become the end lines, and the plaintiffs cannot claim the dip beyond the side lines." But there was no evidence whatever in the case, and no contention, to support any such instruction. The side lines of the Niagara not only are not practically perpendicular to the vein, but they are practically not far from parallel to the same. There were no facts in the case to warrant the giving of such an instruction.

Appellants also urge error in the exclusion of certain testimony of a witness—William E. Hall—offered to be introduced. Mr. Hall was a practical miner. He testified as to what is known as the "Rainbow lode" in the Butte district. He said that it was his opinion that the vein on the Black Rock was a part of or an extension of the Rainbow lode. He had examined the Black Rock mine. He saw a fault in that mine. Appellants then offered to prove by Mr. Hall that he had worked five claims on the Rainbow lode, and that the faults which he had found on the Black Rock are characteristic of the Rainbow vein. The testimony was objected to, the respondents stating that, if the appellants intended to prove that this fault in the Black Rock extends to the Alice mine, with which mine Mr. Hall was familiar, they would not object. Appellants stated that they did not intend to prove this. The court sustained the objection, remarking: "If it is for the purpose of attempting to show a condition of affairs here (that is, in the Black Rock) by comparison of what exists in the Alice, or in any other ground outside, unless it is shown that there is a continuity between the conditions which exist there and the conditions found in this ground," the evidence will not be admitted. The objection was sustained.

We are of opinion that the learned judge of the district ¹²⁹ court stated the reasons for excluding the testimony as completely as we could set them forth. The subject under consideration in Mr. Hall's testimony was a fault in the Black Rock vein. One certainly could not prove the existence of a fault in one vein by showing that there were other and disconnected faults in another vein, which the witness claimed was a continuity of the

vein under consideration, without showing any continuity in the fault.

Again, appellants contend that the judgment should be reversed because the appellants' counsel were not present when the verdict was rendered, and thus had no opportunity to poll the jury. Appellants' counsel had made arrangements with the bailiff that when the jury agreed upon a verdict, he, the bailiff, should call counsel. This was a matter wholly out of the court, and had no place in the proceedings in the court. It appears that the jury came in at a time when all the counsel were absent. The bailiff omitted to send for appellants' counsel. The counsel made the bailiff his agent for this purpose, and, if such agent omitted to do that which he had agreed to do, we are not prepared to reverse this case for that reason. When it is the fact that the counsel had the privilege of being in the court, if he wished, when the verdict was received, and his accidental absence at that time was not owing to any order or any action of the court, or any conduct by the counsel or parties on the other side, we shall not reverse this judgment for any such reason.

Another ground set up for the granting of a new trial is the alleged misconduct by juror Hess. Hess makes an affidavit that he was ill, and that he agreed to the verdict in order to get discharged from service. But this juror never made any complaint to the court of his illness. When the jury came in and rendered its verdict, he said nothing to the court, and there was no intimation that he was ill, or needed any medical attendance. His alleged illness, and thereby his alleged coercion into the verdict, never appeared until after his discharge and his making an affidavit for the benefit of the appellants. The case was an equity one, the findings were advisory, and ¹⁴⁰ the district court very properly disregarded this juror's affidavit given to impeach his own verdict: *Gordon v. Trevathan*, 13 Mont. 387; 40 Am. St. Rep. 452.

It is also attempted to be shown in juror Hess' affidavit that the bailiff in charge of the jury was guilty of misconduct. The story that juror Hess tells about the conduct of the bailiff bears upon its face all the appearances of absurdity. Perhaps the district court would have been perfectly justified in disbelieving Hess' statements in regard to the bailiff without any contradiction, but the affidavit was contradicted in many respects. The district court was perfectly justified in paying no attention to the showing attempted to be made by the Hess affidavit.

Having reviewed all the questions raised in this case, it is

ordered that the judgment, and the order denying a new trial, be affirmed.

Pemberton, C. J., and Hunt, J., concur.

IN THE CASE of *King v. Amy & Silversmith Con. Min. Co.*, 9 Mont. 543, the supreme court decided that, under section 2322 of the United States Revised Statutes, it must be held that if "a vein of ore crosses the side line of a location, the strike is terminated by the plane of each side line, and the right to follow the vein on its dip is determined by a vertical plane, parallel to the end lines, drawn downward, and which takes effect at the point where the apex of the vein intersects the side line." The case was appealed to the supreme court of the United States, and that court, in reversing the supreme court of Montana, held, that "the side lines of the location of a lode claim, under the United States Revised Statutes, section 2322, are those which run on each side of the vein or lode, distant not more than three hundred feet from the middle of such vein," and that "a line in such location which does not run parallel with the course of the vein but crosses it, is an end line," and also that "when, in making such location, the claimant calls the longer lines, which cross the vein, side lines, and the shorter lines, which do not cross it, end lines, the court must disregard, in its decision, the mistake of the locator in the designation of the side and end lines, and hold the locator to the lines properly designated by him, as it cannot relocate them for him": 52 U. S. 222.

MINES—RIGHT TO FOLLOW DIP OF LODE.—Where a miner has a surface location together with a lode following its dips, spurs, and angles, he is entitled to the surface and the lode wherever it may go, so far at least as it may extend under the public land: *Bullion Min. Co. v. Croesus etc. Min. Co.*, 2 Nev. 168; 90 Am. Dec. 526. See especially the discussion of this subject in the extended note to *McClintock v. Bryden*, 63 Am. Dec. 106, 109.

TRIAL—VERDICT.—**AFFIDAVITS OF JURORS** may be received to attack their verdict under the statutes of Montana, if such affidavit shows a resort to the determination of chance: *Gordon v. Trevarthan*, 18 Mont. 387; 40 Am. St. Rep. 452, and note.

SAFELY v. CALDWELL.

[17 MONTANA, 184.]

INTERVENTION AFTER DEFAULT.—Under a statute providing that any person may intervene "before the trial of an action," a default takes the place of a trial, and a party cannot file a complaint in intervention after defendant's default has been entered, and nothing remains to be done but to enter the judgment.

Safely commenced an action against a defendant who allowed a default to be entered against him for want of an answer; thereafter, and while the default was still standing, Caldwell made application to intervene, and filed a complaint in intervention. A demurrer to this complaint was sustained, judgment entered for Safely, and Caldwell appealed.

J. A. Luce, for the appellant.

Sutton & Thersher, for the respondent.

¹⁸⁴ DE WITT, J. We are of the opinion that the complaint in intervention was not filed in time. Section 24 of the Code of Civil ¹⁸⁵ Procedure of 1887 provides that "any person may before the trial intervene in an action or proceeding," etc. We think that, in the sense intended by this statute, the intervenor in this case did not, in effect, intervene before the trial. It is true that no trial was had between the original parties, for the reason that the original defendant defaulted. This default has never been opened. It still stands.

It was held in *Thompson v. Lumber Co.*, 4 Wash. 600, that a complaint in intervention was in time if it were not filed until after a motion for default had been made. But in the case at bar there was more than a motion for default. The default had been entered. The action was upon a simple money demand for funds alleged to be in the hands of the defendant and belonging to the plaintiff. In a case of this nature, if no answer is filed within the time specified in the summons, the clerk shall enter the default of the defendant: Code Civ. Proc., sec. 245.

In this case more formality was observed than was required by the statute. The default was entered in court. The statute (Code Civ. Proc., sec. 245) further provides that, immediately upon the entering of such default, the clerk shall enter judgment for the amount specified in the summons. In this case, the judgment was to follow, of course, upon the default. Nothing remained to be done but the ministerial act of the clerk. No trial was to be had. It was dispensed with by the default. The clerk enters a judgment, after a trial, just as he does after a default. If the intervention must take place before trial, we think the spirit of the statute is, that it should also take place before that happens which takes the place of a trial—that is to say, before the default, and where the default is undisturbed.

It is said in *Pomeroy on Remedies*, section 416: "Passing to the codes of Iowa and California, we see that intervening rises at once into a proceeding of great importance. It may be resorted to in any and all actions, and at every stage in the action prior to the commencement of the trial." Again we find, in the same book, page 492: "As to the provision that the intervenor ¹⁸⁶ has no right to delay, it has been held that, in general, he cannot intervene after the cause has been submitted to the court for decision: *Teachout v. Railway Co.*, 75 Iowa, 722."

In the case at bar, the case had gone farther than a submission.

All had been accomplished which could have been attained by a trial and verdict. If the default had been inadvertently entered, or by reason of an excusable neglect of the defendant, an application to open the default could have been made on the statutory grounds, and, if granted, the intervenor would have had opportunity to appear. But this was not done. The default remained. The intervenor appeared only after the default, and when nothing remained but to enter judgment, just as nothing would remain but to enter judgment after a trial had. No collusion was claimed between the plaintiff and original defendant. In fact, the showing was, that there was no collusion.

We are of the opinion that the intervenor did not intervene within the time contemplated by the spirit of the statute: Code Civ. Proc. 1887, sec. 24. Judgment is affirmed.

Pemberton, C. J., and Hunt, J., concur.

INTERVENTION.—THE APPLICATION TO INTERVENE MUST BE MADE BEFORE THE TRIAL of the cause: Extended note to *Brown v. Saul*, 16 Am. Dec. 179, 180.

FIRST NATIONAL BANK v. COLLINS.

[17 MONTANA, 433.]

EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY FOR BORROWED MONEY.—An administrator is personally liable for money borrowed by him in his representative capacity without an order of court, and used in the payment of the debts of the estate generally, other than existing debts created by the deceased, or for administration expenses, or for the actual preservation of the estate.

Action on promissory notes made by defendants as administrators and payable to plaintiff. After answer filed, plaintiff had judgment on the pleadings and defendants appealed.

Waterman & Callaway and H. G. McIntire, for the appellants.

Smith & Gormley, for the respondent.

433 DE WITT, J. The defendants, in their answer, make their allegations with some vigor of language, but when we arrive simply at the facts set up, the pleading of defendants seems to be that they, as administrators of the Higgins estate, borrowed this money and used it for the estate.

We cite the following remarks from some of the leading text-writers upon the law of administration, negotiable instruments, and commercial paper:

"It is a well-recognized principle that for liabilities contracted by the personal representative, although for the benefit and in the interest and behalf of the estate, it is not liable to creditors. Disbursements, reasonable in amount, and for services necessary in the proper discharge of the duties imposed upon them, will constitute a charge in favor of executors and administrators against the estate, although their allowance should leave no surplus to pay creditors of the deceased; but, in the absence of statutory authority, the probate court, as already stated, has no jurisdiction to adjudicate between the personal representative and the creditor. It follows that the estate is not liable to an attorney for his services at the instance of an executor or administrator, but that the latter is himself liable in a suit by the attorney. So for corn fed to the stock of the estate; for the terms of a contract by the administrator in renting the land of the estate. The same holds good in respect of negotiable paper made, indorsed, or accepted by him, although he add to his signature his official character; and a fortiori, where he gives a bond. So where the executor employs a salesman to take charge of the stock in trade belonging to the estate, or a sawyer to saw lumber. So where money is borrowed by pledging property of the estate, unless pledged for the purposes of administration. For the same reason, the estate is not bound by the administrator's agreement to credit a note payable to his decedent with the value of work done upon the lands of the estate": 2 Woerner's American Law of Administration, sec. 356.

"The executor or administrator of a decedent has no power to bind the latter's estate by any note or bill which he may ⁴³⁷ make in his representative capacity. So, also, is it impossible for the executor or administrator to bind the estate by the acceptance of a bill drawn in settlement of a claim against the estate. In all such cases, the executor or administrator is personally liable, even though the signature is stated in the most explicit manner to have been made in his representative character": Tiedeman on Commercial Paper, sec. 146.

"An administrator or executor cannot bind the decedent's estate by any negotiable instrument. He can only bind himself. If he make, accept, or indorse a negotiable instrument, he will bind himself personally, even if he adds to his own name the designation of his office as personal representative. Thus, if he

signs himself 'A B, executor (or administrator) of C D,' or 'A B, as executor of C D,' the representative terms will be rejected as surplusage. And an accommodation indorser, or acceptor, who pays the amount of the instrument, has no claim against the decedent's estate. But if the bill or note of the personal representative be taken for a debt of the decedent, the estate is discharged from liability, and the representative alone is bound": 1 Daniel on Negotiable Instruments, sec. 262.

"Where a note or bill is given by an executor or administrator as such he will, in general, be individually liable for its payment. So, upon an indorsement by him as executor; or upon his written promise to pay such debt, he having assets of the estate in his hands at the time of giving the promise. This is true, also, where he has given his note in renewal of one made by his testator. In like manner, an administrator will be individually liable on a note given by him for personal property purchased for the benefit of the estate. But a note given by an administrator, and expressed to be 'for value received by A (the intestate) and his heirs,' has been held to be void for want of consideration. The mere addition of 'administrator' to an acceptor's signature does not qualify his liability or render the acceptance of a bill conditional. But, in general, an executor, like an agent, must expressly limit his promise to payment out of the estate represented in order ⁴³⁸ to avoid individual liability on it. And merely adding the word 'administrator' will not amount to such a restriction, as we have seen; especially where the estate administered is not particularly designated": 1 Randolph on Commercial Paper, sec. 439. See, also, numerous cases cited in these text-books, which we will not review.

It is not pretended that these notes were given for the expenses of administration. This court said, in *Dodson v. Nevitt*, 5 Mont. 518: "Claims against the estate are those in existence at the date of the death of the deceased. Other claims against an estate are those incurred by the administrator or executor in settling the estate, and are properly denominated 'expenses of administration.'" The rule seems to be as laid down by the above-quoted writers.

It is said in *Dunne v. Deery*, 40 Iowa, 251, a case relied upon by the appellants, as follows: "The rule is very well settled that an administrator or executor cannot bind the assets of the deceased by his promissory note. If he executes a note, and adds to his signature, 'as executor for' the deceased, he will nevertheless be personally liable: *King v. Thom*, 1 Term. Rep. 489; *Aspinwall*

v. Wake, 10 Bing. 55; Davis v. French, 20 Me. 21; 37 Am. Dec. 36; Walker v. Patterson, 36 Me. 273. But while the administrator will be personally and alone bound upon the note, yet if that for which it was given was legally a claim against the estate, the giving and accepting the note will not, without more, discharge the estate."

Counsel, in argument, cite this Iowa case, as showing that the case at bar is an exception to the general rule, but it does not appear in the case before us that that for which the note was given was already legally a claim against the estate.

We take the following from another case relied upon by the appellants: McLaughlin v. Winner, 63 Wis. 120; 53 Am. Rep. 273. "It is a general rule that, upon all contracts made by an executor or administrator, in the discharge of his duties as such, he is liable personally; and his liability does not depend upon the fact that he has assets in his hands sufficient to discharge the debts so incurred; and the judgment, if any be recovered, ⁴³⁹ is to be satisfied out of his estate, and not out of the estate of the deceased. There are, undoubtedly, exceptions to the general rule, but they depend upon equitable considerations, which clearly show that the estate in the hands of the executor or administrator ought to be charged with the payment of the claim rather than the property of the executor or administrator": Citing many cases.

The case at bar, in our opinion, is not an exception to the rule that the administrators are personally liable. It does not appear that the notes given by them were simply an acknowledgment of a former debt existing against the estate and created by the deceased. It does not appear that the money received by the estate upon the notes given was used for the purposes of administration or funeral expenses, if such facts would be important if they existed. It does not appear that the money so obtained was upon any order or permission of a court having power to make such order or give such permission. It does not appear that the money was used in the actual preservation of the estate, as discussed in Dunne v. Deery, 40 Iowa, 251.

We are, therefore, of opinion that this judgment must be affirmed, and it is so ordered.

Pemberton, C. J., and Hunt, J., concur.

EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY FOR BORROWED MONEY.—To say that an executor can, by borrowing money, enable the person who has lent it to stand as a

creditor of the estate is to say that which finds support in neither authority nor principle. Upon a contract of borrowing made by an executor after the death of the testator, the executor is personally liable, and cannot be sued as executor so as to get execution against the assets of the estate: Extended note to *Schlicker v. Hemenway*, ante, pp. 120, 121.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

PEOPLE v. ADELPHI CLUB.

[149 NEW YORK, 5.]

SOCIAL CLUBS, SALE OF WINES AND LIQUORS BY.—A social club, not organized for the purpose of evading any law, but to establish and maintain a library and readingrooms, and to promote social intercourse among its members, and which serves liquors to them upon their written order, at a price fixed by one of its committees, is not guilty of the selling of liquors, within the meaning of a statute prohibiting any person without license from selling either strong or spirituous liquors in less quantity than five gallons at a time, to be drunk or used on the premises where the same shall be sold.

INTOXICATING LIQUORS, SALES OF BY SOCIAL CLUBS. If the object of its organization is merely to provide its members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then the sale of liquors by a club to its members is contrary to the provisions of the excise law. If, on the other hand, the club is organized and conducted in good faith, with a limited and select membership, as well as owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquors to its members is merely incidental, in the same way and to the same extent as the supplying of dinners or daily papers might be, its furnishing of liquors to its members, though such liquors are paid for by them, is not a sale within the meaning of that law.

THE CONSTRUCTION OF A STATUTE penal in its character by public officers charged with the duty of executing its provisions for many years, may properly be considered in determining the legislative intention.

Matthew Hale, for the appellant.

Eugene Burlingame, district attorney, for the respondent.

7 HAIGHT, J. The offense of which the defendant stands convicted is that of selling strong and spirituous liquors to be drunk upon the premises, without a license, in violation of section 31 of chapter 401 of the laws of 1892.

8 On the twenty-eighth day of January, 1895, one Leopold M. Stark made a written order upon a piece of paper for five glasses of liquor, and delivered the same to the steward of the defendant, who filled the order from the stock of liquors belonging to the club, and the same was served to Stark and his associates, who drank it upon the premises. They were all members of the club. The following evening Stark paid the steward therefor fifty cents, which went into the treasury of the club.

The defendant was regularly incorporated on the tenth day of February, 1881, as a social club, to establish and maintain a library, reading and assembly rooms, and to promote social intercourse among its members. It is managed by a board of trustees, with a membership limited to one hundred and fifty persons of full age and residents of the city of Albany. A person can be admitted as a member only when proposed by some member to whom he is personally known, and upon the recommendation of the board of trustees, and by an election by the members at a regular meeting of the club by a two-thirds' vote. The initiation fee is fifty dollars, and the annual dues thirty dollars.

The defendant maintains a club house at the corner of Division and South Pearl streets in the city of Albany, in which there are parlors, a ballroom, diningroom, kitchen, library, cardrooms, billiard, pool, and store rooms, with apartments for the janitor. Meals, cigars, and liquors are served to members of the club upon their written orders at a price fixed therefor by the house committee of the board of trustees, which is charged to the member, who pays therefor monthly. The money so paid in by the members, together with the annual dues, is used in defraying the general expenses of the club, its library, readingrooms, servants, lights, and fuel, and in keeping up its stock of provisions, cigars, and liquors. Its business is conducted solely for the entertainment and recreation of its members, and not for the purpose of deriving a profit beyond the defraying of its expenses. Residents of the city of Albany may be introduced to the club by any member thereof once a year. Nonresidents may in like manner be introduced, not to exceed ten times a year. A member introducing a visitor is required to register his name in a book kept for that purpose, and to be responsible for his conduct while in the clubhouse. From ten to twelve entertainments, social, lit-

erary, musical, and dramatic are given annually, to which the female friends of members are invited.

The statute under which the defendant was indicted provides as follows: "Any person who, without having a license granted to him in pursuance of a law of this state permitting him to sell either strong or spirituous liquors, wines, ale, or beer, shall sell strong or spirituous liquors, wines, ale, or beer in quantities of less than five gallons at a time, or shall sell any strong or spirituous liquor, wine, ale, or beer in quantities of five gallons or more at a time to be drunk or used on the premises where the same shall be sold, or in any garden or inclosure communicating with such premises, or in any public street or place contiguous thereto, shall be guilty of a misdemeanor."

Upon the trial, the defendant asked the court to direct the jury to find a verdict of acquittal on the grounds: 1. That the facts proven do not constitute a crime; 2. That the facts proven do not show that the defendant has violated section 31 of chapter 401 of the laws of 1892 or any of the provisions of said chapter 401 of the laws of 1892. The court refused to so direct, and an exception was taken by the defendant.

The court was then asked by the defendant to charge that "the disposing of wines and liquors by the defendant is not a sale of the same within the meaning and intent of the provisions of chapter 401 of the laws of 1892, or of the laws amendatory or supplementary thereto, and that the furnishing of wines and liquors by the defendant to its members, as shown by the evidence, is not a violation of section 31 of chapter 401 of the laws of 1892, nor a violation of any of the ¹⁰ provisions of said act." This was refused and an exception was taken.

Much has already been written with reference to the liability of social clubs under excise laws. An impression has prevailed that they were not brought within the provisions of the statute, and, consequently, thousands of clubs have been organized all over the country, by hotel and saloon keepers who had been refused a license, for the purpose of evading the laws with reference thereto. The devices adopted by these so-called clubs were numerous, and, in many instances, ingenious. It, however, has not been difficult to ascertain the true purpose and intent of their organization. And the courts thus far have not failed to unmask such schemes, and hold the organizers thereof responsible for a violation of the law. But this defendant is conceded to be a legitimate club, regularly organized, of many years' standing, and conducted for the purposes mentioned in its articles of incorporation.

The first question is, has the liability of such a club ever been determined by this court? Upon this question the counsel for the respective parties differ with reference to what was decided in the case of *People v. Andrews*, 115 N. Y. 427. In that case, the general term held that social clubs, organized for legitimate purposes, were authorized by the statute; that the property of the club was, in effect, the joint property of the members, and that the furnishing of liquors of the club to its members by the steward was not a violation of the statute. There was evidence, however, in that case tending to show that the club was a fraudulent concern, organized for the purpose of evading the law by a saloonkeeper who had been refused a license; that any person could join the club upon the payment of fifty cents, which was returned to him upon his withdrawal, and that the only object and purpose of the organization was the sale of strong and spirituous liquors. The general term reached the conclusion that the trial court should have submitted to the jury the question as to whether the organization was a scheme or a device to evade the excise law: *People v. Andrews*, 50 Hun, 592, 595.

¹¹ Upon this question the court of appeals differed with the general term, holding that the question of sale, under the statute depended upon the character of the act. The opinion calls attention to the evidence in much detail, tending to show the fraudulent character of the organization; that the sales were made for cash, and the business conducted in every respect as in an ordinary saloon. And then concludes: "Whatever may be the merits of the scheme prescribed by the organization, it has no effect here. It did not control or govern the parties."

We are aware that it has been generally understood that this court in that case intended to hold clubs liable under the statute, and that the general terms in several instances have subsequently so held, resting their decisions upon that case: *People v. Sinell*, 34 N. Y. 898; *People v. Bradley*, 33 N. Y. 562; *People v. Luhrs*, 7 Misc. Rep. 503. But such was not the intention of this court, and to that extent its determination has been misunderstood. The question here presented must, therefore, be regarded as undecided and still open for consideration.

In 11 *American and English Encyclopedia of Law*, 727, it is said that "the distribution of liquors by a bona fide club among its members is not a sale within the inhibition of a liquor law, even though the person receiving the liquor gives money in return for it, and the law prohibiting the sale of liquor on Sundays does not apply to such a club. It is otherwise, however,

where the club is simply a device resorted to as a means of evading the statute."

Black on Intoxicating Liquors, at section 142, after referring to the authorities in the different states upon the subject, concludes as follows: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense so that any person without discrimination can procure liquor ¹² by signing his name in a book, or buying a ticket, or a chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But, on the other hand, if the club is organized and conducted in good faith with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquors to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or letter of the law."

In *Graff v. Evans*, L. R. 8 Q. B. Div. 373, the appellant was a manager of a club under the supervision of trustees, in whom all the property of the club was vested. The club was not licensed for the sale of intoxicating liquors, but these were supplied at fixed prices to members for consumption, the money produced thereby going to the general fund of the club. The manager, in the course of his employment, supplied liquors to a member. It was held that it was not a sale within the meaning of the licensing act. Field, J., in delivering the opinion of the court, says: "The question here is, Did Graff, the manager who supplied the liquor to Foster, effect a sale by retail? I think not. I think Foster was an owner of the property, together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association, by which he subscribed a sum to the funds of the club and became entitled to have ale and whisky supplied to him as a member at a certain price."

In *State v. St. Louis Club*, 125 Mo. 308, it was held that

the distribution of wines or other liquors among the members of a social club which is a bona fide organization with limited membership, admission to which is ¹³ only on a vote of the governing board, and with common ownership of property, is not a sale of liquor within the meaning of the Missouri dram-shop act. This is a recent case, and the opinion contains a review of all of the decisions upon the subject.

The courts in our sister states are in conflict upon the question discussed in the above cases. Many of the decisions are based upon local statutes differing materially from our own, and other cases are disposed of upon the ground of the fraudulent character of the organization. Attention is called to *Commonwealth v. Ewig*, 145 Mass. 119; *Seim v. State*, 55 Md. 566; 39 Am. Rep. 419; *Tennessee Club v. Dwyer*, 11 Lea, 452; 47 Am. Rep. 298; *Piedmont Club v. Commonwealth*, 87 Va. 541; *Columbia Club v. McMaster*, 35 S. C. 1; 28 Am. St. Rep. 826; *Barden v. Montana Club*, 10 Mont. 330; 24 Am. St. Rep. 27; *Koenig v. State*, 33 Tex. Cr. Rep. 367; 47 Am. St. Rep. 35; *People v. Soule*, 74 Mich. 250; *State v. Horacek*, 41 Kan. 87; *State v. Essex Club*, 53 N. J. L. 99; *State v. Lockyear*, 95 N. C. 633; 59 Am. Rep. 287; *State v. Neis*, 108 N. C. 787; *State v. Mercer*, 32 Iowa, 405; *Rickart v. People*, 79 Ill. 85; *State v. Easton Club*, 73 Md. 97; *Kentucky Club v. Louisville*, 92 Ky. 309; *Newell v. Hemingway*, 16 Cox C. C. 604; *Commonwealth v. Pomphret*, 137 Mass. 564-567; 50 Am. Rep. 340.

For a full and elaborate consideration of the cases we refer to Black on Intoxicating Liquors, section 142, and to *State v. St. Louis Club*, 125 Mo. 308. A further discussion of them here we do not deem necessary or profitable, for the question presented must be determined upon a construction of our own statute. It first provides for the creation of boards of excise in towns and cities, prescribes their powers and duties, and then, in section 19, provides that "a board of excise may, when authorized by law, and not otherwise, grant," etc., a license. It then specifies the cases in which a license may be granted: 1. To the keeper of an inn, tavern, or hotel; 2. To the keeper of a saloon; 3. To the keeper of a saloon for the sale of ale and beer only; 4. To the keeper of a store; and 5. To the keeper of a drugstore. ¹⁴ The statute contains no provision authorizing the issuing of a license to a club or an organization of the character of the defendant. And it was conceded on the part of the learned district attorney upon the argument that the defendant was not an inn, tavern, or hotel, a saloon, store, or drugstore, within the

meaning of the act which permitted boards of excise to issue a license to it. We are thus brought to a consideration of the provisions of section 31, under which the defendant was indicted, It is prohibitory as to form and character of the sale of strong and spirituous liquors, wines, ale, or beer by a person without having a license. It provides that a person offending shall be guilty of a misdemeanor. This section doubtless must be considered in connection with section 19, which, as we have seen, regulates the sale of strong and spirituous liquors by requiring persons who engage in that business to first procure a license, and specifies the kinds of license which the board of excise may issue. The fact that clubs of the nature of the defendant are not included within its provisions has an important bearing upon the meaning to be placed upon the provisions of section 31. In this connection, the construction placed upon a statute penal in character, by public officers charged with the duty of executing its provisions for many years, may properly be considered in determining the legislative intention: *Potter's Dwarria on Statutes*, 183, 184; *People v. Dayton*, 55 N. Y. 367-378; *Brown v. United States*, 113 U. S. 568. Upon this subject the evidence shows that clubs in this state have existed for a long period; that they have not been required to take out a license, and yet it is a well-known fact that they have kept on hand stocks of liquors which they distributed to their members. Was it then intended that the distribution of liquors by a club among its members should be a sale within the contemplation of the statute? If so, commissioners of excise, police officers, and district attorneys have for many years neglected their official duties.

As we have seen, the defendant is a social club organized under the statute for a legitimate purpose, to which the furnishing¹⁵ of liquors to its members is merely incidental and is not unlike the supplying of dinners or articles which the member may desire for his own comfort and entertainment. The defendant has a limited and selected membership. And whilst the property and supplies are technically owned by the club, each member is in equity an equal owner in common. It was not organized for the purpose of engaging in a business for profit, or for the traffic in liquors. It engages in no business other than that which pertains to the maintenance of its library, readingrooms, and the social intercourse and comfort of its members. Liquors, as well as other supplies, are distributed to its members upon the written order of the member at a price fixed by the officers of the club designed to cover the purchase price and disbursements in

serving. These orders pass to the steward or treasurer of the club, and are charged against the member, who settles therefor monthly. We think that the transaction with Stark did not amount to a sale within the meaning of the statute. It was but a distribution among the members of the club of the property that belonged to them. The fact that a payment was made does not change the character of the act, for it was but the means adopted by which each member could receive his own and not that belonging to his fellow-member. The payment went into the treasury to ultimately restore that which he had taken.

We think the court erred in refusing to charge as requested that the act charged against the defendant was not a violation of the statute, and that the judgment of the general term and court of sessions should be reversed, and the defendant discharged.

All concur.

Judgment reversed.

SOCIAL CLUBS—SALE OF LIQUORS BY.—The distribution of liquors at cost by a bona fide incorporated social club to its members is not a sale for which a license can be required under a general liquor law not specially mentioning such clubs: *Columbia Club v. McMaster*, 35 S. C. 1; 28 Am. St. Rep. 826, and note. See the full discussion of this subject contained in the monographic note to *Barden v. Montana Club*, 24 Am. St. Rep. 35-50.

STATUTES—CONSTRUCTION OF.—The long established construction of a statute by the officers who execute it ought to have the force of a judicial determination: *Bruce v. Schuyler*, 4 Gilm. 221; 46 Am. Dec. 447.

PEOPLE v. HAVNOR.

[149 New York, 195.]

SUNDAY LAWS, CONSTITUTIONALITY OF.—A statute forbidding and punishing the carrying on the business and work of a barber on Sunday, provided in the city of New York and in the village of Saratoga Springs barber shops may be kept open and work performed therein until 1 o'clock of the afternoon of that day, is not in conflict with the provisions of the state constitution declaring that no person shall be deprived of life, liberty, or property without due process of law, nor does it violate the constitution of the United States by denying to any class of citizens the equal protection of the laws.

Prosecution and conviction for engaging in the business of a barber at number 57 West Thirty-third street, in the city of New York, on Sunday afternoon until 8 o'clock for the purpose of shaving customers and cutting and dressing their hair.

Albert I. Sire, for the appellant.

John D. Lindsay, for the respondent.

¹⁹⁵ VANN, J. The main ground upon which the defendant asks us to reverse the judgment against him is, that the statute under which he was convicted is in conflict with that provision of the constitution which provides that "no person shall be deprived of life, liberty, or property without due process of law": Const., art. 1, sec. 6. The statute in question, entitled, "An act to regulate barbering on Sunday," provides that "any person who carries on or engages in the business of shaving, haircutting, or other work of a barber on the first day of the week shall be deemed guilty of a misdemeanor, . . . provided that in the city of New York and the village of Saratoga Springs barber shops . . . may be kept open and the work of a barber performed therein until 1 o'clock of the afternoon of the first day of the week": Laws 1895, c. 823.

The defendant claims that this statute deprives him to a certain extent of his "liberty," by preventing him from carrying on a lawful calling as he wishes, and also of his "property," by preventing the free use of his premises, tools, and labor, and thus rendering them less productive. It is not claimed that his occupation is of a noisy nature, or that he so carried on his business as to disturb the peace, quiet, and good order of the neighborhood, or that the act for which he was convicted, if done on any day of the week other than the first, or at any hour of that day prior to 1 o'clock in the afternoon, would have been a violation of law. Nor is it claimed that the conviction was authorized by the common law, or that it was based upon any statute except the one above cited, and, indeed, the judgment of the court of special sessions expressly refers to that act, and adjudges the defendant guilty of a misdemeanor because he violated its command.

The phrase "due process of law" is not satisfied by a judgment pronounced, after an opportunity to be heard, by a court ¹⁹⁹ of competent jurisdiction in accordance with the provisions of a statute, unless that statute accords with the provisions of the fundamental law: *Wynehamer v. People*, 13 N. Y. 378, 393. In a broad sense, whatever prevents a man from following a useful calling is an invasion of his "liberty," and whatever prevents him from freely using his lands or chattels is a deprivation of his "property": *Bertholf v. O'Reilly*, 74 N. Y. 515; 30 Am. Rep. 323; *In re Jacobs*, 98 N. Y. 98, 105; 50 Am. Rep. 636. Yet, during the history of our state many laws have been passed which, to some

extent, have interfered to the right to liberty and property, but their accord with the constitution has seldom been questioned, and, when questioned, has been generally sustained. The power of taxation, the right to preserve the public health, to protect the public morals, and to provide for the public safety may interfere somewhat with both liberty and property, yet proper statutes to effect these ends have never been held to invade the guarantees of the constitution. While the confinement of the insane or of those afflicted with contagious diseases infringes upon personal liberty, and the destruction of buildings to prevent the spread of fire, the exercise of the power of eminent domain, and the prevention of cruelty to animals encroach upon the right to property, still the proper exercise of these powers, under the authority of the legislature, although constant and known of all men, gives rise to no question of moment under the constitution. The sanction for these apparent trespasses upon private rights is found in the principle that every man's liberty and property is, to some extent, subject to the general welfare, as each person's interest is presumed to be promoted by that which promotes the interest of all. Dependent upon this principle is the great police power, so universally recognized, but so difficult to define, which guards the health, the welfare, and the safety of the public. While this power may not be employed ostensibly for the common good, but really for an ulterior purpose, when its object and effect are manifestly in the public interest, as was said in *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, "it is very broad and comprehensive, and . . . under ²⁰⁰ it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other." In the exercise of this power, the legislature has the right, generally, to determine what laws are needed to preserve the public health and protect the public safety, yet its discretion in this respect is not wholly without limit, for our courts have been steadfast in holding that the statute must have some relation to the general welfare; that the purpose to be reached must be a public purpose, and that "the law must in fact be a police law." Thus it has been held that "an act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses in certain cases" (Laws 1884, c. 272), was unconstitutional, because it did not tend to promote the public health, and that this was not the end actually aimed at: *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636. For the same reason, "An act to prevent deception in sales of dairy products"

(Laws 1881, c. 202), was declared to conflict with the constitution, as it absolutely prohibited an innocent industry that was not fraudulently conducted, solely for the reason that it competed with another and might reduce the price of an article of food: *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34. When, however, the act was so changed as to make the substance accord with the title (Laws 1885, c. 183), it was held to be constitutional: *People v. Arensberg*, 105 N. Y. 123; 59 Am. Rep. 483. In a recent case, an act prohibiting the sale of any article of food upon the inducement that something would be given to the purchaser as a premium or reward (Laws 1887, c. 691) was held to be an unauthorized invasion of the rights of property, and an improper exercise of the police power of the state: *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465. It was expressly declared in that case that the courts must be able to see, upon a perusal of the enactment, that there is some fair, just, and reasonable connection between it and the common good, and that, unless such relation exists, the statute cannot be upheld as an exercise of the police power.

Subject, however, to the limitation that the real object of ²⁰¹ the statute must appear, upon inspection, to have a reasonable connection with the welfare of the public, the exercise of the police power by the legislature is well established as not in conflict with the constitution: *Metropolitan Board of Health v. Heister*, 37 N. Y. 661, 669; *Matter of Deansville Cemetery Assn.*, 66 N. Y. 569; 23 Am. Rep. 86; *In re Ryers*, 72 N. Y. 1, 7; 28 Am. Rep. 88; *People ex rel. Kemp v. D'Oench*, 111 N. Y. 359; *People v. Ewer*, 141 N. Y. 129; 38 Am. St. Rep. 788; *People ex rel. Nechamcus v. Warden etc.*, 144 N. Y. 529; *Health Department v. Rector etc.*, 145 N. Y. 32; 45 Am. St. Rep. 579. When thus exercised, even if the effect is to interfere to some extent with the use of property, or the prosecution of a lawful pursuit, it is not regarded as an appropriation of property or an encroachment upon liberty, because the preservation of order and the promotion of the general welfare, so essential to organized society, of necessity involve some sacrifice of natural rights: *Phelps v. Racey*, 60 N. Y. 10, 14; 19 Am. Rep. 140; *Prentice v. Weston*, 111 N. Y. 460.

The vital question, therefore, is whether the real purpose of the statute under consideration has a reasonable connection with the public health, welfare, or safety. The object of the act, as gathered from its title and text, was to regulate the prosecution of a particular trade on Sunday, by prohibiting it from being

carried on as a business, on that day, except in two localities to which the prohibition applies only after a certain hour. It does not require the observance of the Sabbath as a holy day, or in any sense as a religious institution, as is evident from the fact that the entire day is left open to all secular employments but one, and a part of the day, in certain places, to that. There is nothing in the act to prevent the defendant from carrying on his trade "in any manner or in any place that he pleases. He is simply prohibited from carrying on that trade upon Sunday."

The peculiar character of the first day of the week, not simply on account of the obligations of religion, but as a day of rest and recreation, has been recognized for time out of mind both by the legislature and the courts. Statutes passed ²⁰² upon the subject while we were a colony of Great Britain, as well as under the various constitutions in force since our organization as a state, have, so far as appears, been uniformly enforced by the courts: 29 Car. II, c. 7; 2 Green. 89; Andrews, 467; 1 Rev. Laws, 194; 2 Rev. Stats., sec. 70, p. 675; Laws 1788, c. 42; Laws 1801, c. 34; Laws 1847, c. 349; Laws 1883, c. 358; Pen. Code, sec. 263.

Similar laws in other states, and especially those which require the closing of places of business on Sunday, have generally been sustained: *People v. Bellet*, 99 Mich. 151; 41 Am. St. Rep. 589; *Voglesong v. State*, 9 Ind. 112; *Shover v. State*, 10 Ark. 259; *Warner v. Smith*, 8 Conn. 14; *Bloom v. Richards*, 2 Ohio St. 387; *Specht v. Commonwealth*, 8 Pa. St. 312; 49 Am. Dec. 518; *Commonwealth v. Has*, 122 Mass. 40; *Bohl v. State*, 3 Tex. App. 683; *Cooley's Constitutional Limitations*, 5th ed., 589, 726; *Tiedeman's Limitations of Police Powers*, 183; *Hare's American Constitutional Law*, 766.

While questions have been raised as to noiseless and inoffensive occupations that can be carried on by one individual without requiring the services of others, as well as to persons who observe the seventh instead of the first day of the week, still the rule is believed to be general throughout the Union, although not generally enforced, that the ordinary business of life shall be suspended on Sunday, in order that thereby the physical and moral well-being of the people may be advanced. The inconvenience to some is not regarded as an argument against the constitutionality of the statute, as that is an incident to all general laws. Sunday statutes have been sustained as constitutional almost without exception, the most notable instance to the contrary, *Ex parte Newman*, 9 Cal. 502, decided by a divided court in an early day in California, having been subsequently overruled by

the courts of that state: *Ex parte Andrews*, 18 Cal. 685; *Ex parte Koser*, 60 Cal. 202.

The leading case in our own state upon the subject is that of *Lindenmuller v. People*, 33 Barb. 548, in which Judge Allen discussed the common law as well as legislation affecting the Sabbath with great force and clearness. He ²⁰³ held, in substance, that the body of the constitution recognizes Sunday as a day of rest and an institution to be respected, by not counting it as a part of the time allowed to the governor for examining bills submitted for his approval; that the Sabbath exists as a day of rest by the common law without the necessity of legislative action to establish it; and that the legislature has the right to regulate its observance as a civil and political institution. That case was expressly approved in *Neuendorff v. Duryea*, 69 N. Y. 557, 561, 563, 25 Am. Rep. 235, and was referred to as one "which has never been questioned in a court of higher or equal authority," and "as declaring the law of this state." It was cited with approval in *People v. Moses*, 140 N. Y. 214, 215, where Judge Earl, speaking for a majority of the court, said: "The Christian Sabbath is one of the civil institutions of the state, and that the legislature, for the purpose of promoting the moral and physical well-being of the people and the peace, quiet, and good order of society, has authority to regulate its observance and prevent its desecration by any appropriate legislation is unquestioned." While works of charity and necessity have usually been excepted from the effect of laws relating to the Sabbath, and sometimes also, those persons who keep another day of the week, still quiet pursuits have not, even when they can be carried on without the labor of others, because general respect and observance of the day, so far as practicable, have been deemed essential to the interest of the public, including as a part thereof those who prefer not to keep the day, as their health and morals are entitled to protection, even against their will, the same as those of any other class in the community. According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of citizens, as this causes the least inconvenience through interference with business: *Lindenmuller v. People*, 33 Barb. 548.

It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and ²⁰⁴ of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day

of rest to restore his strength and preserve his health, have an obvious connection with the public welfare." Independent of any question relating to morals or religion, the physical welfare of the citizen is a subject of such primary importance to the state, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power, and hence valid under the constitution, which "presupposes its existence, and is to be construed with reference to that fact": *Carthage v. Frederick*, 122 N. Y. 268, 273; 19 Am. St. Rep. 490.

The statute under discussion tends to effect this result, because it requires persons engaged in a kind of business that takes many hours each day to refrain from carrying it on during one day in seven. This affords an opportunity, recurring at regular intervals, for rest, needed both by the employer and the employed, and the latter, at least, may not have the power to observe a day of rest without the aid of legislation. As Mr. Tiedeman says in his work on Police Powers: "If the law did not interfere, the feverish, intense desire to acquire wealth, . . . inciting a relentless rivalry and competition, would ultimately prevent not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature and obeying the instinct of self-preservation by resting periodically from labor": *Tiedeman's Limitations of Police Powers*, 181. As barbers generally work more hours each day than most men, the legislature may well have concluded that legislation was necessary for the protection of their health.

We think that this statute was intended and is adapted to promote the public health, and thereby to serve a public purpose, of the utmost importance, by promoting the observance of Sunday as a day of rest. It follows, therefore, that it does not go beyond the limits of legislative power by depriving anyone of liberty or property within the meaning of the constitution.

²⁰⁵ The learned counsel for the defendant, however, criticises the act in question as class legislation, and claims that it is invalid under the fourteenth amendment to the constitution of the United States, because it denies to barbers who do not reside in New York or Saratoga the equal protection of the laws. That amendment does not relate to territorial arrangements made for different portions of a state, nor to legislation which, in carrying out a public purpose, is limited in its operation, but within the sphere of its operation affects alike all persons similarly situated: *Missouri v. Lewis*, 101 U. S. 22, 30; *Barbier v. Connolly*, 113 U. S. 27, 31. It was not designed to interfere with the exercise

of the police power by the state for the protection of health, or the preservation of morals: *Powell v. Pennsylvania*, 127 U. S. 678, 683. The statute treats all barbers alike within the same localities, for none can work on Sunday outside of New York and Saratoga, but all may work in those places until a certain hour. All are, therefore, treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed: *Hayes v. Missouri*, 120 U. S. 68. As was said by the learned appellate division in deciding this case: "If the legislature has power to regulate the observance and prevent the desecration of the Sabbath, it has the power to say what acts in the different localities of the state it is necessary to prohibit to accomplish this purpose. It is quite conceivable that an act in one locality, thickly settled, should be prohibited which in sparsely settled districts of the state could be allowed, and for this reason an act might be objectionable in one district, but not in another. All of these regulations have in view the proper observance of the day, and are within the discretion of the legislature."

We think that the statute violates no provision of either the federal or state constitution, and that the judgment appealed from should, therefore, be affirmed.

FROM THE DECISION of the majority of the court, Justices Gray and Bartlett dissented, the former declaring that the enactment in question could find no justification, unless in an attempted exercise of the police power of the state; that "as the occupation of a barber had not been deemed unlawful, it would look like a relapse into the narrow groove of earlier Puritanical belief if we should now regard it as inconsistent with the due observance of the Sabbath day": that everyone is at liberty to follow any lawful avocation not injurious to the community, and to enjoy its fruits, without interference by the legislature, under the guise of a police regulation, and that any interference with this right must be seen by the court to have some real reference to the common good; that it could not be seriously contended that defendant's business conflicted with the comfort, safety, or welfare of the community, though carried on upon Sunday; that it was in its nature a peaceable occupation, not calculated to interfere with the quiet of the day, or with the performance by any citizen of the duties of the day; that it conduced to the comfort of the citizens by promoting their decent appearance as members of the community; that the discretion which the legislature had to provide for the observance of the Sabbath was restricted to preventing what amounts to a desecration of the day, and should not extend to interfering with a peaceable calling and one more or less necessary to the comfort and decency of the members of the community; that the legislation in question was peculiarly deserving of judicial condemnation for discriminating in dealing with those engaged in the pursuit of a lawful avocation by discriminating against barbers who did not reside in

the city of New York nor in the village of Saratoga Springs; and, finally, that "regarded as an exercise of the police power, it cannot be justified as either necessary for the good of society, or as conducive to its welfare; and it is violative of constitutional principles in that it restrains unduly and unequally the liberty of those engaged in a lawful business."

Justice Bartlett, in his dissenting opinion, emphasized the fact that the statute discriminated against barbers who did not carry on business in the city of New York or the village of Saratoga Springs, and added: "I think the act under consideration is vicious class legislation and in direct violation of the fourteenth amendment of the constitution of the United States, which provides that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" The act is, in my judgment, a specimen of grotesque and absurd legislation, resting upon no principle of public policy, and utterly indefensible under any reasonable or proper exercise of the police power."

The constitutionality of Sunday laws similar to those under consideration in the principal case was also considered and determined in *Eden v. People*, 161 ill. 296, ante, p. 365, in which a conclusion was reached opposed to that of the majority of the court in the principal case. The same question was presented to the supreme court of California in *Ex parte Jentzsch*, 112 Cal. 468. The Penal Code of that state declared that every person who, as proprietor, manager, lessee, employé, or agent, keeps open or conducts, or causes to be kept open or conducted, any barber shop, bath-house and barber shop, barber shop of a bathing establishment or hair-dressing establishment, or any place for shaving or hair-dressing used and conducted in connection with any other place of business or resort, or who engages at work or labor as a barber in any such shop or establishment on Sunday, or on a legal holiday, after the hour of 12 o'clock noon of said day, is guilty of a misdemeanor. A conviction being had under such statute, the defendant was brought before the supreme court of the state under a writ of habeas corpus, where he was set at liberty, on the ground that the statute under which he was convicted was unconstitutional and void. The particular provisions of the constitution of California relied upon by the supreme court were as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness": Cal. Const., art. 1, sec. 1. "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen, or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens": Cal. Const., art 1, sec. 21. "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: 2. For the punishment of crimes and misdemeanors. . . . In all cases where a general law can be made applicable": Cal. Const., art. 4, sec. 25, subds. 2, 33.

The court said that the law could not be declared valid, unless it

could be upheld as a proper exercise of the police power, and that while this power is one "whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant. We think the act under consideration gives plain evidence of such encroachment. It is sought to be upheld by the argument that it is a police regulation; that it seeks to protect labor against the oppression of capital. The people have passed the law; let not the courts interfere with it. If the people are dissatisfied, they may amend or repeal it. It is not easy to see where or how this law protects labor from the unjust exactions of capital. A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet that is precisely what this law does. The laboring barber, engaged in a most respectable, useful, and cleanly pursuit, is singled out from the thousands of his fellows, in other employments, and told that, wilfully, he shall not work upon holidays and Sundays after 12 o'clock noon. His wishes, tastes, or necessities are not consulted. If he labors, he is a criminal. Such protection to labor, carried a little further, would send him from the jail to the poorhouse. How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his tolling brethren in other vocations. Steam-car and street-car operatives labor through long and weary Sunday hours, so do mill and factory hands. There is no Sunday period of rest and no protection for the overworked employees of our daily papers. Do these not need rest and protection? The bare suggestion of these considerations shows the injustice and inequality of this law. In brief, whether or not a general law to promote rest from labor in all business vocations may be upheld as within the due exercise of the police power as imposing for its welfare a needed period of repose upon the whole community, a law such as this certainly cannot. A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all. As was said in *Pasadena v. Stimson*, 91 Cal. 238: 'The conclusion is, that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.' And in *Darcy v. Mayor etc. of San Jose*, 104 Cal. 642: 'The classification, however, must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity of legislation.' In the case of our cities, the constitution itself decrees a classification by population, and the differing exigencies of municipal government require that laws operating upon any

class should be held general. Otherwise, the constitutional scheme itself is overthrown. But in a law such as this, no reason has been or can be shown why the followers of one useful and unobjectionable employment should be debarred from the right to labor upon certain days, and others in like classes of employment be not so debarred. If it be constitutional to single out one such class, and deny its members the right to labor on one day in the week, it would be constitutional to prohibit them from following their vocation upon six days of the week. When any one such class is singled out and put under the criminal ban of a law such as this, the law not only is special, unjust, and unreasonable in its operation, but it works an invasion of individual liberty, the liberty of free labor which it pretends to protect."

PEOPLE v. BARBERI.

[149 NEW YORK, 256.]

MURDER.—ONE CANNOT BE GUILTY OF MURDER IN THE FIRST DEGREE UNLESS the act was perpetrated not only with intent to kill, but also with deliberation and premeditation. If a mortal wound is inflicted in a sudden transport of passion, excited by what was then said and by preceding events which, for a time, destroy reason and deprive the accused of capacity to reflect, or while under the influence of some sudden and uncontrollable emotion excited by the final culmination of his misfortunes, he is not guilty of murder in the first degree.

MURDER—DELIBERATION AND PREMEDITATION imply a capacity at the time to think and reflect, sufficient volition to make a choice, and by the use of those powers to refrain from doing a wrongful act.

MURDER, EVIDENCE OF PRIOR RELATIONS OF THE PARTIES.—On the trial of a woman for the murder of a man with whom she had had illicit relations, she is entitled to have laid before the jury all testimony tending to prove the condition of her mind at the time, and this condition of her mind cannot be ascertained solely by what took place at the time of the homicide. The prior relations of the parties are competent for the consideration of the jury, if they were connected with the tragedy, and of such a character as to produce a powerful influence on her mind at the time she inflicted the fatal wound.

MURDER—EVIDENCE, ERROR IN EXCLUDING CORROBORATION OF THE DEFENDANT.—Where, on a trial for murder, the prior relations of the parties are a proper subject for the consideration of the jury to enable them to determine the condition of the mind of the accused at the time of the homicide, an error of the court in excluding the testimony of third persons entitles the defendant to a new trial, though she was herself permitted to testify fully on that subject, unless the truth of her statements was conceded.

APPELLATE PRACTICE—CAPITAL CASES.—On reviewing a capital case, the court must be satisfied that a fair trial has been had, and when it appears that the case was submitted to the jury upon an erroneous theory prejudicial to the accused, and which had a controlling influence upon the trial and its result, the court will regard the principle which has been decided, rather than the concrete form in which the question arose at the trial, and will not seek for some technical ground not urged at the trial to sustain the ruling.

JURY TRIAL—PREJUDICIAL COMMENTS OF THE JUDGE. It is prejudicial error for a judge, on the trial of a woman for homicide, to refer to her as having parted with her honor without any promise of marriage, and as having broken from the moorings of her home to go and live with the decedent as his mistress, when her testimony tends to prove that she acted under a promise of marriage, and that her seduction was accomplished by fraud, and aided by some drug administered to her by him.

JURY TRIAL—COMMENTS UPON EVIDENCE.—If a judge presiding at the trial of a woman for murder of a man makes a statement of any matter of fact not reconcilable with her evidence, or otherwise expresses his opinion upon any matter in issue, and respecting which the evidence is conflicting, as where he assumes that she acted with premeditation and not upon a sudden or uncontrollable impulse, she is entitled to a new trial, if convicted of murder in the first degree.

JURY TRIAL—CAPITAL CASE.—It is improper for a judge, on the trial of a woman for the murder of a man with whom she has had illicit relations, she claiming that such relations were induced by a promise of marriage, and also by fraud and the use of drugs, to declare that nature has endowed women with better powers of resistance than men, and made women by nature capable of protecting their honor and defending their virtue.

APPELLATE PRACTICE—CAPITAL CASES—EXCEPTION, WHEN NOT NECESSARY.—Erroneous statements of the law, or improper comments upon the facts or evidence bearing upon them, may be reviewed and corrected on appeal in a capital case without any exception, when it can be seen that they may have operated to the prejudice of the accused.

Frederick B. House, for the appellant.

John D. Lindsay, for the respondent.

²⁶¹ O'BRIEN, J. The defendant was convicted of the crime of murder in the first degree, in causing the death of one Domenico Cataldo on the morning of the 26th of April, 1895. The place where the homicide was committed was in an Italian saloon in the city of New York, and the manner in which the offense was perpetrated was by cutting the throat of the deceased with a razor, which the defendant at some time procured from his trunk, and brought with her to the saloon.

The act was committed publicly in the presence of several persons, at about 9 o'clock in the morning, and there is no dispute whatever in regard to the fact that the defendant then and there inflicted the wound in the manner stated, ²⁶² which almost immediately produced the death of the deceased.

The proof on the part of the people was confined to the act of the defendant producing the death, and her declarations at the time, or immediately thereafter. The defendant was sworn as a witness in her own behalf, and it is from her statement alone that we are enabled to obtain any clear or connected view of the circumstances and events which preceded and produced the tragedy.

The defendant and the deceased were natives of Italy, having resided in New York but a few years, and, at the time of the commission of the homicide, the former was about twenty-two and the latter about twenty-seven years of age. The deceased had a boot blacking stand at the corner of Elm and Canal streets, where he personally attended to that business. The defendant was the daughter of a tailor, and she was herself employed in an establishment at that business, thus contributing to her support and that of the family. Her parents resided in Elizabeth street, and, in going to and from her place of employment, she passed the stand where the deceased carried on his business and was generally to be found. It appears that he had frequently noticed the girl, and finally without any formal introduction, spoke to her, and in that way sought her acquaintance. This was about a year and a half before his death. At a very early stage of the acquaintance thus formed, he avowed his intention to call upon her parents and seek her hand in marriage, a proposition which she did not discourage, if, indeed, it did not receive her approval and consent. The parties met upon these terms from time to time during some months following, the deceased frequently walking with the defendant from his place of business to the entrance of the shop where she was employed. During this time the defendant called his attention to the fact that he had not kept his promise to call upon her parents and ask her in marriage, and, upon receiving evasive or unsatisfactory answers, the girl, in order to avoid passing his place of business or meeting him, changed her ²⁶³ route to and from her home, still being employed in the same tailoring establishment. The deceased, some time after this change, was found waiting for her at the door of the shop where she was employed, and walked with her toward her home. In this interview the deceased urged the defendant to resume the old route and pass by his stand as formerly, so as to enable him to see her, still avowing his intention to call upon her parents and obtain their approval of the contemplated marriage, and, upon his promise to do so, she consented, and complied with his request. During the interviews which followed for some months afterward, the deceased frequently urged the defendant to marry him, and at last suggested such marriage without the consent of her parents, at which she became indignant and left her employment in the shop, in order, as she says, to get rid of him. Some time afterward she obtained employment in another shop in another part of the city. It appears that the deceased learned in some way where she was, and one day when leaving her work for the day, about noon, she

found the deceased at the door waiting for her, and, at his invitation, she accompanied him for a walk. He took her to a saloon on Chrystie street, where they had some soda, after which they parted. The intimacy between the parties, formed on the street, as described, and, interrupted for a short time by the defendant in changing her place of employment, in order to terminate it, was thus resumed and continued for some months, till the 28th of March, 1895, when an event occurred which precipitated, or rather, was the principal cause of the tragedy. On that day, for some reason not important to ascertain, the defendant's duties in the shop terminated about noon. The deceased met her there and invited her to take a walk with him and she accepted the invitation. It may be fairly inferred that by this time the defendant had overcome her objections to marrying the deceased without the express approval of her parents, and, during their walk about the city, he called her attention to various places where there were furnished rooms advertised, pointing out one or more apartments that he ²⁶⁴ thought would be suitable for them. There is nothing in the record to show that the defendant understood these suggestions as implying anything save her approaching marriage, and there are many circumstances to indicate that such was her understanding, as well as the idea that the deceased wished to convey to her. It appears that he so arranged the walk as to arrive in a short time at the same saloon in Chrystie street, already mentioned, where he called for soda for the defendant, and some other drink for himself, each seated at separate tables at his suggestion.

The soda was served to the defendant by the person at the bar, and some other liquid to the deceased, but just what it was does not appear. After the defendant had drunk a portion of the glass of soda the deceased came to her table, and requested her to taste the liquid in his glass. She complied, but found the taste disagreeable, and refused to drink it, but the deceased persuaded her to mix it with the soda as it would improve it, and he then poured a portion of the substance in his glass into the soda, and she drank about half a glass of the mixture. According to the statement of the defendant, the inference is warranted that this was some drug that had a powerful effect upon her both physically and mentally. The defendant was then taken by him to a house near the saloon, and at his invitation, but apparently after some hesitation, she accompanied him upstairs, where a woman appeared who directed them to a room, into which they entered, and he locked the door.

They remained in the room about three hours, and the de-

ceased had intercourse with the defendant by means of either force or fraud, according to her statement. He then suggested that they leave the place, and she refused to go until they were married, but he finally succeeded in persuading her to wait for the ceremony until he could prepare suitable apartments to live in. The deceased had money in the bank, and the defendant knew it, and she had no reason to doubt his ability to perform the promise. From this room the parties went to the defendant's home, the deceased parting with the ²⁶⁵ defendant at the house, and refusing to go in and see her parents. She immediately went to bed without disclosing to them what had happened, though her condition did not entirely escape the notice of her mother.

The following morning she concluded to go to the shop, and on the way met the deceased, who told her he was then providing the apartments and would then marry her. The defendant called his attention to the many promises of that kind that he had made, and reminded him that there was now nothing else to do. He then said to her to keep quiet for three days longer, and then the marriage would take place. On April 1, 1895, three or four days after the events described, she met the deceased again, who said to her that the apartments were ready, to go with him and he would marry her. On this assurance she went with him to apartments on East Thirteenth street which, to her surprise, she found entirely empty and unfurnished. The deceased then told her to stay in the room while he went for the furniture and then they would go to the city hall immediately and be married. To this suggestion the defendant replied, "No furniture, first the marriage, and then everything else," and, on her expressing a desire to leave, as she says, he took her by the shoulders, threw her on the floor, and forced her to have intercourse with him. Leaving the defendant with the housekeeper, the deceased went away and in a short time returned with another man bringing a couple of trunks and a bag or mattress, and subsequently an old bureau. They lived and cohabited in this room till the day of the homicide, nearly a month, the defendant every day begging him to marry her and he promising to do so "the next day," though after a couple of weeks he began to interpose obstacles, objections, and sometimes refusals. His conduct in that respect produced frequent quarrels between them, the particulars of which are not disclosed. When the defendant awoke, on the morning of the homicide, she asked him if he proposed to marry her that day, to which he replied, "No, I absolutely cannot marry you." She then said to him that if he did not she would have him ar-

rested, and, on his starting ²⁶⁶ to leave the room, she locked the door and took the key and placed herself at the window, apparently looking out for a policeman, but after some time the deceased prevailed upon her to allow him to leave the room, she telling him that she would follow him and have him arrested by the first policeman she met. From this room it appears that he went directly to the saloon, and in a very short time the defendant followed him with her mother. Both of them urged the deceased to perform his promise of marriage, and considerable talk was had between them on that subject. In the course of the interview, the deceased said that, if the mother would give him two hundred dollars, he would then see about the marriage. At this proposition the defendant and her mother became indignant, and the former said to him, "Was n't you aware, before, that I was a very poor girl that had no money? How is it that now you ask for money from my mother?" and the mother said, "He wants money now. He knows we are poor and have no money. He dishonored you and wants money over the bargain." It appears that at some stage of this interview, but at what particular point is uncertain, the defendant left the saloon and returned again in a very short time and again demanded of the deceased that he marry her that very day. She then had the razor concealed upon her person, but at what time or for what purpose she took it from the trunk does not distinctly appear, though the jury might find from the testimony that she took it for the purpose of using it upon the deceased. He refused with the remark, "Do you think I would marry such a girl?" On her still persisting in the demand, and renewing the request, he repulsed her with a refusal, remarking that "Hogs may marry." These were the last words which he spoke, for at that moment the defendant drew the razor across his throat, inflicting the fatal wound.

Some other and minor incidents appear in the narrative of events which transpired between the parties during the period of about twenty months from the time that they formed the acquaintance of each other to the day of the homicide, but ²⁶⁷ they are not important upon a review of the questions presented by the appeal. It is quite sufficient to say that none of them in any degree tend to palliate or mitigate the conduct of the deceased as it appears from the facts stated, or to discredit the defendant, but, when considered with all the facts and circumstances, have quite a contrary tendency.

The defendant was not guilty of murder in the first degree, unless the act was perpetrated, not only with the intent to kill, but also with deliberation and premeditation. These three ele-

ments must exist in every case in order to constitute that deliberate malice and malignity of heart which is the essential ingredient of the offense. If the defendant inflicted the wound in a sudden transport of passion, excited by what the deceased then said and by the preceding events which, for the time, disturbed her reasoning faculties and deprived her of the capacity to reflect, or while under the influence of some sudden and uncontrollable emotion excited by the final culmination of her misfortunes, as indicated by the train of events which have been related, the act did not constitute murder in the first degree: *People v. Conroy*, 97 N. Y. 62; *People v. Wood*, 126 N. Y. 249; *Leighton v. People*, 88 N. Y. 117. Deliberation and premeditation imply the capacity at the time to think and reflect, sufficient volition to make a choice, and by the use of these powers, to refrain from doing a wrongful act. The defendant had been deceived, betrayed, disgraced, and ruined, but it is not certain that she formed the definite intention to use the weapon until she heard the final refusal of the deceased to marry her. She followed the deceased into the saloon to make a final appeal to him to extricate her from the position in which he had placed her, and it is evident that she had not yet lost all hope of succeeding either by persuasion or threats. It was only when this hope was gone, after his final refusal, accompanied as it was by insulting and brutal imputations, that might well have aroused the most violent passions, that she struck the fatal blow. If, at that moment, in consequence of what he said to her and the final culmination of the alleged wrongs of which she conceived herself to have been the victim, ²⁰⁸ she became incapable of reasoning or of deliberating, the act, we think, would not constitute murder in the first degree.

The crucial question in the case was whether, at the time, her mind was in that condition, and it was, of course, one of fact for the determination of the jury. But the defendant was entitled to the benefit of all testimony that had any legitimate bearing on that question, and to have the jury correctly instructed by the court with respect to the principles of law that governed the inquiry. The condition of the defendant's mind was not to be ascertained solely from what took place in the saloon at the time of the homicide. The relations of the parties which preceded it were competent for the consideration of the jury, since they were connected with the tragedy, and were of such a nature and character as to produce a powerful influence upon the mind when recalled at the moment that the defendant heard the final refusal of the deceased, expressed as it was in the most insulting

and provoking language. That the defendant was then in a high state of agitation and excitement was made clear by the testimony of all the witnesses, and there is some proof tending to show that she fell upon the floor immediately after inflicting the wound. The nature and quality of her act could not be fairly judged by separating what took place within the space of a few minutes in the saloon from the train of events which preceded it and grew out of the relation of the parties, but upon full consideration of every fact and circumstance that could reasonably be presumed to have influenced her mind.

We are convinced from a careful examination of the record that there was a wide departure from these principles in the conduct of the trial. It is true that the defendant herself, when testifying as a witness in her own behalf, was permitted to give the history of her relations with the deceased from the time that he sought and formed her acquaintance, down to the time of his death. The fair inference from the record is, that she was permitted to relate what took place prior to the morning of the homicide by the grace and favor of the court and not as a legal right. Her testimony was delivered in a ²⁰⁹ foreign tongue and reached the jury only through the medium of an interpreter, and, in that process, it may have lost much of the fullness and force which a narrative always derives from being transmitted directly to the court and jury in their own language. Moreover, she was a witness, deeply interested in the result of the trial, and the ~~jury were not necessarily bound to believe her statement, as they~~ were the sole judges of the measure of credit to which it was entitled. If, therefore, she was entitled to give the full history of the relations between herself and the deceased, and we have no doubt she was, she could not be compelled to let the facts rest upon her unsupported testimony, but had the legal right to sustain and corroborate, if she could, her version of them by the testimony of disinterested witnesses to the same facts or any of them. So long as the facts testified to by the party are not conclusively established, or admitted, they are still open to further proof: Page v. Krekey, 137 N. Y. 307; 33 Am. St. Rep. 731.

After the defendant had testified generally to the facts showing the relations that had existed between herself and the deceased, and which have been briefly stated above, her counsel called a witness, and was proceeding to give proof of the same facts, or some of them, by the admissions of the deceased. There was no objection from the district attorney, but the court interposed and inquired of counsel the object of the question. The counsel replied that he proposed to corroborate the defendant by showing

the relations between her and the deceased. The learned recorder then said: "You do not need any corroboration of those relations. The defendant stated those relations herself." Here a long colloquy, which covers several pages of the printed record, took place between the court and the defendant's counsel, in which the purpose of the testimony was stated in various forms, and the court, in still more emphatic language, stated that it was not admissible for the reasons which he had before stated, and for the further reason that it might be injurious to the accused, as affording good grounds for the prosecution to claim that her act was deliberate and premeditated. The learned district ²⁷⁰ attorney then interposed and stated, among other things, substantially, that it was a part of his duty, under the circumstances, to see that the rights of the accused were properly protected, and that as the proof offered would afford abundant grounds for the prosecution to ask for a conviction of murder in the first degree, he felt it to be his duty to warn the defense that if the proof was admitted it would be in the line of his duty to insist that the defendant's act would amount to deliberate murder. No formal objection had yet been made to the testimony, and the defendant's counsel still persisting in laying it before the jury, the district attorney objected to it, and his objection was sustained, and the defendant's counsel excepted. In the course of the trial, similar proof, or proof of the same facts, or some of them, was offered by the defense from other witnesses, but it was excluded under exception. It is important here to note the principle upon which these rulings must rest. Manifestly, the court and the prosecuting officer must have supposed either that the testimony was simply cumulative, and, therefore, unnecessary, or positively injurious to the defendant, and, consequently, no part of her defense. In view of the fact that it was already before the jury from the lips of the defendant, it is not apparent how the latter hypothesis could have been seriously entertained. And as to the former, it might have been correct enough, provided the court and the prosecution were content with the defendant's version of the facts, and accepted it for all the purposes of the trial as conclusively establishing them before the jury. But such was not the case, since in no part of the record does it appear that the prosecution admitted the facts, or in any way waived the right to question the value of her testimony with the jury. On the contrary, it distinctly appears, as will be seen presently, that the court submitted the question of her credibility to the jury, and left it for them to determine how far her statement of

the relations between herself and the deceased should be accepted as true.

It should also be observed that no question was raised at the trial, and none is now made in this court, with respect to ²⁷¹ the quality of the proof offered to establish the facts or corroborate the defendant's statements. The ruling was directed to the competency of the facts themselves for any purpose, and not to the mode of proving them. The admissions or declarations of the deceased may or may not have been admissible for that purpose, depending entirely upon circumstances not disclosed and which had no influence upon the decision. It may be that it would have to appear that they were so related or connected, in point of time or otherwise, with the principal fact as to be a part of the *res gestae*, and thus within the exceptions to the rule excluding hearsay evidence: *Commonwealth v. Densmore*, 12 Allen, 535. But we are not now dealing with that question, and do not propose to pass upon it one way or the other. It is quite certain that the district attorney could waive a technical rule of evidence relating to the mode of proving a material fact, or of corroborating facts testified to by the accused, and did waive it in this case, if it was applicable at all, by failing to interpose the proper specific objection at the proper time, since the counsel might then have so changed and framed the question as to comply with all technical rules. On the question now under review, his attitude and that of the court were identical, and that was that the facts sought to be proven were wholly irrelevant.

In reviewing a capital case, we must be satisfied that a fair trial has been had, and when we can see that the case has been tried and submitted to the jury upon an erroneous theory, prejudicial to the accused, and which had a controlling influence upon the trial and the result, we ought to regard the principle which has been decided, rather than the concrete form in which the question arose and became a practical one at the trial, and should not be astute to seek for some technical ground, not urged upon the trial or here, to sustain the ruling. Upon an examination of the whole record, it is plain that the case was tried upon the theory that the relations of the parties, prior to the morning of the homicide, had no bearing upon the question of deliberation and premeditation, and that was the principle upon which the evidence referred to was ²⁷² excluded. This will be made plainer by reference to the charge of the learned recorder to the jury. In submitting this vital question, he used the following language: "You are not called upon to perform a miracle, by transferring your intelligence back to the 26th of April; when this

defendant is alleged to have committed the deed charged. You are only called upon and expected to determine, by your verdict, what was the condition of the defendant's mind at that time, and the only way in which you can determine such condition, and the only way known to law and to reason, is by the acts of the defendant at that time, and by those acts and from those acts you may infer the operations of this defendant's mind. That is the only method known to human wisdom and intelligence, and that is the method by which you must be governed."

Here the learned court stated the rules by which the jury were to be governed in determining the condition of the defendant's mind at the time of inflicting the wound that caused the death. That, of course, included her ability to reason, think, and reflect and her general power of volition, and they were instructed that there was but one method known to the law and to reason and human wisdom for ascertaining that condition and determining these questions, and that was by considering her act at the time. These instructions excluded from the consideration of the jury all the facts and circumstances preceding the homicide, and of which that act was but the culmination. This part of the charge renders the ruling excluding the corroborating proof intelligible, but we think that both the ruling and the charge were in these respects erroneous.

There is another portion of the charge which is intimately related to the questions under consideration. In speaking of the relations of the parties and the credibility of the defendant, the court said: "On another phase of this case, it is but proper for me to say that, in this narration, which, if true, would put Cataldo in a bad and an unenviable light, but one being has given the narration, and that is the defendant. She is vitally interested ²⁷³ in this case; and it is for you to say whether a defendant, situated as this defendant is, had a motive in testifying as she did; because it may be fairly claimed that the rule of action and conduct among men is, that they are expected to assume the greater part of the responsibility for such acts. It is for you, in consideration of the motives that may actuate this defendant, to consider: 1. Being a woman, whether she would have a motive, from the instinct of delicacy, which is inherent in the sex, to palliate her own conduct, by throwing all the blame upon Cataldo; and 2. Whether she would have a motive in so testifying to affect your verdict, in order to escape the legitimate consequences of her act."

When the court had ruled that the statement of the defendant did not need corroboration, this portion of the charge might well

have been omitted. The jury were permitted to reject her testimony, although proof to corroborate her had been excluded on the ground stated. It would seem to be clear that either the ruling or the charge is wrong. The primary error doubtless was in refusing to permit her counsel to strengthen and reinforce her narrative, or any material part of it, in any way that he could. Had he been allowed to do that, this passage in the charge, though the language is strong and quite unfavorable to the defendant, under all the circumstances, could be defended as embodying no legal error. In speaking of the refusal of the deceased, at the time of the homicide, to marry the defendant, the court said to the jury, in substance, that this refusal was nothing new, and whatever effect it had upon her mind must have been produced before that day, and then proceeded as follows:

"She was living with him at the time in meretricious intercourse. It was a mode of life condemned by sound public morals. Under the law of our state, however, it is not criminal; but that it was an immoral condition of life cannot and will not be disputed. This defendant, with her father and mother living in this city, left her father and mother's house, without a word of notice, and voluntarily went to live with the deceased in this meretricious life. You must draw a line ²⁷⁴ of distinction between the woman who parts with her honor upon a solemn promise to marry and the woman who parts with her honor without a solemn promise to marry on the part of the man, and who continues to surrender her person to him at his will, breaks away from the moorings of her home, and goes to live with him as his mistress."

We think that this part of the charge was clearly erroneous. It was the province of the jury to determine whether the refusal of the deceased, at the time of the homicide, to perform his promise, and the exasperating form in which the refusal was made, or expressed, had, for the time any effect upon her mental condition or not. The words that the deceased then uttered may have extinguished the last ground of a lingering hope, and suddenly revealed to her mind her real situation. What was then said, taken in connection with the preceding events, were causes which are sometimes known, and may reasonably be supposed, to operate powerfully upon the human mind, and the statement that they could not, coming as it did from the court, amounted to something more than a mere expression of opinion, even if that were permissible upon such a vital question. It was an instruction as to the force and effect of the evidence. But this part of the charge was open to a still more serious objection. It suggested

to the jury, and submitted for their consideration, a theory of the facts which had no foundation in the evidence as it appears in the record. It could not be found upon any fair or just construction of the evidence that the defendant voluntarily parted with her honor without a solemn promise of marriage, or surrendered her person to the deceased to become his mistress. The testimony shows that there was in fact such a promise preceding these relations. It is quite clear upon the evidence in the record that he obtained possession of her person and accomplished his purpose by means of that promise, and of a series of falsehoods and fraudulent devices of the most atrocious character. It was, at least, an open question whether her disgrace and dishonor were not effected by the use of some drug which he had administered to her for the purpose of ²⁷⁵ overcoming her mental and physical powers of resistance. If her testimony is to be believed—and it must be remembered that the learned recorder ruled that it needed no corroboration—she was decoyed into the rooms on Thirteenth street under the false pretense of an immediate marriage, and if she remained there with him, as she did, in the hope that it would be fulfilled, for a month prior to the killing, in order to hide her disgrace or retrieve her honor, or in some way disentangle herself from the situation in which she was placed, her conduct fell far short of voluntarily contracting meretricious relations with the deceased. These remarks of the court upon this feature of the case were, as it seems to us, quite misleading, and could scarcely fail to have an unfavorable effect upon the jury.

The attention of the court was plainly directed to these questions at the close of the charge, and they were made the subject of exception, but there was no attempt to modify, explain, or retract what had been said.

The defendant was subjected to a protracted cross-examination, in which the same question was repeatedly asked and answered, frequently by the suggestion and direction of the court. We will not refer to the numerous incidents which the record discloses in the course of this examination by the prosecuting officer and the court, further than to say that we are wholly unable to perceive any such element of improbability in her direct narrative, or any such danger to the cause of justice to be apprehended from her statements, as to warrant such a wide and unusual departure from the ordinary and usual methods long sanctioned for the examination of witnesses in courts of justice. But the most important feature disclosed by this part of the trial is the manner in which the testimony thus elicited was sub-

mitted to the jury. In order to get a clearer view of the action of the court in that respect, it is necessary to present at least a small part of the testimony on her cross-examination by the assistant district attorney, which is copied from his brief in this court. After stating several times that the immediate cause of the act was what ²⁷⁶ the deceased said to her about the hogs marrying her, the examination continued as follows:

"Q. Well, now, Miss Barberi, I want you to tell me, honestly and truthfully, why you killed Cataldo? A. I did n't want to kill him.

"Q. Well, why did you kill him? A. It was not my intention to kill him, but I was in a state of terrible agitation in that moment. I did n't see myself what I was doing, and when I heard that ejaculation, that word 'hogs,' I nearly lost consciousness, and I did n't know what I did.

"Q. Now, what did you cut his throat for? A. I did n't know, and I did n't see what I did. I was in a state of terrible exasperation, because he had insulted me atrociously; and I wanted to get married. I did n't know what had become of me.

"Q. Why did you cut Cataldo's throat? A. For God's sake, I don't know what I have to say, I already said.

"Q. Why, Miss Barberi, did you cut Cataldo's throat? A. Because I lost consciousness, and, physically, my eyesight, in the moment that I heard him say that a hog may marry me.

"Q. Why did you cut Cataldo's throat? A. It was not my intention to kill him. It was in the moment, an irrepressible moment, and I followed the impulse of rage, when I heard that a pig had to marry me.

"Q. Now, I will ask the question once more: Why did you cut Cataldo's throat? A. I never believed that he would die. I never thought to kill him."

Making every allowance for the strong temptation to color the narrative, which is always present to a witness under such circumstances, and for what it may have gained or lost in the translation, still it could not be said that there was no evidence to sustain the theory that the act was not preceded by deliberation or premeditation. There can be no reasonable ²⁷⁷ doubt that the situation in which she had been placed and the disgrace attending it was the constant subject of her thoughts during the preceding month, and may have preyed upon her mind. In this state of agitation, she confronted the deceased in the saloon, and the insulting refusal may have been the spark that produced the explosion. It was not impossible, under all the circumstances, to take that view of the case. At the very least, the defendant was

entitled to have the question fairly submitted to the jury, and we think it was not for reasons already stated, and for the further reason that the learned recorder, in effect, told the jury that there was no evidence to warrant the inference. In speaking to this point, he said:

"You will see that the killing was not, so far as this evidence shows, a sudden act of retaliation or revenge, or resistance for an outrage upon her, or for a forcible trespass upon the person of this defendant. The killing was not the result, so far as the evidence shows, of a single refusal to marry her upon the part of Cataldo. If, as it is claimed, that this refusal of his produced a whirlwind of passion in this defendant, and, as a result of that whirlwind of passion, she killed Cataldo, you must bear in mind that he had been promising this marriage from the day on which she went with him into the house of assignation as a free agent and of her own accord; and his repeated promises necessarily brought repeated disappointments. So that it was not the first time she was disappointed, because, according to her own story, the times of her disappointment went into high numbers."

Apart from the very objectionable remark, in which the defendant is represented to the jury as having accompanied the deceased "into the house of assignation, as a free agent and of her own accord," which, upon the evidence, was not correct in point of fact, as already shown, the substance of the charge was, that there was no evidence that the act was the result of a sudden impulse. That was the very question that the jury had to decide, and the strong expression of opinion upon such a question, even if it was nothing more, ²⁷⁸ was calculated to mislead the jury and exceeded the limits which this court has ever sanctioned, or ought to sanction, for judicial comment upon the character and effect of evidence.

The court warned the jury in very emphatic language and in various forms against rendering any verdict in the case which should in any degree be based upon sympathy for the defendant on account of her sex, which, of course, was correct as within his powers and discretion. But this was followed by a long argument to show that women in general are by nature capable of protecting their honor and defending their virtue, the plain tendency of which was to leave in the minds of the jury the impression that, after all the defendant may have been equally or more to blame for what had occurred, prior to the day of homicide, than the deceased, and thus to excuse or palliate his conduct. The recorder concluded that branch of the charge with the following proposition: "Nature has so ordained the sexes that woman is gifted, in

a particular way, with greater caution and more reserve force and power; while man is gifted in a different way; and while he may pay his court and attentions, yet nature has fitted and equipped her in such a way that she is better qualified to resist than man."

The suggestion that, according to certain natural laws, woman is better qualified to resist than man was departing far from the real question in the case, and, moreover, was incorrect in point of fact, according to common experience. When that part of the charge is all read together, it is apparent that matters were discussed that are scarcely within the range of the proofs in such a manner as to operate to the prejudice of the defendant with the jury.

Those portions of the charge are also fairly covered by exceptions, and, even if they are not, an erroneous statement of the law, or improper comments upon facts or the evidence bearing upon them, may be reviewed and corrected in this court in a capital case without any exception, when it can be seen that they may have operated to the prejudice of the accused.

The questions already discussed are sufficient to dispose of ²⁷⁹ the appeal. The record discloses other rulings, arising during the conduct of the trial, that would be difficult, if not impossible, to defend. To review them all by attempting to point out their bearing on the issue, and in what respect they were or might have been prejudicial to the defendant, would unnecessarily extend the discussion. A careful examination of the whole charge leaves the impression, from its general tone and entire structure, that the learned trial court, in the elaborate discussion of the facts and statement of the law in many important particulars passed the line which marks the limits of the judicial function.

From an examination of the whole case, we are impressed with the conviction that the defendant has not had a fair trial, and that it should be submitted to another jury to the end that all competent proof may be given in the regular and orderly way, and all the questions presented in that temperate and dispassionate manner, which is so important in the trial of a capital case and so essential to the protection of all the rights of the accused.

In a recent case, the highest court of the land concluded the review of a judgment of conviction for a capital offense, where the proceedings upon the trial and the substance of the charge were much more moderate and exempt from objection than in the case at bar, with the following pertinent remarks, which are applicable here: "When the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so in-

termingled with inferences springing from forensic ardor, that the jury are left without proper instructions, their appropriate province of dealing with the facts invaded and errors intervene which the pursuit of a different course would have avoided": *Alison v. United States*, 160 U. S. 203.

The judgment of conviction should be reversed and a new trial granted.

All concur (Vann, J., in result).

HOMICIDE—PREMEDITATION.—An instruction that omits the element of premeditation in defining murder of the first degree is erroneous: *State v. Johnson*, 8 Iowa, 525; 74 Am. Dec. 321. See notes to *Commonwealth v. Webster*, 52 Am. Dec. 737, and *Whiteford v. Commonwealth*, 18 Am. Dec. 778.

HOMICIDE—PREMEDITATION—WHAT IS.—Premeditatedly is properly defined to mean, "thought of beforehand any time, however short": *State v. Landgraf*, 95 Mo. 97; 6 Am. St. Rep. 28, and note with the cases collected.

WOOD v. AMERICAN FIRE INSURANCE COMPANY.

[149 New York, 332.]

INSURANCE, TRANSFER OF INTEREST.—The fact that a member of a partnership had transferred his interest therein to a third person before a policy of insurance issued does not affect the unconditional and sole ownership of the firm in its real estate, and hence does not avoid a policy containing a condition that it shall be void, if the interest of the assured shall be other than an unconditional and sole ownership, or if any change takes place in the interest, title, or possession of the subject of the insurance.

PARTNERSHIP REAL ESTATE is vested in the firm, and an assignment for the benefit of creditors, executed by one member thereof, does not pass any title to its real property, because it cannot be known until the partnership affairs have been settled and adjusted whether the assignee acquired anything by the assignment.

INSURANCE—WAIVER BY AGENT.—The general agents of insurance corporations may waive stipulations and conditions contained in a policy of insurance with respect to the conditions upon which it shall go into operation, by delivering it with knowledge of the facts, and receiving the premium.

INSURANCE, PROVISIONS, PROHIBITIONS WAIVED BY AGENTS.—Restrictions in a policy of insurance against the power of agents to waive any condition, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract, when it appears that the agent delivered it, and received the premium with full knowledge of the actual situation.

INSURANCE, CHANGE OF INTEREST.—A SALE OF REAL PROPERTY UNDER EXECUTION, when the statute gives the debtor time for redemption, and entitles him to remain in possession until the expiration of that time, does not avoid a policy of insurance containing a condition that it shall become void if any change, other than by the death of the assured, takes place in the interest,

title, or possession of the subject of insurance, whether by legal process or judgment, or by the voluntary act of the assured, or otherwise.

Michael H. Cardozo and Sheldon & Booth, for the appellant.

T. F. Conway, for the respondent.

³⁸⁴ O'BRIEN, J. The plaintiff recovered upon a policy of insurance, of which she was the assignee, issued by the defendant, upon a building used as a store, January 9, 1891, and which was destroyed by fire March 31, 1891. The only defenses interposed by the answer, which were proven and found at the trial, were: 1. That Wood Brothers, a firm composed of six brothers, which owned the property and procured the insurance, had not, at the time, the sole and unconditional title or ownership of the property; and 2. That the property covered by the policy had been sold upon judgment and execution against the firm some days before the loss. The contract was made by means of what is known as the standard policy, which contained the condition that it "shall be void . . . if the interest of the insured shall be other than unconditional and sole ownership, or . . . if any change, other than by the death of an assured, take place in the interest, title, or possession of the subject of the insurance, . . . whether by legal process or judgment, or by the voluntary act of the insured or otherwise."

With respect to the defense first referred to, it appeared that, in the year 1885, one of the individuals composing the firm made a general assignment of his individual property for the benefit of his creditors, and also of his interest in the firm. That in 1888 his assignee sold whatever interest in the firm property that passed to him by the assignment to a third party, and before the policy was issued had accounted and been discharged. The assignee had no accounting with the firm in order to ascertain what interest the assignor had, if any, in the surplus, if any, and no claim was ever made upon the firm for anything passing by the assignment. It appeared by the proofs and findings that the defendant's agents, who were, as may be fairly inferred, general agents, knew, at the time of issuing the policy, and before, all the facts and circumstances ³⁸⁵ with respect to the individual assignment and the transfer of that interest as above stated.

The answer to the defense, based upon these facts, is two-fold: 1. That since the title to the real estate held by a partnership is in the firm, and not in the individual members of it, the transfer of the interest of one of the members, before the in-

insurance, had no effect upon the unconditional and sole ownership of the firm. That an assignment by one partner of his share in the partnership stock simply transfers any interest he may have in any surplus remaining after payment of the firm debts and the settlement of the firm accounts. Whether the purchaser of such an interest takes anything whatever by the transfer cannot be known until all the partnership affairs have been settled and adjusted: *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683. The title to the real property, which was the subject of the insurance, was in the partnership firm, and was not affected by the assignment of one of the members. It still remained firm property, since the assignee had no interest in it as such, and whether the sale or transfer by the individual member was anything more than a mere form, or conveyed anything to the assignee, must depend upon the existence of a surplus after the partnership affairs are adjusted. It does not even appear in this case that there would then be any surplus to divide, though that circumstance cannot be regarded as material upon the question whether such a transfer by a member affects or changes the estate or interest which the firm has in the partnership realty. 2. That general agents of an insurance company may waive stipulations and provisions contained in the policy with respect to the conditions upon which it shall have inception and go into operation as a contract between the parties, by delivering it with knowledge of all the facts and receiving the premium, has long been settled. It is so obviously just that a party to a written contract should be precluded from defeating it by asserting conditions and stipulations contained in it which would prevent its inception, and which he knew at the time he delivered it and accepted the benefits were contravened ³⁸⁶ by the actual facts, that any statement of the reasons upon which the rule rests is no longer necessary. The principle is not a new one, and it has not been shaken by any decisions of this court made since the adoption of the standard policy: *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Forward v. Continental Ins. Co.*, 142 N. Y. 382.

The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts, and attempt afterward to defeat it, when called upon to perform, by asserting conditions re-

lating to those facts, would be to claim that no contract was made and thus operate as a fraud upon the other party.

It appears from the findings that on the 20th of March, 1891, about ten days before the fire, the real estate which was the subject of the insurance, was sold by the sheriff under an execution duly issued to him against the firm and a certificate of sale in due form delivered by him to the purchaser, one Aurelia O. Wood, and the remaining, and perhaps most important, question is, whether this sale worked such a change in the interest, title, or possession of the property as to avoid the policy, within the meaning of the conditions to which reference has been made. In *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375, 32 Am. St. Rep. 752, we held that, when the subject of the insurance was personal property, that the conditions of the policy were not violated by the mere levy of an execution upon the goods insured. The reasoning of that case, however, plainly leads to the conclusion that it would be otherwise in case the levy had been followed by a sale. The sale of personal property upon an execution divests the owner of his title to the property sold and transfers it to another. But what was said in that case with respect to the effect of a sale upon execution applies to personal property. ³⁸⁷ There was no question in the case with respect to the effect of a sale of real estate, and nothing was decided upon that question. The effect of a sale of real estate upon execution is declared by statute, and no other effect can be given to it. The judgment debtor, or his assignee, or his creditors, may redeem the same within fifteen months thereafter, and the right and title of the judgment debtor is not divested by the sale until the expiration of the period for redemption: Code Civ. Proc., sec. 1440. During that time the debtor is entitled to the possession and use of the rents and profits. At the time, therefore, that the property in question was destroyed by fire, the interest, title, or possession of the insured had not been changed. The statute had operated to postpone the effect of the sale upon the interest, title, or possession of the owners until the expiration of the period for redemption. In *Browning v. Home Ins. Co.*, 71 N. Y. 508, 27 Am. Rep. 86, the policy contained a provision that if the property be sold, or transferred, or any change take place in the title or possession, then in either such case the policy shall be void. The insured entered into a contract in writing for the sale of the premises, and this court held that the conditions of the policy were not violated. It was said that an executory contract for the sale of the property without change of possession did not work a breach of the con-

ditions against a sale or transfer or change in title or possession. That such a condition applies only to a legal transfer which divests the insured of title to or control over the property. Before we could assent to the proposition that in this case there was a breach of the conditions of the policy by the sheriff's sale, we would be compelled to overrule numerous cases in this court which, in principle, decide otherwise: *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Haight v. Continental Ins. Co.*, 92 N. Y. 51, 55; *Green v. Homestead Fire Ins. Co.*, 82 N. Y. 517.

The judgment must, therefore, be affirmed, with costs.

All concur, except Gray, J., who dissents upon the ground that the policy was avoided by the change of interest effected by the sale of the property.

PARTNERSHIP—GENERAL ASSIGNMENT BY ONE PARTNER.—One of several partners has no authority, without the consent of the other partners, to make a general assignment of the firm property for the benefit of creditors: *Shattuck v. Chandler*, 40 Kan. 516; 10 Am. St. Rep. 227, and note. An assignment by one partner of his property for the benefit of creditors does not convey property of the partnership nor any right to the possession thereof: *Van Kluck v. Hammell*, 87 Mich. 590; 24 Am. St. Rep. 182, and note.

PARTNERSHIP REALTY—CONVEYANCE BY ONE PARTNER. At law, as we have seen, the partners are tenants in common of their realty. Each can, therefore, convey his undivided interest, and neither can convey any part of the interest of his copartners: *Extended note to Goldthwaite v. Janney*, 48 Am. St. Rep. 74.

INSURANCE—WAIVER OF CONDITIONS BY GENERAL AGENT.—A condition in a policy of insurance is waived by the issuing of such policy by a general agent, who at that time knows of, and assents to, facts which constitute a breach of such condition: *Kruger v. Western etc. Ins. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42, and note. A policy of insurance can be modified or a condition therein waived by parol, by the general agent of the insurance company: *German Ins. Co. v. Gray*, 48 Kan. 497; 19 Am. St. Rep. 150, and note. See, also, the note to *Menk v. Home Ins. Co.*, 9 Am. St. Rep. 163.

INSURANCE—CHANGE OF INTEREST—EXBOUTION.—A levy of execution on insured property is not an alienation avoiding the insurance, where a right of redemption still remains in the assured: *Note to Walraedt v. Phoenix Ins. Co.*, 32 Am. St. Rep. 753.

NEILL v. ORDER OF UNITED FRIENDS.

[140 New York, 430.]

BENEVOLENT INSURANCE ASSOCIATIONS.—Under the by-laws of an association entitling a member to recover a stated sum when, by reason of accident or disease, he becomes permanently disabled from following his usual or some other occupation, he is not precluded from recovery where he has been injured so as to be unable to pursue his ordinary occupation, though not incapacitated from pursuing another occupation in which his wages are much inferior, and which requires for its duties much less physical or mental ability.

M. W. Van Auken, for the appellant.

W. F. O'Neill, for the respondent.

⁴³⁰ **HAIGHT, J.** This action was brought to recover the sum of fifteen hundred dollars upon a certificate of membership issued to plaintiff by the defendant, a duly incorporated domestic insurance association. Under the by-laws, he is entitled to recover that sum, when, by reason of disease or accident, he becomes permanently disabled from following his usual or some other occupation. The plaintiff's usual occupation was that of a railroad brakeman, and while in the discharge of his duties as such he was pushed from his car by a tramp, and so severely injured that amputation of one of his legs became necessary. His injury has disabled him to such an extent ⁴³¹ that he can no longer pursue his usual occupation. For several months he was out of employment, but of late has been engaged in watching a milk-car at Weehawken, but at much lower wages.

It is contended that his disability, though permanent, is not such as to prevent him from engaging in "some other occupation"; that "some other" means any other, and that, consequently, he has no cause of action. Should this construction be adopted? If it is, what disability must a member suffer in order to be entitled to the benefits guaranteed to him under his certificate of membership? This question is not easily answered. He might be deprived of both feet and both hands and still be able to sit and watch a milk-car, and thus engage in some other occupation. Such a construction would practically relieve the defendant from all liability, for total disability arising from accident seldom occurs. The defendant was organized under the act for incorporating charitable, benevolent, and beneficiary associations. Being charitable and benevolent in character, its position of promising insurance, yet giving none, is hardly consistent. We cannot believe such a construction was intended. The first clause entitled the member to receive the benefits if "disabled from following his usual occupation; the second clause

provides for such benefits if disabled from following some other occupation. The two clauses are connected with the conjunction "or." It does not appear to us that the latter clause was intended to cut down or limit the first clause. Usual does not necessarily mean entire or only. A member may be engaged in more than one occupation. He may have a usual and an occasional business, either of which would come within the terms of the defendant's by-laws. "Some other occupation" should not, for reasons suggested, be construed to mean any occupation, for it was doubtless intended to refer to some occupation with which the member was familiar and could adopt. If the occupation referred to also has reference to one requiring substantially the same physical and mental ability of that in which he was usually engaged, the two clauses would be in harmony with each other, and the meaning intelligible. To our minds, this construction is more in accord with the spirit and intention of the defendant's charter and by-laws than that proposed by the appellant.

The order of the general term should be affirmed and judgment absolute ordered for the plaintiff on the stipulation with costs.

All concur.

INSURANCE—ACCIDENT—LOSS OF BUSINESS TIME.—If a policy provides that, if an accidental injury creates a disability, the assured shall be paid a certain sum per week for the immediate, continuous, and total loss of such business time as may result from such injury, he is entitled to recover if his injury is such that he loses his time in the business in which he was engaged when insured, though there are other business pursuits from which the accident would not incapacitate him: *Pennington v. Pacific etc. Ins. Co.*, 85 Iowa, 468; 39 Am. St. Rep. 306. The phrase "total inability to labor," contained in the constitution and by-laws of an employes' relief association, means a total inability to earn a livelihood at any employment, and not at the particular employment at which the member was engaged at the time of his injury: *Baltimore etc. Relief Assn. v. Post*, 122 Pa. St. 579; 9 Am. St. Rep. 147. See, also, the note to *North American etc. Ins. Co. v. Burroughs*, 8 Am. Rep. 218.

PICKSLAY v. STARR.

[140 NEW YORK, 432.]

GIFT, MISTAKE AS A GROUND OF AVOIDING.—A gift intentionally made, and perfected by delivery, cannot be avoided on the ground that the donor when making it temporarily forgot a business arrangement into which he had entered with the donee and on account of which he would have withheld the gift, had such arrangement been present in his mind.

A GIFT REQUIRES NO CONSIDERATION, and depends upon no agreement, but upon the voluntary act of the donor, only, and is accomplished by a delivery of the subject of the gift.

GIFT, CHECK ON BANK AS.—The delivery to the donee of the check of the donor is a valid gift of the sum therein named, when such check is directed to a bank having funds of the donor, which he expects it to pay, and which it does pay, on presentation by the donee.

Action to recover a balance claimed to be due the plaintiff from the defendant for compensation while in his employment. The defendant sought to have credited to him the sum of two thousand five hundred dollars which had been given to the plaintiff in a check as a Christmas present in 1889. The plaintiff had been in the service of the defendant for several years prior to that date, and had for some time annually received a present of two thousand five hundred dollars. In April, 1889, an agreement was made between the parties by which the plaintiff was to receive a very substantial increase in his salary, to commence on May 1, 1889, and from and after May 1, 1890, he was, in addition to such increased salary, to receive a commission of one and a half per cent upon all sales made in the defendant's business in excess of six hundred thousand dollars per annum. Notwithstanding the change in the relation of the parties effected by this agreement, the defendant on Christmas Eve, 1889, handed to the plaintiff a check for two thousand five hundred dollars, with an expression of his wishes for a Merry Christmas. The day after Christmas the plaintiff thanked the defendant for the present and also for a present given to plaintiff's wife, and defendant responded, that "he was very glad they were pleased." Shortly afterward, on the defendant's attention being called to the check by his bookkeeper, he directed the latter to charge it to the plaintiff's account. The plaintiff was not present and it did not clearly appear when he was first notified that the check had been charged to him, though in September following the making of the gift, and at a later time, he claimed to have spoken to the defendant about the charge being made to him, and to have insisted that he had every reason to suppose it was a gift. The

defendant, however, claimed that it was a mistake arising from his having forgotten at the time of making the gift about the new arrangement by which the salary of the plaintiff had been raised. The referee, however, found that the check was given to plaintiff, not on account of his salary, but as a gift from the defendant, and judgment was entered in favor of the plaintiff for the amount claimed by him. This judgment was affirmed by the general term, and thereupon a further appeal was taken to this court.

Delos McCurdy, for the appellant.

William H. Ford, for the respondent.

⁴³⁶ GRAY, J. This is a peculiar case. It is perfectly clear that the defendant intended, at the time, to give to the plaintiff the Christmas present of two thousand five hundred dollars, and it is also equally clear that, subsequently, he bethought himself of the new arrangement, which he had made with respect to his clerk's compensation, and became conscious of the mistake he had committed. Of course, notwithstanding the new arrangement between them, which, according to the defendant, was upon a basis which would make the usual annual Christmas gift no longer a thing to be expected, there was nothing to prevent his continuing to recognize the peculiar value to him of the plaintiff's services by way of gifts of money. When, upon the occasion of their interview on Christmas eve, he handed the envelope containing the check to the plaintiff, with the expression of his good wishes, there can be no doubt that there were present the two elements necessary to constitute a perfect gift, viz., ⁴³⁷ the intention to give, followed by a delivery of the thing given. The argument that the defendant could not have intended to give the two thousand five hundred dollars, because that sum would then have been given twice, in view of its having been included by the defendant in the new arrangement with respect to compensation, is not quite sound. All that is necessary to constitute intention, and all that we understand, legally or otherwise, by intention, is the design, or determination, of the mind and that mental condition may exist, when an act is done, irrespective of the fact that, were something else then recalled, it might not have acted in the same manner. This is not like the case where parties come to some agreement, in the belief that a certain state of facts exists, and money is paid by the one to the other in consequence thereof, and it subsequently appears that there was a mistake with regard to the facts. Money, when so paid, is deemed to have been received by the one to whom it is paid to the use of the

one paying it. The mutual error, which affected the agreement between the parties, requires that they should be remitted to their original rights. In such a case, in equity and in justice, the money does not belong to the party receiving it. So too, if there is an equitable basis for redress, by reason of some mistake of fact in the contract, due to the ignorance or forgetfulness of the party, equity will not infrequently intervene. The principle is, in such cases, that there is not that consent of the minds which is essential to the perfect agreement. A gift, however, requires no consideration and depends upon no agreement, but upon the voluntary act of the donor only, and is accomplished by a delivery of the subject of the gift.

The defendant's silence toward the plaintiff for months afterward, until the latter, becoming acquainted with the fact of the book-keeper having charged the sum to his account in the books, had the opportunity of speaking with him upon the subject, is a very remarkable fact and one which militates against the defendant's case in every way. The finding of the referee, that there was a gift from the defendant to the plaintiff, is not only supported by the affirmative evidence in ⁴³⁸ the case given by the plaintiff, but it would have support in the inferences which might be drawn from the strange silence of the defendant toward the plaintiff subsequently. Indeed, it is difficult to see, giving all faith to the defendant's testimony about the matter, how the referee could have come to a different conclusion than he did upon the facts. If the defendant's position was tenable, that a gift under a mistake invalidates it and the giver is at any time justified in setting up the mistake in order to defeat the gift, it might, in instances, result in great injustice, if not hardship. The party receiving an important gift might be so misled by the silence of the other into believing, not only that the giver had meant to give, but that he had not repented him of his act, as, in that belief, to have spent the money, or to have changed his mode of life in consequence. How was the plaintiff to know, after the gift of his money to him, accompanied with the friendly expressions of the giver, in the time that followed, that he had incurred an obligation to return the money? It would be a very harsh rule to lay down, that a party, receiving a gift under the circumstances of the present case, might incur, to quote the language in *Haviland v. Willets*, 141 N. Y. 52, "an unknown and unsuspected obligation, if required, to return the fund."

In answer to the argument of the appellant, that the delivery of the donor's check did not make a valid gift of the sum of two thousand five hundred dollars, it is sufficient to say that it

is not like the making of a promise, such as would be the donor's promissory note, where the gift is not consummated until the delivery of the thing promised and remains revocable until such delivery. The delivery of a check is the delivery of something which represents a certain sum of money, which the drawer of the check intends that the payee shall, in fact, have. What the defendant gave to the plaintiff, while in form his own check, in fact, was an order upon the bank to pay to him the sum of money represented by it. That the transaction was complete, by the payment of the check to the plaintiff, is amply evidenced; if by nothing else, by the very direction of ⁴³⁹ the defendant to his book-keeper to charge its amount to the account of the plaintiff in his books. The reasoning of the referee with respect to this point made by the appellant is perfectly satisfactory.

The judgment appealed from should be affirmed, with costs.

All concur, except O'Brien, J., not voting.

GIFTS—CONSIDERATION.—A gift is a voluntary transfer of his property by one to another without any consideration therefor: *Ingram v. Colgan*, 106 Cal. 113; 46 Am. St. Rep. 221. No consideration is necessary to support gifts, and if made bona fide, and there is immediate delivery of possession, they are good against the world: *McWillie v. Van Vacter*, 35 Miss. 428; 72 Am. Dec. 127, and note.

GIFTS.—BANK CHECKS AS: See the extended notes to Appeal of *Waynesburg College*, 56 Am. Rep. 253, and *Sheedy v. Roach*, 26 Am. Rep. 685.

WILHELM v. WILKEN.

[149 NEW YORK, 447.]

A CONVEYANCE BY QUITCLAIM, made by a purchaser in good faith for a valuable consideration, having no notice of a prior unrecorded conveyance, vests title in the grantee and prevails over such prior conveyance, if first recorded.

A PURCHASER RECEIVING A QUITCLAIM DEED is entitled to be regarded as a bona fide purchaser, and to be protected against a prior, but subsequently recorded, deed, especially when the subject of the deed is particularly described realty, with all the appurtenances, and all the right, estate, title, and interest of the grantor, with an habendum to the grantee, his heirs and assigns, forever. Such a deed implies that the grantor professes to have an interest in the premises which he could convey.

The case was presented upon an agreed statement of facts, from which it appeared that the plaintiffs had contracted to sell, and the defendant to purchase, certain premises, and that the defendant refused to complete his contract, upon the ground that the plaintiffs had not a good title. In 1864 C. H. Tallman, then

being the owner of the property in controversy, conveyed it to one Page, but the conveyance was left unrecorded until February, 1893. Tallman, in 1889, conveyed the same property to Louisa A. Penfield by a quitclaim deed, which was recorded a few days after its date, and thereafter the grantee conveyed the premises to the plaintiffs, who, at the time of the conveyance to them, had no notice of the unrecorded conveyance to Tallman. By the quitclaim deed, the grantor professed to remise, release, and quitclaim unto the party of the second part, her heirs and assigns forever, the real property, fully describing it, "together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, and interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, and to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, under the said party of the second part, her heirs and assigns forever." The consideration expressed in the quitclaim deed from Tallman to Penfield was one hundred and twenty-five dollars, and it was made subject to unpaid taxes and to tax sales. The consideration of the conveyance to plaintiffs was one thousand dollars. The question which the parties presented for consideration was whether Louisa A. Penfield, as a purchaser of the premises by the quitclaim deed, should be deemed a bona fide purchaser for value without notice, and, as such, to be within the protection of the recording acts.

Frank A. Bennett, for the appellant.

Harry V. Morgan, for the respondents.

440 GRAY, J. I think there can be no doubt as to the correctness of the general term judgment. While there seems to
450 have been no decision by this court upon precisely such a case as is here presented, nevertheless, there are decisions to the effect that deeds which "remise, release, and quitclaim" are operative as a conveyance of land by way of bargain and sale. Such are, for instance, the cases of *Lynch v. Livingston*, 6 N. Y. 434, and *Striker v. Mott*, 28 N. Y. 92, which rested upon the authority of the early case of *Jackson v. Fish*, 10 Johns. 456. This latter case did away with the strictness, in which a release or quitclaim had been sometimes regarded. In *Sparrow v. Kingman*, 1 N. Y.

242, it was assumed in the opinion that an ordinary quitclaim deed might be used to pass the fee to an estate; so that whatever the interest or estate of the grantor, whether that of tenant for life, or years, or a fee, it would pass by such a conveyance. But the provisions of the Revised Statutes should make the matter perfectly clear. "Deeds of bargain and sale and of lease and release may continue to be used and shall be deemed grants; and, as such, shall be subject to all the provisions of this chapter concerning grants": 1 Rev. Stats., sec. 142, p. 739. The requirement of the Recording Act (1 Rev. Stats., sec. 1, p. 756) is, that every conveyance of real estate shall be recorded in the office of the clerk of the county where it is situated, and if not so recorded, it shall be void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded. Section 38 of the chapter prescribes that "the term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing by which any estate, or interest in real estate, is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or in equity." The elasticity of the term "conveyance" thus appears to be quite sufficient to comprehend a grant by way of quitclaim, or of bargain and sale.

The argument for the defendant is, that the unrecorded deed from Tallman to Page was a valid conveyance, and that Penfield, as grantee under Tallman's quitclaim deed, has no better ⁴⁵¹ right to the possession of the property than her grantor had, and, as he had none at the time of the delivery of the quitclaim deed, there was nothing for it to grant. I fail to see the relevancy, or importance, of the argument, when considering the purpose and scope of the recording statute; which is designed, obviously, to afford protection to purchasers, in good faith and without notice, from those having an apparent title to land. In the cases in the United States supreme court of *May v. Le Claire*, 11 Wall. 217, 232, and *Villa v. Rodriguez*, 12 Wall. 323, 338, it was, indeed, suggested that one who acquires his title by quitclaim deed cannot be regarded as a bona fide purchaser without notice, and that, as the conveyance by such a deed would pass the title as the grantor held it, the grantee would take only what the grantor could lawfully convey. The expression of such an opinion in those cases was unnecessary for their decision, and nothing was, in fact, decided against the competency of quitclaim deeds to convey interests in lands. They were based on the case of *Oliver v. Piatt*, 3 How. 333; but that case did not go to any further extent, with reference to the question of the validity

of a quitclaim deed as a conveyance, than to point it out, in connection with other facts in the case tending to show notice, as a significant circumstance. Mr. Rawle, in his work on Covenants, fourth edition, page 35, justly criticises *Oliver v. Piatt*, 3 How. 333, and observes, in answer to the suggestion in the decision, that a deed with general warranty might as well be regarded as a "significant circumstance"; for, unless there had been something wrong about the title, the purchaser would not have demanded a general covenant, and he must have intended to rely upon it for his protection. These cases and others in the state courts, to which the appellant refers, and which I have examined, not because they can be authoritative, but for the purpose of investigation, do not go quite so far as the appellant would have us believe, except in the one case of *Marshall v. Roberts*, 18 Minn. 405, 10 Am. Rep. 201, where a contrary view of the question seems to have been taken. The supreme court of Iowa, while holding that a quitclaim deed would not protect a purchaser ⁴⁵² from one whose title was tainted by fraud, seems to have held, under the recording statutes in that state, that a purchaser acquiring title by quitclaim takes precedence of one holding under a prior but unrecorded deed, of which he had no notice: *Springer v. Bartle*, 46 Iowa, 688; *Pettingill v. Devin*, 35 Iowa, 344. In the Texas case of *Thorn v. Newsom*, 64 Tex. 161, 53 Am. Rep. 747, the question appears to have been raised, but it was left undetermined. The distinction, however, was made there between a contract calling for the sale of the vendor's interest in the land, or, as it is termed, "chance of title," and one calling for a conveyance of the land as distinguished from a release of the vendor's rights. The intimation from the decision is, that if there was a conveyance intended, the bona fide purchaser would be protected. In the Missouri case of *Ridgeway v. Holliday*, 59 Mo. 444, the title of the holder by quitclaim deed from the holder of the record title was actually affected, because of his having notice of facts respecting the title of the true owner of the land.

On the other hand, there are many decisions by the state courts, to the effect that the holder of the quitclaim deed is entitled to be regarded as a bona fide purchaser and to be protected against a prior, but subsequently recorded, deed: *Brown v. Banner Coal etc. Co.*, 97 Ill. 214; 37 Am. Rep. 105; *Chapman v. Sims*, 53 Miss. 154; *Cutler v. James*, 64 Wis. 173; 54 Am. Rep. 603; *Shotwell v. Harrison*, 22 Mich. 410; *Graff v. Middleton*, 43 Cal. 341; *Willingham v. Hardin*, 75 Mo. 429. The recording statutes in these different states are very similar to, if not sub-

stantially the same as, the New York statute; and the effect of the decisions is to make a deed of real estate by quitclaim as operative to transfer title as would be a deed of bargain and sale, and to hold that the prior recording of such a deed would give it a preference over one previously executed and delivered, but which was subsequently recorded.

The practice of transferring title to real estate through quitclaim deeds has not been uncommon in this state, and, in the absence of any facts creating a suspicion as to the transaction of transfer, there is nothing especially significant in the use of ⁴⁵³ such a mode of conveyance. The point is, what is effected by the deed; and where, as in the present case, the subject of the release and quitclaim is a certain particularly described property with all the appurtenances and all the estate, right, title, and interest of the grantor, with "habendum" to the grantee, her heirs and assigns, forever, a conveyance of the real estate, within the meaning of the act, is evident. The terms of such a deed imply that Tallman professed to have an interest in the premises, which he could convey, and it is the duty of the court to so construe a deed, purporting to convey land for a valuable consideration, as to give effect to the intentions of the parties, and to hold it to be a conveyance of the land.

I think the judgment of the general term should be affirmed, with costs.

All concur.

QUITCLAIM DEED, RIGHTS OF PURCHASER BY.—A purchaser by quitclaim deed for value and without notice acquires title as against a prior unrecorded deed conveying or affecting real estate, but one who takes by quitclaim deed a title which is subject to equities in the hands of the grantor takes subject to such equities: *Eoff v. Irvine*, 108 Mo. 378; 32 Am. St. Rep. 609, and note. One holding under a quitclaim deed is not a bona fide purchaser without notice: *Wood v. Holly Mfg. Co.*, 100 Ala. 826; 46 Am. St. Rep. 56, and note. See, also, the note to *Reynolds v. Shaver*, 43 Am. St. Rep. 88.

FIRE DEPARTMENT OF NEW YORK v. GILMOUR.

[149 NEW YORK, 453.]

CONSTITUTIONAL LAW—FIRES, STATUTES IMPOSING PRECAUTIONS AGAINST.—The legislature has power to enact regulations for the protection of cities and villages against serious dangers from conflagrations. It may directly enact a code of regulations applicable to exposed localities, or may invest municipalities with the power to pass ordinances regulating the subject.

FIRE COMMISSIONERS, REASONABLENESS OF REGULATIONS OF, MAY BE QUESTIONED.—Though a board of fire commissioners of a city is by its charter given power to determine whether the use of property for the storage of combustible materials by the owner or occupier is a menace to the public safety, and upon determining that the use made is dangerous, a penalty is inflicted upon the person continuing it, the determination made by such board is not conclusive, so as to preclude one prosecuted for a penalty from proving that the order made was unreasonable, unnecessary, and oppressive.

MUNICIPAL BOARDS—NOTICE AND HEARING.—A person affected by a determination of a board of fire commissioners that the use made of his property is dangerous is not entitled to notice and hearing, but such determination does not preclude him from contesting its correctness in the courts, and showing that it is unreasonable and unnecessary.

Prosecution to recover a penalty of the defendant for his neglect to obey an order made in May, 1892, under the authority of the board of fire commissioners of the fire department of the city of New York requiring the defendant to build a wall of stone, brick, or other fireproof material, not more than eighteen feet in height, around certain premises in the city of New York, and prohibiting him from storing on such premises boxes of wood to a height above a point twelve inches below the top of the wall. By section 463 of chapter 410 of the laws of 1882, commonly called the consolidation act, the board of fire commissioners and its officers and agents under their direction, or the direction of either of the commissioners, are empowered "to enter any building or premises where any merchandise, gunpowder, firewood, boards, shingles, shavings, etc., or other combustible materials may be lodged, and, upon finding that any of them are defective or dangerous, or that a violation of this title exists therein, may deliver a written or printed notice containing an extract from this title of the provisions in reference thereto, and notice of any violation thereof and notice to remove, amend, or secure the same within a period to be fixed therein." A neglect or refusal on the part of the occupier or possessor of the combustible materials subjected the offender to a penalty of twenty-five dollars and the further sum of five dollars for each day's neglect. At the trial, the surveyor of combustibles was sworn as a witness,

and testified to making an inspection of the defendant's premises, and that he was directed before going there to report against the place "if they did not have a proper wall around it, and a large number of boxes were stored there." He made a report, and the order was thereupon made upon which the present prosecution was based. The defendant offered to prove the situation and surroundings of his premises, for the purpose of showing the absence of danger from conflagration, and also to prove other facts all tending to show that the order made was unreasonable, and that the use made by him of his property did not involve any extraordinary danger from fire. The evidence so offered was excluded on the ground that the action of the board of fire commissioners was a conclusive determination of the question, and a judgment of conviction followed. An appeal was taken by the defendant to the general term of the New York common pleas, which reversed the conviction, and the prosecution thereupon took its appeal to this court.

William L. Findley, for the appellant.

Hector M. Hitchings and Edward J. Dunphy, for the respondent.

457 ANDREWS, C. J. The action was tried and determined by the justice of the district court upon the theory that the determination of the board of fire commissioners that the use made by the defendant of the yard of his premises for the piling of boxes was dangerous, as being likely to cause or promote a conflagration, to the prejudice of life and property, was conclusive, and not open to inquiry in an action brought for the penalty given by section 463 of the consolidation act. It was upon this view of the law that the justice excluded the evidence offered by the defendant to show that, in fact, the use made by him of the yard did not involve any unusual risk of fire, either from the inherent nature of the property stored therein, or in promoting a conflagration originating on adjacent premises. This, the justice, declared, he could not consider, but was confined to the simple inquiry whether the order of the board of commissioners had been disobeyed.

We think the justice erred in the principle upon which he proceeded.

There can be no doubt of the power of the legislature to enact regulations for the protection of cities or villages against the serious dangers from conflagrations. It is one of the subjects

to which the police power of the state extends, and there is no one in the wide range of this power upon which the legislature has more frequently acted. It may directly enact a code of regulations applicable to exposed localities, or, as is more commonly done, it may invest municipalities with the power to pass ordinances regulating the subject. The authority given in most charters of municipalities to the legislative body to fix fire limits, to prohibit the erection of buildings therein of wood or other combustible materials, the storing of gunpowder or other explosive compounds in quantities and under circumstances hazardous to life and property, are among the familiar instances of the delegated power. Regulations on this subject are restrictions of personal freedom and the free use of property. But they are justified by public necessity, and so are within the acknowledged power of the legislature. The legislature by section 463 of the consolidation act ⁴⁵⁸ conferred upon a subordinate department of the city government the power to determine in specific cases whether the use of property for storage of combustible materials by the owner or occupant was a menace to the public safety, and, upon the determination of the board of commissioners that such use was dangerous, authorized an order to be made by the board for the discontinuance of such use or the regulation thereof, upon disobedience to which the owner or occupant is subjected to a penalty. It is manifest that if an irreviewable discretion is thereby lodged in the board, and the citizen is precluded in a suit for the penalty from contesting the reasonableness of an order made, the board is vested with a power of the most arbitrary description, liable to great abuse, a power which, though in terms vested in the board of commissioners, is, sometimes at least, as the evidence in this case shows, in fact wielded by the subordinate appointees in the name of the department. It would have been competent for the legislature to have enacted a general regulation prohibiting the piling of boxes or masses of combustible material in yards or open spaces in the populous and defined districts within a city, and such an enactment every citizen would be bound to obey, and, where sued for a penalty, it would be no defense to a party who had violated the law to show that in his particular case, owing to exceptional circumstances, the regulation was unnecessary or unreasonable. The will of the legislature would stand as the reason for the rule, and, being general, no one, however situated, could escape its obligation, unless indeed he could establish that, passing beyond the police power, it involved some right of person or property protected by the constitution. In

other words, where the legislature, in the exercise of the police power, enacts a regulation defining the duty of citizens, either in respect to their personal conduct or the use of their property, the reasonableness of the thing enjoined or prohibited is not an open question, because the supreme legislative power has determined it by enacting the rule: See Dillon on Municipal Corporations, sec. 328, and cases cited. But where the legislature, as in the present case, enacts no general rule of conduct, but invests ⁴⁵⁹ a subordinate board with the power to investigate and determine the fact whether in any special case any use is made of property for purposes of storage, dangerous on account of its liability to originate or extend a conflagration, not prescribing the uses which it permits or disallows, then we are of opinion that, in such cases, the reasonableness of the determination of the board, or of the order prohibiting a particular use in accordance with such determination, is open to contestation by the party affected thereby, and that he is entitled, when sued for a disobedience of the order, to show that it was unreasonable, unnecessary, and oppressive. The general rule in respect to the validity of ordinances of a municipal corporation, passed under a general or implied authority to enact ordinances to secure the welfare of the people of the municipality, is that they must be reasonable, and are void if not so. The courts do, and doubtless should, exercise great caution in interfering with the exercise of police regulations enacted under general powers conferred upon municipal corporations or subordinate public agents. But the public interests are also subserved in protecting citizens against unnecessary, unreasonable, and oppressive regulations, interfering with a reasonable use of their property or their freedom of action. It was not necessary in this case that the defendant should have been notified (as he was not) of the investigation made of his premises by the appointees of the fire commissioners, or that he should have been afforded an opportunity to be heard before the order was made: *Health Department v. Rector etc.*, 145 N. Y. 32; 45 Am. St. Rep. 579. But we think he was entitled to contest in the action for the penalty the reasonableness of the order made and the facts upon which it proceeded: *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1; 37 Am. St. Rep. 522; *Health Department v. Rector*, 145 N. Y. 32; 45 Am. St. Rep. 579; *Salem v. Eastern R. R. Co.*, 98 Mass. 431; 96 Am. Dec. 650.

For the denial of this right we think the order should be affirmed.

All concur.

BOARDS OF HEALTH are not required to give notice of hearing to any person before they can exercise their jurisdiction for the public welfare, unless the statute under which they are authorized to act expressly requires such notice or hearing: *People v. Board of Health*, 140 N. Y. 1; 37 Am. St. Rep. 522, and note; to the same effect see *Health Department v. Rector*, 145 N. Y. 82; 45 Am. St. Rep. 579.

FIRES—VALIDITY OF ORDINANCES INTENDED TO PREVENT.—A municipal corporation has inherent power, independent of legislative grant, to forbid the erection, and compel the removal, of buildings formed of combustible materials within densely built-up parts of a town: *Mayor v. Hoffman*, 29 La. Ann. 651; 29 Am. Rep. 345, and extended note; *Wadleigh v. Gilman*, 12 Me. 406; 23 Am. Dec. 188. Under a power "to make regulations for guarding against damage by fire," a city may establish fire limits and forbid the erection of wooden buildings within them: *Charleston v. Reid*, 27 W. Va. 681; 55 Am. Rep. 336; *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89. A borough has no implied authority to prohibit the erection of wooden buildings under a penalty: *Kneedler v. Norristown*, 100 Pa. St. 366; 45 Am. Rep. 383. A city cannot, without express authority, establish fire limits and declare wooden buildings within such limits to be nuisances: *Rye v. Peterson*, 45 Tex. 312; 23 Am. Rep. 608. See, also, the note to *Mayor v. Hoffman*, 29 Am. Rep. 347.

WETMORE v. WETMORE.

[149 NEW YORK, 520.]

TRUST INTEREST, PROCEEDING TO REACH AND APPLY TO THE PAYMENT OF DEBTS.—Under the statutes of New York, if a trust is created to receive and pay over the income of personal property, an action may be maintained by a judgment creditor of the beneficiary, after the return of an execution unsatisfied, to reach the surplus income beyond what is necessary for the suitable support and maintenance of the cestui que trust and those dependent upon him.

JUDGMENT CREDITOR, WHO IS A.—A JUDGMENT FOR ALIMONY in favor of a woman makes her a judgment creditor of her former husband, and, as such, she is entitled to avail herself of all the remedies given by the statute to judgment creditors.

TRUST ESTATE, ALIMONY, ENFORCING PAYMENT OUT OF.—A wife in whose favor judgment has been entered for alimony may enforce payment thereof out of the income of personal property devised to a trustee by the father of her late husband, with directions to apply the net income to the support of the son so long as he shall live.

A JUDGMENT AWARDED ALIMONY in a suit for divorce, to be paid to the plaintiff for her future support and that of her children, makes the husband, in effect, a debtor owing the wife the amount adjudged to be paid, and entitles her to the same remedies as any judgment creditor.

TRUST, INCOME OF, DUTY OF HUSBAND TO APPLY TO THE SUPPORT OF HIS WIFE.—Where a trust is created in a will, and a trustee directed to pay the income for the support of the testator's son, the wife of the latter is included within the equity of the trust, and will not be permitted to starve while the husband is provided for; and if a decree has been entered against him providing

that he shall pay her alimony, a court of equity may direct the trustee to pay over to her the surplus of the income already accumulated, and also to make therefrom such payments as shall thereafter accrue and be necessary to satisfy the decree for alimony. The whole of the trust income may be taken, leaving none for the husband, if it appears that he has other estate ample for his support.

TRUST INCOME, APPLYING TO THE PAYMENT OF ALIMONY.—A judgment directing the income of a trust in favor of a husband to be applied to the payment of alimony to his wife, due and to become due, should not deprive him of his support out of such fund, if it should become necessary for him to have recourse thereto, and though he at the time has a large estate and ample means of support therefrom, he should not be deprived of the right to apply to the court at any future time for leave to share in such income.

S. P. Nash and Gerrard Irvine Whitehead, for the appellants.

F. B. Candler, for the respondent.

525 **HAIGHT, J.** This action was brought to obtain a judgment applying the accumulated income of a trust estate created for the benefit of the defendant, William B. Wetmore, in satisfaction of the plaintiff's judgment for alimony due, and which may accrue to her in the future.

The plaintiff was his wife, and on the first day of April, 1892, obtained a judgment of absolute divorce in the supreme court which required him to pay her as alimony the sum of three thousand dollars per year, and the further sum of one thousand dollars per year for each of her three infant children until they should respectively become of age. To secure such payments, he was required to give a bond in the penal sum of fifty thousand dollars, with two sufficient sureties. At the time of entering the judgment he resided in the city of New York, but shortly thereafter removed to the state of New Jersey, and ever since has remained absent from this state, and has not given the bond required by the judgment, nor paid any of the alimony. After the sum of four thousand five hundred dollars of the alimony had become due and payable, a judgment was entered against him in favor of the plaintiff for that amount, on which an execution was issued and returned unsatisfied. Proceedings were then instituted to sequester his property found within the state, but none was discovered, and all attempts to collect the alimony due, either by action or proceedings, failed: *Continental Trust Co. v. Wetmore*, 67 Hun, 9.

526 After exhausting the remedies given the plaintiff by law, this action was commenced, and the chief question brought up for review is as to the jurisdiction of the court to award the judgment appealed from. It is claimed that it subverts, and in effect abrogates, the provisions of the will of Samuel Wetmore,

made for the support of his son, the defendant, William B. Wetmore.

Samuel Wetmore was a resident of the city of New York, and on the sixth day of March, 1885, died, leaving a last will and testament, in which, among other things, he gave and bequeathed to his executors one hundred thousand dollars upon trust, to keep the same invested and collect the profits therefrom, and to apply the net income from time to time, as it should accrue, to the use of his son so long as he shall live. By the eighth clause of his will, he directed that "no person for whose benefit any trust is hereby created shall have power to anticipate or to dispose of any income directed to be paid or applied to the use of such person until the same shall have fully accrued and become payable to such heir, and the trustees of said respective trusts are empowered and requested to disregard and defeat every assignment or other act in contravention of this clause in my will." By the ninth clause he provided: "I declare that this, my will, and every part thereof, is made with reference to the present existing laws and statutes of the state of New York relating to trusts and trust estates and the disposition of personal estates by will or legal distribution, and without regard to the laws and regulations of any state or country where I may happen to be at the time of my decease, or where any portion of my estate may be situated."

Section 57 of the Revised Statutes, with reference to uses and trusts, provides that "where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity to the claims of the creditors of such person ⁵²⁷ in the same manner as other personal property which cannot be reached by an execution at law." It has been held that this provision of the statute is equally applicable to a trust created to receive and pay over the income of personal property. And that an action may be maintained by a judgment creditor after the return of an execution unsatisfied to reach the surplus income beyond what is necessary for the suitable support and maintenance of the cestui que trust and those dependent upon him: *Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 N. Y. 616; *Graff v. Bonnett*, 31 N. Y. 9; 88 Am. Dec. 236; *Sillick v. Mason*, 2 Barb. Ch. 79.

Is the plaintiff such a creditor? As we have seen, a judgment has been entered in her favor for the alimony that had

become due and payable. She is, therefore, as to that amount a judgment creditor, and as such entitled to avail herself of all the remedies given by the statute. It is claimed that this judgment was irregularly entered. Its regularity is supported by the general terms: *Miller v. Miller*, 7 Hun, 208; *Lansing v. Lansing*, 4 Lans. 377; Code Civ. Proc., sec. 1240.

But this question we do not consider now before us for determination. If the judgment was entered irregularly, or without authority, the judgment debtor should avail himself of appropriate remedies to rid himself therefrom, for judgments ordinarily will not be annulled in collateral actions where they are incidentally brought in question.

Inasmuch as the judgment entered for alimony past due does not cover all of the alimony that has accrued and is provided for in the judgment entered in this action, it becomes necessary to determine the effect of the judgment in the divorce action awarding alimony to the plaintiff.

In *Romaine v. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, alimony had been awarded to an innocent wife as incidental to a decree of divorce in her favor for her support and maintenance. It was held that the awarding of alimony was not the enforcement of a debt due to the wife from her husband, but was founded upon the marital obligation of support, from which he was ⁵²⁸ not relieved by the decree. Its allowance is measured by the court, and is made specific. And whilst in one sense it is the property of the wife, it is a specific sum provided for a specific purpose created by equity, having the protection of equity, and consequently will not be applied in the payment of debts contracted by her prior to the decree. It will thus be seen that the awarding of alimony is not on account of any debt due and owing from the husband to the wife, but that it is based upon a duty devolving upon the husband to support her. And that in awarding judgment against him the court determines the amount necessary for such support, and requires the amount so fixed to be paid to her. His duty is thus determined. And from that time on he is, in effect, a debtor owing his wife the amount adjudged and determined by the decree. Whilst such amount is, in effect, the property of the wife, yet it, being created and protected by equity, cannot be reached by prior existing creditors.

The will, as we have seen, contains no direction for the accumulation of surplus. Such surplus over and above that which is necessary for the support of the defendant, William, is, therefore, under the statute made liable in equity to the claims of his

creditors. Equity is here given jurisdiction to apply such surplus. And it appears to us that the plaintiff is a creditor within the spirit and intention of the statute.

The constitution gives to the supreme court general jurisdiction in law and equity. As a court of equity, it is invested with the power and jurisdiction exercised by the ancient court of chancery in England with the exceptions, additions, and limitations created and imposed by the constitution and laws of this state: 2 Rev. Stats., sec. 36, p. 173.

The code contains statutory provisions with reference to the collection and enforcement of judgments awarding alimony. It, however, contains no provision attempting to limit or curtail the powers of the court of equity. It is the province of that court to interpose when the law fails to afford an adequate remedy: *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241.

⁵²⁹ As we have seen, the plaintiff has availed herself of the remedies given by statute without success. She then brought this action appealing to the equity powers of the court to enforce her rights. When she became the wife of the defendant, William, he undertook to support and maintain her during life. That duty still devolves upon him, notwithstanding the decree of divorce. Being the guilty party, his duty is continued, and is measured and fixed by the decree: *Romaine v. Chauncery*, 129 N. Y. 566; 26 Am. St. Rep. 544.

At common law the husband and wife were recognized as one. The married women's acts have to some extent changed the common-law rule. But as to the question we have here under consideration their common-law unity still exists: *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361.

The will creating the trust for the benefit of William makes no mention of his wife. And yet, owing to their unity of person and his duty to support her, equity will not permit the interposition of creditors until there is a surplus over and above that which is necessary for the support of himself, his wife, and infant children: *Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 N. Y. 616; *Sillick v. Mason*, 2 Barb. Oh. 79.

Equity will not feed the husband and starve the wife. Neither will it favor the wife to the detriment of the husband. Treating them as one, and both entitled to support out of the income of the estate, so far as creditors are concerned, furnishes a just rule and a safe basis for adjustment where the question of support arises between themselves. In *Thompson v. Thompson*, 52 Hun, 456, a trust had been created by will in favor of the defendant

similar to the one in question. The plaintiff was the wife of the defendant, and had obtained a divorce with an allowance of eight hundred dollars per year for her support. That action, like this, was brought to compel the trustee to pay her alimony out of the income of the trust estate payable to her husband. Judgment was awarded in her favor, and the same was affirmed in the general term.

In *Clinton v. Clinton*, L. R. 1 Pro. & Div. 215, the ⁵³⁰ court had made an order on the respondent for payment of permanent alimony at the rate of one hundred and ten pounds per annum so long as he was in receipt of a rent charge of four hundred pounds per annum, his only source of income. The respondent had become a bankrupt, and had failed to comply with the order of the court. It was held that sequestration in general terms should issue against his property.

In *Watkins v. Watkins*, 2 Atk. 96, a bill was brought against the husband for maintenance. It appeared that the defendant had possessed himself of the fortune of his wife and then departed the kingdom, without leaving any provision for her maintenance. The decree adjudged that the interest arising from the trust money should be paid to her until the husband returned and maintained her: See, also, *Head v. Head*, 3 Atk. 295; *Colemore v. Colemore*, referred to therein, and *Miller v. Miller*, 1 Abb. N. C. 30.

The judgment requires the trustee to pay over not only the surplus accumulated, but that which shall hereafter accrue in satisfaction of the plaintiff's allowance for alimony. We do not think the court exceeded its powers in this respect, or that the judgment operates to annul the trust. To hold that a separate action must be brought as each annual or semi-annual payment accrued would be burdensome and unnecessary. The question is analogous to that disposed of in the case of *Williams v. Thorn*, 70 N. Y. 270, in which it was held that the remedy of the creditor is not confined to the surplus which has accrued and accumulated in the hands of the trustee, but that provision may be made in the judgment determining what will be a reasonable allowance for the cestui que trust, and directing the application toward the payment of the judgment out of any future surplus.

The judgment makes no provision for the support of the defendant, William. The trust was created for his benefit. He is entitled to his support as well as the plaintiff, and it is the duty of the court to properly protect him in this respect. But it is found as a fact by the trial court that at the time of the entering

of the judgment in the divorce action he was possessed ⁵³¹ of an estate in his own right of the value of about two hundred thousand dollars, from which, with the trust estate, he had an income of about fifteen thousand dollars per year. That after the decree he removed with his estate from the jurisdiction of the court, and has continued ever since to refuse obedience to its mandates. The inference to be drawn from the facts is, that his income was sufficient to support him. If this is not so, it was his duty, upon the trial, to have presented evidence showing his necessities.

The case of *Holden v. Strong*, 116 N. Y. 471, has no application to the question here presented. In determining the defendant's necessities, we think the rule is well stated in *Moulton v. de ma Carty*, 6 Robt. 533: "It is proper to consider his station in life and the manner in which he has been reared and educated, his habits, and the means he may have to aid in his support." It is suggested that his circumstances may change, and that in such case the income from the trust estate, or some portion thereof, should be devoted to his maintenance. This is true, and in this respect we think the judgment should be modified. It permits the plaintiff to apply, from time to time, for such orders at the foot of the judgment as may be necessary for its enforcement. And we think that, in view of the fact that the judgment appropriates the future income from the trust estate for the support of the defendant, William's, wife and children, that he also should have leave at any time to apply for leave to share in such income, or to modify the judgment in that regard.

The judgment should be modified accordingly, and as so modified affirmed with costs.

All concur.

A CREDITOR'S BILL TO REACH THE INCOME OF A TRUST FUND may be sustained by an execution creditor or an assignee in insolvency of the beneficiary, where a sum has been bequeathed to the trustee upon a trust to pay the income over to such beneficiary during the term of his natural life, although such trustee is also given authority, in addition to the income, to pay over any part of the principal when he shall regard such payment as wise and expedient, and demanded by the necessities of the beneficiaries: *Evans v. Wall*, 159 Mass. 164; 38 Am. St. Rep. 406, and note.

A JUDGMENT FOR ALIMONY IS A DEBT OF RECORD as much as any other judgment for money is: *Conrad v. Everich*, 50 Ohio St. 476; 40 Am. St. Rep. 679, and note.

CASES
IN THE
SUPREME COURT
OF
OREGON.

SCHMIDT V. OREGON GOLD MINING COMPANY.

[28 OREGON, 2.]

NO APPEAL LIES from a judgment to which the appellant consented.

CONSENT DECREE—PRESUMPTION.—Where it appears in a decree that it was entered upon consent of the defendant, and it grants the relief prayed for in the complaint, and fixes the compensation of the plaintiff's attorneys and of the referee and the stenographer, the consent of the plaintiff thereto will be presumed on appeal therefrom.

APPEAL, WAIVER OF RIGHT OF.—CONSENT excuses error, and ends all contention between the parties. It waives the right of appeal.

JUDGMENT.—PROVISIONS OUTSIDE OF THE ISSUES may be sustained and enforced, if the decree containing them was entered by consent of all the parties, and they have reference to the subject matter of the litigation, and fall within the general scope of the case made by the pleadings.

ATTORNEYS, JUDGMENT IN FAVOR OF FOR THEIR COMPENSATION.—Where an allowance to the complainant is proper on account of attorneys' fees, it may be made directly to the attorneys themselves.

ATTORNEYS' FEES, ALLOWANCE OF.—In a suit by a trustee to foreclose a mortgage by the terms of which he is entitled to reasonable attorney's fees, together with his costs and disbursements, the court may, though there is no issue upon the subject, fix the amount of the fees due the attorney, referee, and the stenographer, and provide in the decree for the payment thereof to them, where the provision appears to have been made by consent.

JUDGMENT BY CONSENT—PRESUMED POWER OF ATTORNEYS.—Where it appears that a judgment was entered by consent, and that it fixes the compensation of plaintiff's attorneys in the suit, it will be presumed, on appeal, in the absence of any showing to the contrary, that the attorneys were authorized to request, con-

sent to, and have entered, just such a decree as was entered, and which the plaintiff seeks to have reversed upon appeal.

IF ATTORNEYS ACT BEYOND THEIR AUTHORITY IN CONSENTING to a decree, the remedy is not by appeal, but by some appropriate proceeding in the court where the consent was received and acted upon.

Suit to foreclose three mortgages executed by the Oregon Gold Mining Company to A. L. Schmidt, trustee, to secure the payment of bonds issued by the corporation. Each mortgage provided that, upon default, the trustee might foreclose, and that, out of the proceeds of any sale made, he should be allowed for attorneys' fees such sum as the court should deem reasonable, together with all costs necessarily incurred, including compensation to himself for the execution of the trust. The prayer of the complaint asked, among other relief, for the fixing of the amount to which plaintiff was entitled in the suit, for reasonable attorneys' fees, and for professional services therein, and that it be declared a lien upon the mortgaged property, and made payable out of the proceeds of the sale thereof. A decree was entered in the suit, which, in addition to ordering a sale of the property, fixed the amount due to the attorneys of the plaintiff, and the referee in the action, and the stenographer for services rendered therein. Though such decree appeared on its face to be entered by consent, an appeal therefrom was taken by the plaintiff. In his notice of appeal, he specified that the court erred in finding and adjudging that the plaintiff recover the several sums as attorneys' fees and for the fees of the referee and the stenographer, and in directing that such sums should be a lien superior to that of the plaintiff's mortgage, and in not adjudging that the sums found to be reasonable attorneys' fees be paid to the plaintiff, and in not providing for a reasonable sum to be paid plaintiff for services as trustee. There was no appearance on behalf of the defendant. T. Calvin Hyde and T. H. Crawford, for themselves and as attorneys for the referee and the stenographer, moved to dismiss the appeal, on the ground that it was from a judgment entered by consent, and therefore not appealable.

Dolph, Nixon & Dolph, for the appellant.

22 WOLVERTON, J. 1. Section 536 of Hill's Code provides that "any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom." The decree appealed from, in a strict sense, is neither a decree given by confession nor for want of an answer;

but it has been held by this court that, by consenting to the rendition of a judgment against himself, the defendant, in effect, waives his answer, and thereby leaves no issue in the case to be tried; and that from such a judgment no appeal lies: *Rader v. Barr*, 22 Or. 496. In the present case, the decree shows upon its face that the "defendant, by his said attorneys, in open court, here now consents that a judgment and decree may be here now made and entered . . . as prayed for in plaintiff's complaint." What more could plaintiff have obtained in the absence of an answer, or upon defendant's entire default? The recitals in the decree also show that the defendant gave its consent to the fixing of plaintiff's attorneys' fees by the court at such sum as it should find reasonable, and, there being no evidence in the record to guide it in determining what would be reasonable, we conclude that the parties intended that the court should ascertain the amount in its own way, and that they should ²⁴ be bound by the result. And, further, it is apparent that the amount of the attorney's fee which plaintiff should recover and have entered in the decree as the finding of the court was a matter not to be determined by the court in invitum. The simple fact that plaintiff did not complain of the court's judgment in fixing this sum at five thousand five hundred dollars would indicate that he so understood it, and expected to be fully bound thereby. All other conditions of the decree appear to be either deducible directly from the allegations of the complaint, or were specially consented to by the defendant. As to the matter of the referee's and stenographer's fees, the record shows that they were fixed and entered by the express agreement of both parties. So we have here a decree which the plaintiff, through his attorney, specifically requested the court to make, and to every feature of it which the defendant has upon the record consented. True, the record does not show upon its face that the plaintiff consented to the decree in the form as entered, but it was entered, nevertheless, at his expressed request, so that this decree is essentially a consent decree. The conditions, simply stated, are, the court is requested by one party to make certain findings, and to enter a decree thereon with certain definite conditions. To all this the other party consents, and the decree is entered. Now the party making the request appeals to this court, and demands that the decree be reversed in part, without even so much as moving the lower court to modify its findings, or the decree entered thereon, or calling its attention to errors and irregularities, so that the court could, upon its

own motion, purge the record of its infirmities. To say the least, this is not fair treatment of the court below, and, in support of its decree, this court ²⁵ will presume the consent of plaintiff to the entry thereof in its present form: Hayne on New Trial and Appeal, sec. 285, p. 846; Parker v. Altschul, 60 Cal. 380; Leese v. Clark, 28 Cal. 36; Wilson v. Dougherty, 45 Cal. 35; Reynolds v. Hoamer, 45 Cal. 627. Consent excuses error, and ends all contention between the parties. It leaves nothing for the court to do but to enter what the parties have agreed upon, and, when so entered, the parties themselves are concluded. From such a decree there is no appeal: Beach on Modern Equity Practice, sec. 795; Armstrong v. Cooper, 11 Ill. 540. Under section 692 of the Revised Statutes of the United States, the practice of the national courts is to entertain an appeal from a consent decree; but they will not decide any matters that appear to have been consented to by the parties, and, if the errors complained of come within the waiver, the decree of the court below will be affirmed: Pacific R. R. Co. v. Ketchum, 101 U. S. 295. This court, however, is committed to the doctrine that no appeal lies from such a decree: Rader v. Barr, 22 Or. 496. For these reasons the appeal must be dismissed.

2. It is further claimed that, notwithstanding the parties may have consented to all the terms and conditions of the decree, yet that those portions thereof wherein it is found and decreed that plaintiff have and recover of and from the defendant two thousand seven hundred and fifty dollars in trust for T. Calvin Hyde, two thousand seven hundred and fifty dollars in trust for T. H. Crawford, two hundred dollars in trust for Charles F. Hyde, and one hundred and fifty dollars in trust for John Wheeler, are entirely without the scope of the complaint, and for that reason void, and therefore reversible upon appeal. Undoubtedly, under ²⁶ the allegations of the complaint, the plaintiff could recover the fees named. He sues in the capacity of trustee, and whatever he may recover by reason of the decree would be in trust for the bondholders. Now, if, at his own request, the court has decreed that he recover these certain fees in trust for the parties named, who, for all that appears of record, have earned them, when, at the same time, he, as trustee for the bondholders, is under personal obligations to these parties for services rendered in the suit instituted by him, we cannot say that these provisions are so entirely without the scope of the pleadings, and the authority of the parties to agree to under them, as that the court

will declare them void at the instance of a party requesting the court to enter just such a decree. We therefore consider the point not well taken.

As to the error assigned because the court did not ascertain and decree to plaintiff a reasonable sum as compensation for services rendered as trustee, if the question was properly here we could not consider it, as no testimony is found in the record upon which to base such a finding and decree.

Dismissed.

ON REHEARING.

WOLVERTON, J. A motion for rehearing having been filed in this case, and with it a vigorous and very able brief by Messrs. Dolph, Nixon, and Dolph, of counsel for appellants, we have been impelled to review with much care and pains our former opinion, but with the same result. When the former opinion was rendered, we had some misgivings as to whether we were right in holding ²⁷ that the provisions of the decree concerning attorneys', referee's, and stenographers' fees were not so entirely without the scope of the pleadings as to render them void, simply because we had been cited to no adjudicated cases that seemed to bear directly upon the question, and were unable to find any at the time that were in point, but believed the opinion to be founded upon sound principles of law. Further research has confirmed us in this view. The authorities will be cited and discussed later on. Counsel do not controvert the soundness of the decision in *Rader v. Barr*, 22 Or. 495, but contend that it has no application to the case at bar, and assign as the sole ground for this contention that the provisions of the decree to which they take exception are without the scope of the pleadings. But, conceding the premises to be true, non constat that the conclusion contended for would follow. Let us examine the premises, and determine their effect in a case of this nature.

3. As a general proposition, all provisions of a decree outside of the issues raised by the pleadings are void, but this cannot be predicated of a consent decree. All the authorities cited by counsel support the general proposition, but are not applicable to consent decrees. Nor is any allusion made in these authorities to such decrees, except in *Jones v. Davenport*, 45 N. J. Eq. 77. This was a suit to set aside a deed to a certain real property as fraudulent and void as against creditors. The complaint also contained a general allegation that a certain one hundred shares of bank stock had been transferred in fraud of the creditors. The lower court by its decree set aside the deed, but

refused to disturb the transfer of bank stock, for the reason that the allegations of the complaint ²⁸ were insufficient to show a fraudulent disposition of such stock. Afterward, an amended decree was entered under the same pleadings, by consent of the parties, as of the date of the original, decreeing that the transfer of the stock was also fraudulent. Subsequently, however, upon application to the same court, the decree as so amended was declared to have been irregularly entered, and for that reason set aside. Upon appeal to the supreme court, Van Fleet, V. C., said of this proceeding: "There can be no doubt that that decree was an absolute nullity. The principle is authoritatively settled that a decree or judgment on a matter outside of the issue raised by the pleadings is a nullity, and is nowhere entitled to the least respect as a judicial sentence." But a consent decree is not in a strict legal sense a "judicial sentence." "It is," says Mr. Gibson in his excellent treatise entitled *Suits in Chancery*, section 558, "in the nature of a solemn contract, and is, in effect, an admission by the parties that the decree is a just determination of their rights upon the real facts of the case, had such been proved. As a result, such a decree is so binding as to be absolutely conclusive upon the consenting parties, and it can neither be amended or in any way varied without a like consent, nor can it be reheard, appealed from, or reviewed upon a writ of error. The one only way in which it can be attacked, or impeached, is by an original bill alleging fraud in securing the consent."

Mr. Beach, in his *Modern Equity Practice*, section 792, says: "Parties to a suit have the right to agree to anything they please in reference to the subject matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings": See, also, *Pacific R. R. Co. v. Ketchum*, ²⁹ 101 U. S. 297. In *Schermerhorn v. Mahaffie*, 34 Kan. 108, it was held that a decree rendered by consent of the parties was not void as between themselves, because it did not give to each just what the petition called for, and what ought, as a matter of right, have been given to each of them. Chancellor Walworth, in *Bank of Monroe v. Widner*, 11 Paige, 533, 43 Am. Dec. 768, says: "An agreement to refer a suit pending to an arbitrator, and that a judgment shall be entered in the cause in conformity with his decision, will justify the entry of a judgment accordingly, which judgment will be binding upon the parties, as a judgment by consent." Chief Justice Waite, in *Pacific R. R. Co. v. Ketchum*, 101 U. S. 297, after giving utterance to the language quoted above

from Beach's Modern Equity Practice, says: "It is within the power of the parties to this suit to agree that a decree might be entered for a sale of the mortgaged property without any specific finding of the amount due on account of the mortgage debt, or without giving a day of payment. It was also competent for them to agree that if the property was bought at the sale by or for the bondholders, payment of the purchase money might be made by a surrender of the bonds. . . . All these were matters about which the parties might properly agree; and, having agreed, it does not lie with them to complain of what the court has done to give effect to their agreement." Fletcher v. Holmes, 25 Ind. 458, was a case wherein suit was brought to foreclose a mortgage, in which neither the mortgage nor the complaint to foreclose showed any right to a personal decree against the defendant, but he appeared, and with his consent one was rendered. Regarding such decree, the court says: "It cannot be doubted that without May's consent such a judgment against him, ³⁰ upon that complaint, would not have been warranted. We need not say whether or not it would have been void. But he consented to it. Was it then void as against May, because the complaint did not allege sufficient facts to justify it without such consent? We can conceive of no reason why a judgment entered by agreement, by a court of general jurisdiction, having power in a proper case to render such a judgment, and having the parties before it, should not bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment. The object of a complaint is to inform the defendant of the nature of the plaintiff's case. It is for his protection that it is required. If he wishes to waive it, or agrees to the granting of greater relief than could otherwise be given under its averments, without amendment, and such relief is given by his consent, we think that the judgment is not even erroneous, and much less void as to him."

A judgment or decree entered upon the pleadings or after contest must fall within the issues raised by the pleadings, but a consent decree will be valid and binding upon the parties if its provisions fall within the general scope of the case made by the pleadings. This distinction is clear and incisive, and, it will be seen by the foregoing authorities, is recognized both by the text-writers and the courts. In a recent case just reported a suit was instituted by the Central Trust Company of New York to foreclose a mortgage given by the Marietta and North Georgia Railway Company, with which was consolidated a creditor's suit by V. E. McBee and others against the trust company and others to re-

strain the prosecution of the foreclosure suit, and the enforcement of other liens claimed upon the mortgaged property, and praying for ²¹ a sale, and payment of their claims from the proceeds. It was decreed, among other things, "that the counsel representing the claimants in the original bill of V. E. McBee and Company et al. v. Knoxville Southern Railroad Company et al., viz., Washburn and Templeton, are entitled to compensation out of the general fund arising from the sale of the road for their services in bringing said sale, and administering the assets of said insolvent railroad company, and a lien is declared upon said fund in their favor." This portion of the decree was approved by the circuit court of appeals of the United States sixth circuit. Taft, J., speaking for the court, says: "The complainants who filed the creditors' bill and brought in all the lienholders did a work in the administration and direction of the assets of the railroad company beneficial to all concerned. For services in filing the bill, therefore, and bringing in all lien claimants, it was not improper for the court to order a fee paid to complainants' counsel out of the fund realized from the sale": See *Central Trust Co. v. Condon*, 14 Co. Ct. App. 314; 67 Fed. Rep. 84, 110. In *Central R. R. Co. v. Pettus*, 113 U. S. 124, which was a creditors' suit, it was held that "when an allowance to the complainant is proper on account of the solicitors' fees, it may be made directly to the solicitors themselves, without any application by their immediate client." This doctrine was based upon the authority of *Trustees v. Greenough*, 105 U. S. 527. So that we here find authority for entering a decree directly in favor of the attorneys for the plaintiff. These were creditors' bills, it is true, but the decrees were rendered in contested cases, without issues being formed under the pleadings by the attorneys or solicitors as parties litigant. Now, in the light of these authorities, can it be said that the decree here purports ²² to adjudicate matters outside of and beyond the general scope and purview of the case made by the pleadings? As was said in the former opinion, the plaintiff sues as trustee, each step taken by him was in the capacity of a trustee, and whatever sum of money he may realize by a sale under the decree of the court would come into his hands as trust funds, to be distributed to the bondholders in just proportion to their several demands. Under the terms of the mortgage, he is entitled to recover a reasonable attorney's fee, together with his costs and disbursements. Now, if, by his direction, and with the consent of the defendant, it is decreed by the court that he recover the attorneys', referee's, and sten-

ographer's fees in trust for the very persons whom he has employed, and who have rendered him services in his capacity as trustee, there exists no good and sufficient reason why it should not be binding upon all the parties interested, and the right to have execution issue at their instance would not affect its legality. The decree of the court has, at his instance, only extended his trusteeship, as regards the funds to come into his hands, so that he has become trustee to the use of his attorneys and the officers of the court, as well as the bondholders, of a fund in which they are all entitled to share, and whether the property brings a small or large sum cannot change the situation. Aside from all this, when it is determined that plaintiff is party to a decree from which there is no appeal, a determination of this question upon either contention would still leave this court powerless to relieve him in this proceeding. We still adhere to the opinion, and the reasoning upon which it is based, that plaintiff is without a remedy by appeal, ³³ and no good results could come of enlarging upon it here.

4. Another question briefly. It is insisted "that an attorney at law has no implied authority to enter a consent decree, or to consent to a decree by which a definite fee is given to him, and made a first lien upon the property which is the subject of the action." Conceding the soundness of this proposition, it is not apparent how it can aid the appellant, in the absence of proof that the act complained of was done without express authority. We cannot say here in this proceeding that Messrs. Crawford and Hyde acted only upon their implied authority from Schmidt. There is not a scintilla of evidence in the record to show whether they acted with or without authority, and, for all that appears, they may have had the most ample and complete power and authority to request, consent to, and have entered just such a decree as was entered, and which the plaintiff now seeks to have reviewed on appeal by this court. In *Pacific R. R. Co. v. Ketchum*, 101-U. S. 297, Chief Justice Waite says: "A solicitor may certainly consent to whatever his client authorizes, and, in this case, it distinctly appears of record that the company assented through its solicitors. This is equivalent to a decree finding by the court as a fact that the solicitor had authority to do what he did, and binds us on appeal so far as the question is one of fact only. The remedy for the fraud or unauthorized conduct of a solicitor, or the officers of a corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and facts

ascertained.”³⁴ The law governing the reciprocal and correlative duties of attorney and client are well settled, and, if these attorneys have exceeded their authority to the injury of the appellant, he is not without a remedy, but it is not by an appeal, unless facts accompany the record to show the dereliction of duty.

A rehearing is denied.

APPEALS FROM JUDGMENTS BY CONSENT.—An appeal does not lie in cases of judgment by confession without demurrer: *Keller v. State*, 12 Md. 322; 71 Am. Dec. 596. Error that proof was insufficient cannot be complained of and assigned where the bill is taken for confessed: *Stephens v. Bicknell*, 27 Ill. 444; 81 Am. Dec. 242, and note. A judgment by consent cannot be impeached, unless for fraud, collusion, or like cause: *Dunman v. Hartwell*, 9 Tex. 495; 60 Am. Dec. 176. Where judgment is rendered in accordance with a previous parol agreement, the judgment puts an end to the agreement, and the party in whose favor the judgment is rendered is estopped from saying that it does not accord with such previous contract: *State Bank v. Young*, 2 Ind. 171; 52 Am. Dec. 501.

JUDGMENT BY CONSENT.—AUTHORITY OF ATTORNEYS cannot be questioned on appeal or writ of error where the record in the case shows that the parties appeared by their attorneys and agreed to a decree to be entered as the judgment of the court: *Dunman v. Hartwell*, 9 Tex. 495; 60 Am. Dec. 176. Where an attorney appeared for a defendant against whom a writ had been issued, but not served, and without authority confessed judgment, the judgment was held regular: *Denton v. Noyes*, 6 Johns. 298; 5 Am. Dec. 237, and note; *Fowler v. Lee*, 10 Gill & J. 358; 82 Am. Dec. 172, and note. Contra, see *Sherrard v. Nevius*, 2 Ind. 241, 52 Am. Dec. 508, and *Reynolds v. Fleming*, 30 Kan. 106; 46 Am. Rep. 86. See, also, the extended notes to *Clark v. Randall*, 76 Am. Dec. 259, and *McAlexander v. Wright*, 16 Am. Dec. 98-100.

JUDGMENTS—ATTACK ON FOR UNAUTHORIZED APPEARANCE OF ATTORNEY.—The presumption that an attorney who appeared in a cause was authorized to do so, may be rebutted in any direct proceeding to attack the judgment based upon such appearance by showing that no process was served in the action, and that the attorney appeared without the knowledge or consent of the one whom he assumed to represent: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204, and note. In the absence of any special circumstances calling for a resort to a court of equity, relief from a judgment rendered against a party upon the unauthorized appearance of an attorney in his name is to be sought in a direct application to the court by motion in the action in which the unauthorized appearance was entered: *Vilas v. Plattsburgh etc. R. R. Co.*, 128 N. Y. 440; 20 Am. St. Rep. 771, and note.

HIBERNIAN BENEVOLENT SOCIETY v. KELLY.

[28 OREGON, 173.]

TAXATION, EXEMPTION FROM.—Under the constitution of Oregon the legislature may exempt from taxation only such property as is used for municipal, educational, literary, scientific, religious, or charitable purposes.

TAXATION, EXEMPTION OF PROPERTY OCCUPIED FOR CHARITABLE PURPOSES.—Under a statute exempting from taxation the personal property of benevolent, charitable, and scientific institutions and such real estate belonging to them as shall be actually occupied for the purpose for which they were incorporated, the real property of such a corporation is subject to taxation when rented out to tenants, though the proceeds are devoted to the objects for which the institution was established.

TAXATION.—LAWS GRANTING EXEMPTIONS from taxation are strictly construed.

CHARITABLE INSTITUTIONS, WHAT ARE.—A society or institution may be charitable within the meaning of the law exempting the property of charitable institutions from taxation, though its benefits do not extend to the general public, but are restricted to its own members and their families.

TAXATION, ESTOPPEL FROM DENYING EXEMPTIONS.—A state is not estopped from taxing the property of a charitable institution by the fact that for many years it has not taxed such property, and that in reliance upon the exemption from taxation the corporation has borrowed money, and made a mortgage on its property to secure its repayment, and agreed to pay all taxes on such mortgage.

ESTOPPEL.—THE NEGLECT OR OMISSION OF PUBLIC OFFICERS to assess property cannot control a duty imposed by law upon their successors, or affect the legal provisions of the statute under which the exemption from taxation is claimed.

TAXATION.—AN INJUNCTION will not issue to restrain the collection of taxes merely because of illegality or irregularity appearing upon the face of the assessment, but the complainant will be left to his remedy at law.

Suit to restrain a sheriff from enforcing the collection of taxes levied for state and county purposes in the year 1892 on property belonging to the Portland Hibernian Benevolent Society under the claim that such property was exempt from taxation under the constitution and laws of Oregon. The society was incorporated in 1873, and its objects, as declared by its constitution, were "charity and benevolence, for the purpose of contributing a weekly allowance for sickness, and the means of defraying the expenses consequent upon the death of a member, and to contribute for the above-named purposes such sums as a majority of the members may be pleased to contribute." Every Irishman, or son of an Irishman, or of a member of the society, between the ages of eighteen and forty-five, of good moral character, possessed of reputable means of support, was eligible to membership in the society, provided he was a resident of the

city of Portland for sixty days prior to his application. Every member of the society was entitled, in the event of sickness, to receive certain weekly benefits for the period of three months, and such benefits might, on a vote of two-thirds of the members of the society, be further extended. On the death of a member, a certain sum was set apart for his funeral expenses, and his widow and orphans were entitled, if need be, to receive an additional sum. Each member, on the death of his wife, was also entitled to a specified sum for funeral expenses. The property assessed was a lot upon which was a three-story brick building, all of which, except one room occupied by the society, was rented out for various purposes, but the rentals were exclusively devoted to the purposes of the society. The trial court found that the plaintiff was a charitable institution, and that the property was actually occupied by it for the purposes for which it was incorporated, and therefore that it was exempt from taxation, and that the complainant was entitled to an injunction as prayed for in its complaint. The defendant appealed.

John H. Hall and Wilson T. Hume, district attorney, for the appellant.

Gearin, Silverstone, Murphy & Brodie, for the respondents.

189 BEAN, C. J. Article 9, section 1, of the state constitution directs that "the legislative assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law." Under this provision, no property can be relieved from taxation, except such as may be in use for some of the purposes enumerated therein, and then only to the extent specially permitted by legislative enactment. The constitution itself does not exempt any property from taxation, and it authorizes the legislature to do so "only for municipal, educational, literary, scientific, religious, or charitable purposes." It follows, then, that before property can be excepted from taxation, it must not only be used for some of the purposes specified in the constitution, but the exemption must be specially authorized by law. Now, the statute which undertakes to exempt property from taxation, and by which the questions presented in this case must be solved, was passed by the territorial legislature in 1854, and, so far as not inconsistent with

the constitution, was continued in force by section 7, article 18, of that instrument, and is now section 2732 of Hill's Code. By subdivision 3 of this section, it is provided that "the personal property of all literary, benevolent, charitable, and scientific institutions, incorporated within this state, and ¹⁹⁰ such real estate belonging to such institutions as shall be actually occupied for the purposes for which they were incorporated," shall be exempt from taxation. Under these constitutional and statutory provisions, it is manifest that real property, to be exempt from taxation, must belong to some incorporated literary, benevolent, charitable, or scientific institution, and must be actually occupied for literary, benevolent, charitable, or scientific purposes.

1. The contention for the defendant is, that the real property upon which the tax in question was laid is not exempt from taxation for the reason: 1. That plaintiff is not a charitable institution within the meaning of the law, because its benefits are confined to its own members and their families; and 2. That the property assessed is not actually occupied for the purposes for which it was incorporated. Upon the first point, the argument of his counsel is, that a charitable institution, within the meaning of the exemption law, is one whose benefits are extended to the public generally, or some indefinite portion thereof, without regard to the relation the recipient may bear to the members of the particular organization or society, or to the fees or dues paid. But the principal authorities relied upon by him in support of this position were determinations of controversies arising under constitutional or legislative enactments exempting from taxation property belonging to institutions devoted to "purely public charity," which it is held does not include charitable institutions whose benevolence is confined to their own members or persons having some particular relationship to such members: *Philadelphia v. Masonic Home of Pennsylvania*, 160 Pa. St. 572; 40 Am. St. Rep. 736; *Swift* ¹⁹¹ v. *Beneficial Soc. of Easton*, 73 Pa. St. 362; *Delaware County Institute of Science v. Delaware County*, 94 Pa. St. 163; *Donohugh's Appeal*, 86 Pa. St. 306; *Mitchell v. Treasurer of Franklin County*, 25 Ohio St. 144; *Babb v. Reed*, 5 Rawle, 150; *Burd Orphan Asylum v. School District of Upper Darby*, 90 Pa. St. 21; *County of Hennepin v. Brotherhood of Gethsemane*, 27 Minn. 460; 38 Am. Rep. 298. But under constitutional or legislative provisions, which, like ours, provide for the exemption of certain property belonging to "charitable institutions," and used for charitable purposes, it is believed that such an institution is entitled to the benefit of the exemption, al-

though its benefactions are confined to its own members or their families. Thus, in *Indianapolis v. Grand Master*, 25 Ind. 518, it is held that an institution which extends charity to its own members only is a charitable institution within the meaning of the law exempting such institutions from taxation, the court saying: "The third paragraph of the answer presents the question whether that is a charitable institution, in the sense of the statute, which confines its benefactions to those who have become members of the order, having paid the fees commonly required for that purpose. We think that this question must be answered in the affirmative. It is not essential to charity that it shall be universal. That an institution limits the dispensation of its blessings to one sex, or to the inhabitants of a particular city or district, or to the membership of a particular religious or secular organization, does not, we think, deprive it, either in legal or popular apprehension, of the character of a charitable institution. If that only be charity which relieves human want, without discriminating among those who need relief, then, indeed, it is a rarer virtue than has been supposed. And ¹⁹² if one organization may confine itself to a sex, or church, or city, why not to a given fraternity? So narrow a definition of charity as the third paragraph presupposes is not, that we are aware of, ever attached to it, and we are not at liberty to circumscribe the effect of the statute, and defeat its intention, by affixing to its terms an unusually limited meaning." So, also, in *Petersburg v. Petersburg Ben. etc. Assn.*, 78 Va. 431, it was held that an association which applies its revenues to the payment of current expenses, and to the relief of its indigent members and the families of such as have died in need, was a charitable institution. "These are charitable purposes," says the court, "and the relief afforded is none the less charity because confined to members of the association and families of deceased members. It is not essential to charity that it shall be universal." And, again, in *M. E. Church South v. Hinton*, 92 Tenn. 188, it was held that a corporation created as an arm or agency of the Methodist Church, and charged with the duty of manufacturing and distributing books, periodicals, etc., in the interest and under the auspices of the church, and thereby raising a fund with which to support its worn-out preachers and their families, is a religious and charitable institution within the meaning of the provision of the constitution exempting such institutions from taxation. From an examination of this question, and all the authorities within our reach bearing upon it, we take the result to be that an in-

stitution organized for benevolent and charitable purposes, free from any element of private or corporate gain, and which devotes its entire revenue to the payment of current expenses and the relief of the poor and needy, is a charitable institution within ¹⁹³ the meaning of the law, although it may confine its benefits primarily to its own members and their families.

2. But whether the plaintiff is such an institution or not, we are clear the property in question is not exempt from taxation, for the reason that it is not actually occupied for charitable purposes. Subdivision 3 of section 2732 of the Hill's Code, under which the exemption is claimed, exempts only such real property belonging to incorporated literary, benevolent, charitable, or scientific institutions as shall be actually occupied for the purposes for which they were incorporated. It does not exempt from taxation the enumerated institutions as such, or real estate simply because it belongs to such institutions, or even because it is used for literary, scientific, charitable, or benevolent purposes, but it expressly confines the right of exemption to such real estate only belonging to them as shall be actually occupied in a particular manner and for a specified purpose, and this right, therefore, clearly cannot be extended to property occupied and used for other and different purposes, although the revenue derived from its use is devoted exclusively to the objects for which the institution was established. It is the actual occupancy of the property which determines its right to exemption, and not the use made of its proceeds. The plain and obvious meaning of the statute is, that only the real estate actually occupied and in use by these different institutions for the purposes for which they were organized, shall be exempt from taxation. While so occupied and used, it does not come in competition with the property of other owners, and the purpose for which it is used was supposed by the legislature to be a sufficient benefit to ¹⁹⁴ the public to justify its exemption from the burdens of taxation imposed upon other property. But when such property is used for the purpose of accumulating money, the law imposes upon it the same burden of taxation as it imposes upon other property similarly situated. The statute does not undertake to discriminate between the uses which different societies or individuals will make of the proceeds of their business, and determine for that reason that one shall be taxed and the other not. It deals with the property as it finds it, and not with what may be done with its proceeds in the future. Upon this question the authorities are practically unanimous under similar statutory provisions: *Indianapolis v. Grand Master*, 25 Ind. 518; *Presbyterian Theological Seminary*

v. People, 101 Ill. 578; Washburn College v. Commissioners of Shawnee County, 8 Kan. 344; Detroit Young Men's Soc. v. Mayor of Detroit, 3 Mich. 172; Cincinnati College v. State, 19 Ohio, 110; Cleveland Library Assn. v. Pelton, 36 Ohio St. 253; First Methodist Episcopal Church v. Chicago, 26 Ill. 482; New Orleans v. St. Patrick's Hall Assn., 28 La. Ann. 512; New Orleans v. St. Anna's Asylum, 31 La. Ann. 293; Mayor of Baltimore v. Grand Lodge, 60 Md. 280; County Commissioners v. Sisters of Charity, 48 Md. 34; Appeal Tax Court v. Grand Lodge, 50 Md. 429; Redemptorists v. County Commrs., 50 Md. 449; Salem Lyceum v. Salem, 154 Mass. 15; Chapel of the Good Shepherd v. Boston, 120 Mass. 212; Mulroy v. Churchman, 52 Iowa, 238; Orr v. Baker, 4 Ind. 86; Trustees v. Exeter, 58 N. H. 306; 42 Am. Rep. 589; Morris v. Lone Star Chapter, 68 Tex. 698; Proprietors v. Lowell, 1 Met. 538; Wyman v. St. Louis, 17 Mo. 336; State v. Ross, 24 N. J. L. ¹⁹⁵ 498; Massenburg v. Grand Lodge, 81 Ga. 212; Fort Des Moines Lodge v. County of Polk, 56 Iowa, 34. See, also, notes to Petersburg v. Petersburg Ben. etc. Assn., 78 Va. 431, 8 Am. & Eng. Corp. Cas. 488, and M. E. Church South v. Hinton, 92 Tenn. 188; 19 L. R. Ann. 289.

It is so manifestly just that all property shall bear its due proportion of the expenses of government that laws granting exemption from taxation are always strictly construed, and before such exemption can be admitted, the intent of the legislature to confer it must be clear beyond a reasonable doubt. Thus, it is held that laws exempting from taxation "houses of religious worship," or "buildings erected and used for religious worship," or "property used for religious purposes," etc., do not exempt a parsonage erected by a religious society for the use of its minister, although occupied by him free of rent and built on grounds which would otherwise be exempt: State v. Axtell, 41 N. J. L. 117; County of Hennepin v. Grace, 27 Minn. 503; Ramsey County v. Church of the Good Shepherd, 45 Minn. 229; Third Congregational Soc. v. Springfield, 147 Mass. 396; Wardens of St. Mark's v. Mayor of Brunswick, 78 Ga. 541; Gerke v. Purcell, 25 Ohio St. 229; Trustees v. Ellis, 38 Ind. 3; Vail v. Beach, 10 Kan. 214. And a building belonging to the Young Men's Christian Association, which contains above the basement, in which are the gymnasium, bowling-alley, and bathroom, twenty-two rooms, only one of which is devoted to public worship, was held not exempt under a law exempting "every building used exclusively for public worship": Young Men's Christian Assn. v. Mayor of ¹⁹⁶ New York,

113 N. Y. 187. The constitution of this state requires an equal and uniform rate of assessment and taxation of all property, excepting "such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specifically exempted by law." Taxation is, therefore, the rule, exemption, the exception; and nothing can be held to be exempt by implication. It is only such property used for the purposes specified in the constitution as the legislature may specially exempt which can escape taxation. Exemption is not a matter of right, but a pure matter of grace; and every person or corporation claiming that his or its property, or any part thereof, is exempt must be able to show some clear constitutional or legislative provision to that effect. The legislature, in its wisdom, has provided that of the real property belonging to literary, benevolent, charitable, or scientific institutions incorporated within this state, such only shall be exempt from taxation as shall be actually occupied for the purposes for which they were incorporated, and, under all the rules for the construction of exemption laws, this cannot be held to include real property which is occupied for other purposes, although the revenues received therefrom may be used for the purposes of the corporation. Some of the authorities cited go to the extent of holding that when a portion only of a building belonging to such an institution is occupied for the purposes for which it was incorporated, and the remainder is occupied by tenants paying rent, the entire building is liable to taxation, but the general tenor of the authorities, and no doubt the better rule, is, that in such cases the assessor, in estimating the value of the property, should make a proper allowance for the portion of the building occupied by the ¹⁸⁷ society, so that the tax levied will be laid only upon the value of that which is not exempt, though the property may be assessed as a whole.

3. It is insisted by the plaintiff that the state is estopped from levying the tax in question for the reason that, while it has owned the property assessed since 1877, no attempt was made to assess it until the year 1890, and that, relying upon that fact, it borrowed in that year thirty-three thousand dollars on a mortgage, to enable it to erect the building now on the premises, and stipulated and agreed to pay the taxes on such mortgage. But the neglect or omission of the proper officers to assess the property cannot control the duty imposed by law upon their successors, or affect the legal construction of the statute under which its exemption from taxation is claimed: *Vicksburg etc. R. R. Co. v. Dennis*, 116 U. S. 665. The case of *State v. Addison*, 2 S. C.

499, relied upon by plaintiff, is not in point. That was a proceeding to enforce a municipal tax. The city had by ordinance in 1793 exempted all and every religious and charitable society from the payment of any city tax, and the city council for more than three-quarters of a century had included the relators as among the societies thus exempted, and the court held that the action of the city council for so long a time would be received as the proper interpretation of their own enactment so long as it remained in force.

4. Again, it is claimed that because the name appearing on the assessment-roll as the owner of the property is "Hibernian Benevolent Society," and not ¹⁸⁸ the "Portland Benevolent Hibernian Society"—the real owner—the assessment is void, and should be enjoined. We understand the rule to be that a court of equity will not interfere by injunction to restrain the collection of a tax merely because of the alleged illegality or irregularity appearing upon the face of the assessment, but will leave the party to his remedy at law: 1 High on Injunctions, sec. 491; Odlin v. Woodruff, 31 Fla. 160; 22 L. R. Ann. 699, and note. "In view of the authorities," says Lord, C. J., "the considerations which influence a court of equity to restrain the collection of a tax are confined to cases where the tax itself is not authorized, or, if it is, that such tax is assessed upon property not subject to taxation, or that the persons imposing it were without authority in the premises, or that they have proceeded fraudulently": Welch v. Clatsop County, 24 Or. 457.

It follows that the decree of the court below must be reversed and the complaint dismissed.

TAXATION—EXEMPTIONS—CONSTRUCTION OF STATUTES GRANTING.—Under a constitutional provision absolutely prohibiting the exemption of any property, except enumerated classes, from taxation, any statute attempting, either directly or indirectly, to exempt from taxation property not within the enumerated classes is void: Hogg v. Mackay, 23 Or. 339; 37 Am. St. Rep. 682.

TAXATION—EXEMPTIONS—POWER OF LEGISLATURE.—Taxation may be limited by the legislature: State v. Bank, 2 Houst. 99; 73 Am. Dec. 699. This question is discussed at some length in the note to Mott v. Philadelphia R. R. Co., 72 Am. Dec. 682-684.

INJUNCTION MAY ISSUE TO RESTRAIN THE COLLECTION OF TAXES: See the extended notes to Williams v. County Court, 63 Am. Rep. 110-113, White v. Stender, 49 Am. Rep. 287-289, and Holland v. Mayor, 69 Am. Dec. 198-205.

TAXATION—EXEMPTION OF CHARITIES.—A home for the relief of aged and indigent masons only, though supported by voluntary contributions, without charge to the beneficiaries, and without profit to the institution or its officers, is not a "purely public charity" and is not exempt from taxation, under a constitutional

provision exempting "institutions of purely public charity from all taxation": *Philadelphia v. Masonic Home*, 190 Pa. St. 572; 40 Am. St. Rep. 738, and note with the cases discussing what are public charities collected. See, also, the extended note to *Hennepin County v. Brotherhood of Gethsemane*, 88 Am. Rep. 300-308.

STATE v. KELLY.

[28 ORSON, 225.]

JURY TRIAL—QUALIFIED OPINIONS OF JURORS.—It is not error for a court to overrule a challenge of jurors who, on their voir dire, state that they have read in the newspapers what purported to be the facts of the case, and had formed and expressed some opinion therefrom upon the merits, but that it was not fixed, and would not influence their verdict.

JURY TRIAL—CONFESSIONS, EXAMINATION IN PRESENCE OF THE JURY RELATING TO ALLEGED.—It is not error to overrule defendant's motion to exclude the jury from the courtroom during a preliminary hearing before the court as to the competency of an alleged confession which the court, after hearing, refused to admit in evidence, because obtained by undue influence and improper inducement exercised and held out to the defendant by persons in authority. Whether such an examination shall be conducted in the presence of the jury must be left to the sound discretion of the trial court.

John F. Caples and John Ditchburn, for the appellant.

Cicero M. Idleman, attorney general, and Wilson T. Hume, district attorney, for the state.

225 BEAN, C. J. 1. Upon the examination of the jurors challenged on their voir dire, each of them testified that he had read what purported to be the facts of the case in the newspapers; that from such reading and what he heard he had formed and expressed some opinion upon the merits, but that it was not fixed, and would not influence his verdict if taken as a juror. Under these circumstances there was no reversible error in overruling the challenge. This question has been so often and thoroughly examined by the court that it is unnecessary to do more at this time than refer to the opinions in the following cases: *State v. Tom*, 8 Or. 177; *Kumli v. Southern Pac. Co.*, 21 Or. 505; *State v. Ingram*, 23 Or. 434; *State v. Brown*, 28 Or. 147.

2. The next point made by the defendant is, that the court erred in overruling his motion to exclude the jury from the courtroom during the preliminary hearing before the court as to the competency of a certain alleged confession which the court, after the hearing, refused to admit in evidence because it was obtained by undue influence and improper inducements held out to the

defendant by those in authority. This is a new question here, but we understand the practice in the trial courts has generally been to conduct such examinations in the presence of the jury, and, in our opinion, the question as to whether it shall be so conducted or otherwise should be left to the sound discretion of such courts. The competency and admissibility ²²⁷ of confessions, like other testimony, is for the court to determine; but, when admitted, their weight and credibility is for the jury alone, and hence it is necessary that the jury should be put in possession of all the circumstances surrounding the making of an alleged confession to enable them to intelligibly determine the weight and credibility to which it is entitled. A confession, to be admitted, must have been freely and voluntarily made. When offered in evidence, the question whether it was so made is to be decided primarily by the presiding judge, but his decision is not conclusive upon the jury as to the weight or credibility to be given to such evidence. If, upon the whole testimony, they believe it was not the free and voluntary act of the defendant, they have a right to exclude it entirely in their consideration of the case. Therefore, if the preliminary examination is not held in the presence of the jury, and the court admits the confession in evidence, the whole testimony as to the circumstances under which it was made must be gone over again before the jury. And whether this course should be pursued or the preliminary examination had in the presence of the jury in the first instance may be safely intrusted to the sound discretion of the trial court. Cases may arise, it is true, in which the ends of justice might be best served by conducting the examination without the hearing of the jury, but the necessity for such precaution must be left to the enlightened discretion of the presiding judge to determine.

The argument that, if the preliminary hearing is had in the presence of the jury, they will ordinarily learn the nature of the confession and be influenced thereby in arriving at a verdict, although the court may refuse to admit it in evidence, is based upon an ²²⁸ unwarranted assumption of the ignorance and incompetency of the jury. During such an examination they are but silent spectators, who necessarily understand that out of its results something may or may not come before them as evidence, and that until the court rules the question is for its consideration and not for theirs. In the judgment of the law juries are deemed capable of that amount of discrimination; it would be impossible to conduct a jury trial on any other principle. In this, as in most other cases where evidence is offered and objected to, it is

generally impossible for the court to determine its admissibility without the objection itself, the argument of counsel, or the offer to prove, disclosing to some extent, at least, its nature; and the law assumes that jurors are competent to disregard whatever is heard at such a time, but not admitted as evidence for their consideration. Experience has shown such to be the case, and upon this assumption the law proceeds. The defendant cites in support of his position *Hall v. State*, 65 Ga. 36; *Ellis v. State*, 65 Miss. 44; 7 Am. St. Rep. 634; *Carter v. State*, 37 Tex. 362. In the Georgia case, what is said upon this question is mere dictum, and the writer of the opinion failed to note a previous decision of the same court (*Holsenhake v. State*, 45 Ga. 43), where the point was directly made and ruled to the contrary. And in the subsequent cases of *Woolfolk v. State*, 81 Ga. 551, and *Fletcher v. State*, 90 Ga. 468, the court took occasion to so explain *Hall v. State*, 65 Ga. 36, and to announce what we conceive to be the true rule—that it is within the discretion of the trial court to say whether the jury shall remain or retire while such preliminary testimony is being taken. In *Fletcher v. State*, 90 Ga. 468, Mr. Chief Justice Beckley said: ²²⁹ “Touching the practice of retiring the jury, the strict letter of *Hall v. State*, 65 Ga. 36, is not good law. Though approved arguendo in *McDonald v. State*, 72 Ga. 55, it has since been toned down in *Woolfolk v. State*, 81 Ga. 564, 565, and the true rule announced to be that the question whether the jury shall be retired or not is one resting in the sound discretion of the court. In the Mississippi and Texas cases, the judgments were reversed upon other points, and the question as to the proper practice in conducting the preliminary examination to determine the admissibility of confessions seems not to have been necessary to a decision in either instance. We have been unable to find that the question has arisen in any of the other states except Ohio, Alabama, and Nebraska, and in these the courts have held that the propriety of conducting the examination in or out of the presence of the jury must be left to the sound discretion of the trial court: *Lefevre v. State*, 50 Ohio St. 584; *Mose v. State*, 36 Ala. 211; *Shepherd v. State*, 31 Neb. 389. In this state, the rule prevails that such inquiry as to the admissibility of dying declarations may be conducted in the hearing or presence of the jury, or otherwise, as the discretion of the court may dictate (*State v. Shaffer*, 23 Or. 555), and no good reason can be suggested why a different practice should prevail as to confessions.

There being no error in the record, the judgment is affirmed.

TRIAL—EFFECT OF QUALIFIED OPINION OF JUROR.—A juror who states upon his examination that he has formed and expressed an opinion about the case from what he has read in the newspapers, or from hearsay, which it would take evidence to remove, but who states that he does not know the accused, and has no prejudice against him, and can fairly try the case according to the law and the evidence, and a true verdict render, is a competent juror under the criminal practice act of Montana: *State v. Sheerin*, 12 Mont. 539; 33 Am. St. Rep. 600, and note with the cases collected. This subject is also discussed in the extended notes to *Commonwealth v. Brown*, 9 Am. St. Rep. 744, and *Smith v. Barnes*, 38 Am. Dec. 521.

NORTH PACIFIC LUMBER COMPANY v. LANG.

[28 OREGON, 245.]

INTERPLEADER.—THE ALLEGATIONS OF A BILL OF INTERPLEADER ARE that two or more persons have preferred claims against the complainant to the same thing, and that he has no beneficial interest therein, and cannot determine without hazard to himself to which of them it belongs. It was usual under the equity practice to annex to the bill an affidavit of the plaintiff that there was no collusion between him and any of the defendants.

INTERPLEADER—PRACTICE.—THE FIRST THING TO BE DONE is to determine whether the interpleader will lie or not. If not, it is unnecessary to go further. If it will, then the plaintiff should be discharged from liability with his costs upon bringing the money in dispute into court, and the suit should thereafter proceed upon issues properly joined between the defendants.

IN INTERPLEADER PLAINTIFF CANNOT CLAIM relief against any of the defendants, but only that he be protected against the claims of all.

INTERPLEADER.—THE DEFENDANTS CANNOT HAVE CONTENTIONS AS BETWEEN THEMSELVES unless it is determined that the interpleader will lie.

INTERPLEADER—PRACTICE.—After determining that interpleader will lie, the court may, for the purpose of determining what are the issues as between the defendants, adopt any course or method of procedure which may seem appropriate and best adapted to raising such issues, and when once raised or settled, the court will pursue the prevailing equity practice in trying them.

INTERPLEADER—PREMATURE DETERMINATION OF THE RIGHTS OF THE DEFENDANTS.—An order of court determining the claims between the various defendants, or some of them, before deciding whether a bill of interpleader can be entertained, is premature.

STATUTORY RIGHTS, ENFORCEMENT OF.—When a statute creates a liability without providing the procedure for its enforcement, it can be enforced by any court having jurisdiction of the subject matter and the parties.

A RIGHT CREATED BY THE STATUTES OF ANOTHER STATE may be enforced in the courts of this. This rule applies to actions *ex delicto* as well as those arising *ex contractu*, and the limitations upon it are that its enforcement must not be against good morals or natural justice, nor prejudicial to the general interests of citizens of the forum.

INTERPLEADER.—ONE OF THE ESSENTIAL REQUISITES to equitable relief by bill of interpleader is, that the adverse titles of the respective claimants must be connected or dependent, or one derived from the other, or from a common source. There must be privity of some sort between all the parties, such as privity of estate, title, or contract, and the claims should be of the same nature or class.

INTERPLEADER—CLAIMS FOR TORTS.—A complainant cannot maintain a bill of interpleader against a defendant whose claim to the property subject to the bill is that plaintiff has by a tortious act become answerable therefor or for some part thereof.

LIEN, CONTINUANCE OF AFTER REMOVAL OF PROPERTY FROM THE STATE.—If a statute providing for a lien upon logs declares that it shall not bind them, unless within twelve months a civil action to enforce the lien shall be brought in a competent court, the lien cannot be enforced in another state into which the logs have been taken, in a suit brought there more than a year after the inception of the lien, though such a suit was brought within less than a year in the state in which the logs were when the lien attached.

Bill of interpleader filed by the North Pacific Lumber Company against C. O. Bergman and John Linkman, M. P. Callender, Lang & Co., and Matthieson. In and by this bill it appeared that in March, 1893, the plaintiff purchased certain logs of Matti Makarainin, for which there became due him three hundred and twenty-eight dollars and sixty cents; that the sum so due was assigned by Makarainin to Eli Maketa, who, in turn, on the 7th of March of the same year, assigned to Lang & Co., that Makarainin after the sale gave defendant Matthieson an order on the plaintiff for forty dollars, which was accepted, subject to the ascertainment of the balance due Makarainin, and that this order, as defendant Matthieson claims, was prior to the assignment made by Makarainin to Maketa; that on March 21, 1893, M. P. Callender attached the moneys due from plaintiff to secure a claim against Makarainin; that the defendants Lang & Co., on June 1, 1893, commenced an action against the plaintiff to recover the balance due from it for said logs; that the defendants Bergman and Linkman also claimed a sum of money under and by virtue of a certain judgment by them obtained against Makarainin, and claimed by them to be duly levied upon the logs sold to the plaintiff and upon said sum of three hundred and twenty-eight dollars and sixty cents now remaining in the hands of the plaintiff. On motion to make the bill more certain, the amendment was overruled. The defendant Callender defaulted, and the other defendants filed answers and cross-complaints. The demurrers interposed by Lang & Co. and Matthieson to the answers and cross-complaints of Bergman and Linkman were sustained December 4, 1893, and declining to appear further,

default was entered against them February 15, 1894, at which time the court decreed that the defendants Linkman and Bergman were not, nor was either of them, entitled to any of the money interpleaded by the plaintiff and deposited in court, "and that the other parties herein, or the claim or claims of those which shall hereafter be found entitled thereto, are declared to be prior to the claim of either of said defendants C. O. Bergman and John Linkman." February 24, 1894, Bergman moved for a default and judgment against the plaintiff, on the ground that it had failed to reply to his answer and cross-complaint, and at the same time Bergman and Linkman moved to set aside and vacate the orders of December 4, 1893, and February 15, 1894. The court set aside the decrees of February 23d, but refused to disturb the previous orders or decrees, or even give a default against the plaintiff. On March 24th, Lang & Co. moved for a decree in their favor upon the pleadings and answers and cross-complaints of Bergman and Linkman. This motion was overruled, and the demurrers sustained. Thereupon Bergman and Linkman were granted leave to file amended answers and cross-complaints, which they subsequently did. From the amended answers and complaints thus filed the plaintiff moved to strike out certain denials, on the ground that they were not proper amendments of the original answers, and also demurred to the new matter, for the reason that it did not state facts sufficient to constitute a defense to the suit. This demurrer was sustained, and the court declared that as a proper cause of action for interpleader had been shown, the plaintiff should not be taxed with costs, that Matthieson had a first lien for forty dollars, and Lang & Co. had a valid claim for the balance, subject to the payment of costs of suit and certain attorneys' fees. Bergman and Linkman appealed. The amended answers and cross-complaints filed by them denied only the allegations of the complaint relating to the defendants Matthieson, Lang & Co. and Callender, and attempted to assert affirmatively certain liens claimed upon the logs under and by virtue of the laws of Washington. The commencement of an action in the state of Washington to enforce such lien on October 27, 1892, was alleged, together with the rendition of a decree therein March 10, 1893, to foreclose the lien in satisfaction of the sum of two thousand eight hundred and fifty-five dollars, and that plaintiff, with full knowledge of the rights and equities of the parties, and of the claim for a lien, had, before the bringing of the foreclosure suit, removed and

transported certain of the logs subject thereto into the state of Oregon, and had sawed them into lumber, thereby rendering their identification uncertain and difficult. The prayer was, that the claims of the other defendants be declared void, that plaintiff's complaint be dismissed, and that plaintiff be decreed to pay the full sum of three hundred and thirty-one dollars and thirty-one cents, to be divided pro rata between Bergman and Linkman according to their several demands, and for general relief.

Stewart & Reynolds and Milton W. Smith, for the appellants.

Thomas N. Strong and Cox, Cotton, Teal & Minor, for the respondents.

251 WOLVERTON, J. 1. It is not attempted by the foregoing statement to set forth or take note of all papers filed or all orders of the court, but the endeavor has been to state sufficient of the record to enable this opinion to be understood. The record is encumbered with many papers which were perhaps unnecessary, and might have been omitted if the ordinary practice attending a bill of interpleader had been pursued. The complaint or 252 bill of interpleader filed by plaintiff seems on its face to state sufficient for the purposes of the suit. Such a bill will lie where two or more persons claim the same thing or debt or duty from the complainant by different or separate interests, and he does not know to which of the claimants he ought of right to deliver the thing in his custody, or render the debt or duty, and, by reason thereof, is in fear of damage or hurt from some of them; or, as defined by Lord Cottenham: "It is where the plaintiff says, 'I have a fund in my possession in which I claim no personal interest, and in which you, the defendants, set up conflicting claims. Pay me my costs, and I will bring the money into court'": Beach on Modern Equity Practice, sec. 114; *Hogart v. Cutts*, Craig & P. 204; *Wing v. Spaulding*, 64 Vt. 83. The allegations such a bill should contain are, in purport: 1. That two or more persons have preferred claims against the complainant; 2. That they claim the same thing; 3. That the complainant has no beneficial interest in the thing claimed; and 4. That he cannot determine without hazard to himself to which of the several defendants the thing belongs: *Atkinson v. Manks*, 1 Cowp. 703. Under the old equity practice, it was usual to annex to the bill an affidavit of the plaintiff showing that there was no collusion between him and any of the defendants: Beach on Modern Equity Practice, sec. 145; but it is, perhaps, sufficient under our practice

that the fact appear by appropriate allegations in the complaint: *Jerome v. Jerome*, 5 Conn. 352; *Nash v. Smith*, 6 Conn. 421.

2. The more orderly practice seems to be to first determine whether the interpleader will lie or not. If not, it is unnecessary to go further; but if it will, then ²⁵³ the plaintiff should be discharged from liability, with his costs, upon bringing the money or thing in dispute into court, and the suit should thereafter proceed upon issues properly joined between the defendants. The plaintiff cannot claim relief against any of the defendants, but only that he be protected against the claims of all, and when he has shown sufficient to entitle him to this he is entitled to his interpleader, which fact being determined by the order of the court, he is thenceforth out of the suit: *St. Louis Life Ins. Co. v. Alliance etc. Ins. Co.*, 23 Minn. 7; *Cullen v. Dawson*, 24 Minn. 66; *First Nat. Bank v. West River Ry. Co.*, 46 Vt. 633; 2 *Beach on Modern Equity Practice*, sec. 637. If, however, at the hearing on the bill, it is made to appear that the defendants have, by their several answers, clearly and sufficiently presented the proper issues as between themselves, and that such issues are ripe for adjudication, the court may at the time it determines the question of interpleader upon the complaint and issues thereto tendered, also decide the questions at issue between the several defendants, and dispose of the case finally. But whichever course is adopted, the question as to whether the interpleader will lie is always preliminary to a trial of the issues between the defendants, as, without the establishment of this fact, the defendants can have no contention as between themselves upon the record: 2 *Beach on Modern Equity Practice*, sec. 638; *Cullen v. Dawson*, 24 Minn. 66; *Farley v. Blood*, 30 N. H. 354; *Kirtland v. Moore*, 40 N. J. Eq. 106; *Hall v. Baldwin*, 45 N. J. Eq. 858. It seems there is no settled practice as to the mode of proceeding after it is ascertained that the bill of interpleader will lie: *City Bank v. Bangs*, 2 Paige, 570. *Van Fleet*, vice-chancellor, in *Kirtland v. Moore*, 40 N. J. Eq. 106, says, ²⁵⁴ touching the case as among the defendants: "The court may then adopt such course as may seem best under the circumstances; as by directing that issues shall be raised by appropriate pleadings, or that an action at law shall be brought, or that such other course shall be taken as may seem best suited to the nature of the case": See *Angell v. Hadden*, 16 Ves. Jr. 202. In *City Bank v. Bangs*, 2 Paige, 570, the case was referred to a master, and, as so many conflicting claims were involved, the court directed that any one of the parties should be allowed to file before the master a statement under

oath in the nature of a bill of discovery, which statement all the other defendants should be required to answer under oath. And so it appears competent, for the purpose of determining what are the issues as between and among the defendants, for the court to adopt any course or method of pleading which may seem appropriate or best suited for raising such issues, and, when once raised or settled, the court will pursue the prevailing equitable practice in trying them. Thus, it will appear that the orders of the court defaulting the defendants Bergman and Linkman, and declaring that the claims of Matthieson and Lang & Co. were prior and superior to theirs, before determining whether the bill of interpleader could be properly entertained, were premature: See *First Nat. Bank v. West River Ry. Co.*, 46 Vt. 633. Bergman and Linkman were contesting the right of plaintiff to proceed under its bill of interpleader, and, until this contest was settled, no issues as among the defendants could be determined.

The main discussion at the trial was directed to the question as to whether the defendants Bergman and Linkman had such an interest in the fund in the hands of the plaintiff as would warrant the court in ²⁵⁵ directing it to be paid to them regardless of the order in which the court may have proceeded. It is difficult to say from the answers and cross-complaints of Bergman and Linkman just what they intended to accomplish thereby, whether to defeat the interpleader, and thereby to terminate the proceeding; or whether, if unsuccessful in this, they intended by their cross-bills to establish their right to the fund as between themselves and the other defendants; and, if this latter, whether they designed to establish their right thereto under the right of action accorded by the statute of Washington against any person rendering difficult, uncertain, or impossible of identification any logs covered by the statutory lien, or by virtue of the lien itself. Their denials, which are mainly upon want of knowledge or information sufficient to form a belief, reach only the allegations of the complaint showing that claims had been preferred by the other defendants against the fund in the hands of plaintiff. It is admitted that plaintiff has such fund, and that it owes for the sawlogs in the identical amount. It is further admitted that plaintiff is unable to determine as to whom it ought to pay the fund without hazard to itself, that it claims no beneficial interest therein, and that there is no collusion between it and any of the defendants. They, themselves, are claiming the fund, beyond question; but they have stated their whole case upon the record by affirmative allegations, and whether styled a further and sep-

arate defense or a cross-complaint, or whether designed to defeat the plaintiff's bill or to establish their right to the fund, makes but little difference for the purposes of this inquiry. The defendants Matthieson and Lang & Co. have, by their answers, each admitted that they have laid claim to this fund, and by cross-complaints ²⁵⁶ have set up their respective demands. Does this record present a case ripe for final determination? The only apparent obstacle in the way is the issue of fact raised by the answers of Bergman and Linkman touching the question as to whether the other defendants had preferred claims against the plaintiff for the fund in its hands, but, as the other defendants have tendered no issue in this regard, and as Bergman and Linkman have not made the point nor insisted upon it here, we feel warranted in assuming that they have intentionally waived it.

3. We are now to determine whether, upon the face of Bergman's and Linkman's separate defenses or cross-complaints, they have shown a right to the fund, or are interested therein. If they have, the case ought to go back for a completion of the issues between them and the other defendants, and a trial upon such as may be tendered, but if they have not shown such right or interest, it ought now to be finally disposed of. At the time the liens of Bergman and Linkman upon the logs in question were filed in the state of Washington, there existed, and still exists, in this state, a similar law providing for the acquirement of a statutory lien upon logs. Indeed, the law of this state was taken from the Washington statute, with but few modifications or changes. The Washington statute contains a provision as follows: "Any person who shall injure, impair, or destroy, or who shall render difficult, uncertain, or impossible of identification, any sawlogs . . . upon which there is a lien as herein provided, without the express consent of the person entitled to such lien, shall be liable to the lienholder for the damages to the amount secured by his lien, which may be recovered by a civil action against ²⁵⁷ such person": Hill's Wash. Stats., sec. 1694. It has been held by this court that where a statute creates a liability, unless it has prescribed a procedure for its enforcement, which attaches as a part of the liability, it can be enforced in any court having jurisdiction of the subject matter and the parties. In this respect it is similar to the common-law right of liability, and may be enforced without regard to territorial limitations: *Aldrich v. Anchor Coal Co.*, 24 Or. 32; 41 Am. St. Rep. 831. The rule applies to actions arising *ex delicto* as well as to those arising *ex contractu*. In *Burns v. Grand Rapids etc. R. R.*

Co., 113 Ind. 172, an action instituted for negligently causing the death of a person, Mitchell, C. J., states the rule thus: "A civil right of action acquired under the laws of the state where the injury is inflicted, or a civil liability incurred in one state, may be enforced in any other in which the party in fault may be found, according to the course of procedure in the latter state": Citing a long list of authorities. And it is not even necessary that the law of the state where the right of action accrued and the laws of the forum where it is sought to be enforced should both give the same right of action: *Herrick v. Minneapolis etc. Ry. Co.*, 31 Minn. 11; 47 Am. Rep. 771. Such actions arising *ex delicto* are transitory in their character, and ought not to be circumscribed by locality as to their enforcement, as otherwise justice might often be defeated. To justify the courts of one state in refusing to enforce such a right of action given by another it must be upon the ground that its enforcement would be against good morals or natural justice, or that for some good reason it would be prejudicial to the general interests of the citizens of the state or the forum. Although there ²⁵⁸ are some cases opposed to this view, it appears to be sustained by the great weight of authority: See *Dennick v. Railroad Co.*, 103 U. S. 11; *Boyce v. Wabash Ry. Co.*, 63 Iowa, 70; 50 Am. Rep. 730; *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250; 56 Am. Rep. 200; *Chicago etc. Ry. Co. v. Doyle*, 60 Minn. 977; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; 38 Am. Rep. 491. So it would seem from the answers that Bergman and Linkman each has a right of action within this state against the plaintiff for damages in taking these logs away and rendering them impossible of identification. But the action sounds in tort; it is one arising *ex delicto*, and it does not appear to be one in which the tort could be waived and a civil action substituted. In this view of the matter, the plaintiff is not a stakeholder as to Bergman and Linkman, as they have no claim upon it for this fund. Their claim is by independent title, without privity of estate, title, or contract, as it pertains to the fund. It is one for unliquidated damages only, arising from a tort.

One of the essential requisites to equitable relief by bill of interpleader is, that all the adverse titles of the respective claimants must be connected or dependent, or one derived from the other, or from a common source. There must be privity of some sort between all the parties, such as privity of estate, title, or contract, and the claims should be of the same nature and character. In cases of adverse independent titles or demands, actions to de-

termine the rights of litigants must be directed against the party holding the property, and he must defend as best he can at law. The primordial element which forms the basis of correlative demands being absent, there can be no contention ²⁵⁹ among the claimants; neither can say to the other, "I have a better right or title than you," but each may be able to say, "I have just cause for complaint against him who would have us litigate only among ourselves." Thus, where the only relation which the plaintiff sustains to the defendants is that he is the debtor of one of them, he cannot invoke the aid of an interpleader: *Third Nat. Bank v. Skillings Lumber Co.*, 132 Mass. 410. So an agent or bailee cannot maintain a bill of interpleader where a person deposits with him money or property, not as a stakeholder, but as such agent or bailee, and the thing deposited is claimed by a third party: 2 *Story on Equity Jurisprudence*, secs. 816, 817. Where one claimant seeks a certain rent from the tenant in possession, and the other unliquidated damages for use and occupation, they cannot be required to interplead: *Johnson v. Atkinson*, 3 Anstr. 798; *Dodd v. Bellows*, 29 N. J. Eq. 127. In *National Life Ins. Co. v. Pingrey*, 141 Mass. 411, the company had issued a policy of insurance on the life of F. A. P., payable to E. H. P., but subsequently allowed F. A. P. to surrender the policy without the consent of E. H. P., and thereupon issued a new policy to F. A. P., payable to C. L. P. On the death of F. A. P., it was held that the company could not interplead E. H. P. and C. L. P. The court say: "By issuing those two policies, the plaintiff has exposed itself to both of these claims, and must meet them as best it may. The difficulty of maintaining a bill of interpleader is not technical, but fundamental. In this form of proceeding, we cannot inquire whether the plaintiff has incurred a double liability. That result is possible. The plaintiff ought to be in a position to be heard upon the question; but, on a bill of interpleader, which assumes that the plaintiff ²⁶⁰ is merely a stakeholder, the plaintiff cannot be heard: *Houghton v. Kendall*, 7 Allen, 72. A plaintiff cannot have an order that the defendants interplead, when one important question to be tried is whether, by reason of his own act, he is under a liability to each of them": See, also, *Bechtel v. Sheaffer*, 117 Pa. St. 555; 1 *Beach on Modern Equity Practice*, sec. 147; *Pomeroy's Equity Jurisprudence*, secs. 1320-1324. So it is in the case at bar. Plaintiff has upon the face of these cross-complaints incurred an independent liability to the defendants Bergman and Linkman sounding in damages for a tortious act. With the transaction from which the liability arose the

other defendants are not in privity, their interest being in the fund; and the converse is also true, Bergman and Linkman are not in privity in title or interest as it pertains to the fund.

4. The next question is, Can they establish their right to the fund through their statutory lien upon equitable grounds? It is claimed that, as the laws of Oregon provide for the acquirement by laborers upon sawlogs of a like statutory lien, and for a like enforcement thereof, that the lien could as well be enforced in Oregon as in Washington, and if, as against the logs, it could as well against the fund which represents the logs. There is much force in this position, as it has been shown that an action will lie for damages (*Aldrich v. Anchor Coal Co.*, 24 Or. 32; 41 Am. St. Rep. 831), by a parity of reasoning why not a suit to foreclose the lien, in the absence of any special statutory procedure devised as a part of the remedy. It would seem to be in accord with a just comity between the states where the rights of citizens of the state in which the remedy is invoked ²⁶¹ are not impaired or intrenched upon. But it is not necessary for us to decide this question, because the lien seems to have been lost by failure to invoke the remedy in season, even admitting the proposition to be tenable.

5. The Washington statute provides that the lien shall not bind the logs for a longer period than twelve months, unless a civil action shall be brought in a competent court to enforce the lien within that time: *Hill's Wash. Stats.*, sec. 1688. Now, the lien was filed October 1, 1892, and no suit was instituted here within the twelve months. If this suit would suffice for that purpose, it came too late, as it was commenced October 3, 1893. True, a suit was instituted in time in the Washington court, but the logs were removed without its jurisdiction before a decree was entered, and by reason thereof the lien was not fixed by its action. We know of no rule by which the lien would be continued by the commencement of the suit in Washington, unless the court retained jurisdiction of the property to fix the lien upon it by a valid decree. This it did not do, and hence no lien can now be established here, even under appellant's contention. The effect of Bergman's and Linkman's further defenses or cross-complaints is to bar the interpleader, and the complaint must be dismissed as to them, as they ought not to be enjoined from proceeding at law; but as to the other defendants the bill is properly filed. In other respects the decree of the court below is in accordance with the facts, and a decree will be entered here in accordance with this opinion.

Modified.

INTERPLEADER—WHAT BILL MUST SHOW.—The interpleader bill must show that complainant is ignorant or at least in doubt as to the respective rights of the defendants to the debt, duty, or other thing claimed by them, and that he cannot safely pay or render it to either without risk of liability to the other: *Shaw v. Coster*, 8 Paige, 339; 35 Am. Dec. 690, and note. See, also, the extended note to *Clark v. Mosher*, 1 Am. St. Rep. 801.

INTERPLEADER—PRACTICE.—If, at the hearing on the bill, the questions in which the defendants are alone interested are stated with sufficient clearness and certainty in the answers to the bill to present proper issues, and they are ripe for decision, the court may, at the same time that it decides the question whether the bill was properly filed or not, also decide questions at issue among the defendants and dispose of the case finally: Extended notes to *Clark v. Mosher*, 1 Am. St. Rep. 801, and *Shaw v. Coster*, 35 Am. Dec. 709.

INTERPLEADER WILL NOT LIE when complainant defends against both suits: *Yarborough v. Thompson*, 3 Smedes & M. 291; 41 Am. Dec. 626.

INTERPLEADER—IDENTITY OF SUBJECT OF DEMAND.—It is an indispensable prerequisite to the filing of a bill of interpleader that the defendants must respectively claim of the complainant the same property, debt, or duty: Extended note to *Shaw v. Coster*, 35 Am. Dec. 698.

INTERPLEADER—CLAIM FOR TORT.—A party cannot file a bill of interpleader who is obliged to put his case upon the ground that as to some of the defendants he is a wrongdoer: *Tyus v. Rust*, 37 Ga. 574; 95 Am. Dec. 365, and note. See, also, the extended note to *Shaw v. Coster*, 35 Am. Dec. 702.

STATUTES OF ANOTHER STATE—ENFORCEMENT OF.—Comity of one state will enforce the laws of another state when such enforcement neither violates its own laws nor infringes the rights of its own citizens: *Deringer v. Deringer*, 5 Houst. 416; 1 Am. St. Rep. 150. The statutes of another state have *ex proprio vigore* no force or effect in this, and, if enforced at all in its courts, such enforcement is dependent upon the adoption of the doctrine of equity: *Marshall v. Sherman*, 148 N. Y. 9; 51 Am. St. Rep. 654, and note. See, also, the cases collected in the note to *Forepaugh v. Delaware etc. R. R. Co.*, 15 Am. St. Rep. 679.

NICKLIN v. ROBERTSON.

[28 OREGON, 278.]

JUDGMENT, RELIEF AGAINST FOR EXCUSABLE NEGLIGENCE, TIME WITHIN WHICH MAY BE GRANTED.—Under a statute authorizing the court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, at any time within one year after notice thereof, a motion for relief made within the year will not support an order, made after the expiration of the year, granting the motion.

COSTS, RELIEF FROM TAXATION OF IN EQUITY.—If a decree grants costs to one of the litigants, the court has no discretion, after the lapse of the time within which it was authorized to grant relief from a judgment, to review or affect the taxation of costs on the ground that the party aggrieved by such taxation was prevented from applying for relief through his surprise, mistake, or excusable neglect.

TIME, COMPUTING.—The time allowed by law for filing cost bills or objections thereto must be computed by excluding the first day and including the last, except when the last day falls upon Sunday, in which event the party is entitled to act on the day following.

COSTS.—WHERE NO OBJECTION IS MADE to a cost bill within the time allowed by law, the clerk of the court has no discretion to disallow any part thereof.

JUDGMENT, RELIEF FOR MISTAKE, ETC.—If the affidavits filed in support of a motion for relief against a cost bill do not show that it was taxed against the moving party through his mistake, inadvertence, surprise, or excusable neglect, no relief can be granted though the motion was made and heard within the time allowed by law.

JUDGMENT, AMENDMENT.—Where there is nothing appearing on the face of the record to show any error or mistake and the moving party must rely on evidence allunde, the court cannot alter its judgment after the close of the term.

Motion to correct a decree so as to relieve the plaintiff from the taxation of costs. On September 29, 1891, the plaintiff's suit was dismissed, and a decree entered awarding defendants their costs and disbursements. Six days later, they filed a verified statement of such disbursements, in which were included four hundred and forty-nine dollars and sixty cents charged for ninety days' attendance and three thousand one hundred and forty-six miles traveling for witness C. W. Burrage; eighty-six dollars and eighty cents for four days' attendance and eight hundred and eight miles traveling for witness W. H. Burrage; fifty-four dollars and fifty cents for three days' attendance and expert services of witness D. W. Taylor. No objection having been filed within the time allowed by law, the clerk taxed the costs and disbursements as claimed by the defendants. March 26, 1892, plaintiff filed affidavits stating that she had no notice of the filing of the statement of costs, and moved the court to disallow and strike out the items hereinbefore referred to, for the reason that they were illegal, and that the statement had not been filed within five days after the entry of the decree. No order in reference thereto having in the mean time been made, the plaintiff, on June 16, 1894, by leave of the court, filed objections to these items, and presented affidavits tending to show that the neglect to bring forward such objections at an earlier date was excusable. September 20th of the same year, the clerk retaxed the items by reducing the charges for the first two witnesses named to one day and one mile each, and the other witness to three days and one mile, making the total sum allowed ten dollars and thirty-one cents instead of five hundred and ninety dollars and ninety cents as claimed by defendants. Thereafter the defendants moved the court to retax their disbursements, and the court

thereupon found that the defendants were entitled only to the sums allowed them by the clerk, and on September 21, 1894, the court decreed a modification of the disbursements as requested by plaintiff, and the defendants thereupon appealed.

William H. Adams, for the appellants.

McDougall, Spencer & Jones, for the respondent.

281 MOORE, J. 1. It is contended by the defendants that no order modifying the original decree having been made within a year after the plaintiff had notice of the taxation of the disbursements, the court was powerless, after the expiration of that time, to grant the relief sought. It must be conceded that a large portion of the disbursements claimed by the defendants is illegal, and hence the only question involved is the power of the court to retax them. The statute, so far as it applies to the case at bar, provides that the court may, "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, or surprise, or excusable neglect": Hill's Code, sec. 102. At the common law, no judgment could be amended after the term at which it was entered, except for clerical errors appearing in the record, and then only when there was to be found, in some minute of the trial, a memorandum of what actually transpired from which the judgment might be corrected: *Albers v. Whitney*, 1 Story, 310; *Aetna Life Ins. Co. v. McCormick*, 20 Wis. 265. A statute conferring power to modify a judgment or decree after the term at which it was rendered, being in derogation of the common law, is to be strictly construed; and hence a party, if he could be relieved from a proceeding taken against him through his inadvertence, surprise, or excusable neglect, must apply therefor and obtain a decision thereon within the time prescribed by the statute, or his laches will preclude the court from thereafter amending the record: *Woolley v. Woolley*, 12 Ind. 663; *Gerish v. Johnson*, 5 Minn. 23; *Knox v. Clifford*, 41 Wis. 459; *Flanders v. Sherman*, 18 Wis. 575. In the case last cited, Cole, J., in construing a statute identical with the one above quoted, says: "But, unless the motion is made within a year from the time the party has notice of the erroneous order or judgment, the court cannot relieve under this statute. It must be made within a year, as the power of the court to grant the relief is expressly limited to that period. After the lapse of that time, the court cannot relieve a party from an order or judgment against him through his mis-

take,' 'inadvertence,' 'surprise,' or 'excusable neglect.'" In *Woolley v. Woolley*, 12 Ind. 663, one of the parties to a judgment, on the day prior to the expiration of a year from its rendition, under the provisions of a similar statute, applied to the court to set it aside, which the court did on the day after the year had expired. An appeal having been taken from the judgment thus rendered, it was reversed, and Perkins, J., in rendering the decision, says: "Under the section upon which the present suit is founded, the court could not set aside the judgment after the expiration of the year." In *Gerish v. Johnson*, 5 Minn. 23, the court, interpreting a similar statute, says: "It by ²⁸³ no means follows that because a party may make such a motion within the year, that he has always a year to make it in. He is in each instance bound to make the motion with diligence, and show the existence of some of the causes specified in the statute." "The period," says Cole, J., in *Knox v. Clifford*, 41 Wis. 459, "within which the discretion is to be exercised is expressly limited to a year after notice of the judgment; and this time cannot be enlarged or extended by merely giving notice of the motion to vacate the judgment. The party is required to act, and must bring his motion to a hearing, within the year, or the power to relieve under the statute is gone. This provision goes upon the only reasonable assumption that a year affords an ample opportunity for a party to obtain relief if he is diligent." These authorities conclusively show that the statute limits the power to one year after notice of the "judgment, order, or proceeding," and that the expiration of that time leaves the court without authority to set aside or modify its decision for any of the causes enumerated in the section quoted. The plaintiff must have had notice of the taxation of these disbursements on March 26, 1892, at which time she moved the court to disallow them, and, more than one year from that time having expired before a modification thereof was decreed, it follows that the court, under the provisions of the statute, had no power to alter the original decree.

2. The plaintiff insists, however: 1. That the allowance of costs in equity rests in the sound discretion of the trial court, which will not be reviewed on appeal except for an abuse thereof; and 2. That the taxation of the disbursements of which she complains ²⁸⁴ results from the misprision of the clerk, and that the court possesses at all times the inherent power to correct such errors. It must be observed that the discretion referred to by plaintiff does not extend to the amount of costs and disbursements to be recovered, but only as to who shall pay them: *Hill's Code*, sec. 554.

In the case at bar, the court exercised its discretion at the time it decreed that the defendants recover of the plaintiff their costs and disbursements, and it is this exercise of it that will not be reviewed except for abuse: *Lovejoy v. Chapman*, 23 Or. 571; *Cole v. Logan*, 24 Or. 304. One of the objects in procuring a judgment or decree is to put at rest forever the issue litigated, but if the trial court could, even in matters within its discretion, change at pleasure its solemn conclusions, judgments might remain open in all matters relating to an exercise of this right, and become subject to be changed at any time in favor of either party who could show a better reason therefor. When the trial court has not abused its discretion in the exercise thereof, its conclusion will not be reviewed in this court, and such conclusion, when announced, ought to be as binding upon the court rendering it as it is upon this court.

3. The statute authorizes the clerk to allow and tax, as a matter of course, the disbursements claimed by a party upon his filing a verified statement thereof within five days from the entry of a judgment or decree given in his favor, unless the adverse party, within two days from the time allowed to file the statement, shall file objections thereto. The statement may also be filed at any time after five days, but in such case a copy thereof must be served upon the ²⁸⁵ adverse party, who is given two days from the service thereof to file objections thereto, and in either case the clerk must pass upon and may allow or reject any or all items to which objections have been made: *Hill's Code*, secs. 556, 557. It will be observed that judgment was entered September 29th, and, excluding the first day from the computation, the five days would expire October 4th, but that day, being Sunday, must also be excluded, and the statement having been filed on the day following, was within the five-day limit: *Hill's Code*, sec. 519.

4. No objections having been filed to the cost bill within the time prescribed by law, the clerk had no discretion in the allowance of the items contained in the statement.

5. The affidavits submitted with the motion on March 26, 1892, did not show that the disbursements had been taxed against the plaintiff through her mistake, inadvertence, surprise or excusable neglect, and even if it be conceded that a motion filed within one year from the notice thereof authorized the court, after the expiration of that period, to relieve a party from a judgment taken against him under such circumstances, the motion filed would be ineffectual for that purpose.

6. The power of a court, at any time after the entry of a judgment, to correct the misprision of a clerk or other officer of the court, when it can be done by reference to some memorandum of the trial, made at the hearing thereof by the court, or from the pleadings on file or proceedings had therein, must be conceded: 1 Black on Judgments, sec. 155; 1 Freeman on Judgments, sec. 71; but when the mistake is not apparent ²³⁶ on the record, and must be made out upon affidavits and evidence aliunde, then there remains nothing to amend by, and the court is powerless to alter the judgment after the close of the term at which it was rendered: *Albers v. Whitney*, 1 Story, 310. The amount of the items claimed in the verified statement is nine hundred and five dollars, which sum the clerk entered in the decree, and, it appearing that the evidence relied upon to correct the record consisted of affidavits which were insufficient for that purpose, it follows that the decree appealed from must be reversed, and the motion to correct the original decree overruled.

Reversed.

Of the Power of a Court to Vacate a Judgment After the Time Specified in the Statute for Granting Relief Therefrom.

The broad statement contained in the principal case, that a party moving to be relieved from a judgment, order, or other proceeding on account of his mistake or excusable neglect must obtain a decision of his motion within one year after the taking of such judgment, order, or other proceeding against him, though he applies for relief within less than that time, is somewhat startling, and we do not believe it can be sustained upon the authorities cited by the court or otherwise. To sustain it would make the moving party, though he applied for relief within the time allowed him, responsible for the future action of the court, over which he necessarily has no control. There are, indeed, cases holding, and perhaps properly, that the court is not bound to grant relief, though an application therefor is made within the time designated in the statute, if it appears that the party moving has been guilty of laches in not sooner making his application. These cases, in other words, affirm that the time designated in the statute is a limitation upon the powers of the court, a specification of a period beyond which no application can be made, but, on the other hand, that the time is not necessarily given in all cases, and therefore that the party moving should not be allowed the whole time if it appears that his delay is unreasonable: *Bozzio v. Vaglio*, 10 Wash. 270.

We do not doubt that the court may also, though the application is made in due time, refuse to grant it for laches in the prosecution of the motion, and hence there may be cases in which, though the application was made in due time, an order denying the motion, and made after the expiration of a year, may be affirmed upon the ground that such order may have been made by the court because of laches in prosecuting the motion. This latter view is sustained by the case

of *Knox v. Clifford*, 41 Wis. 459. In that case, a judgment was entered in favor of the plaintiff on the eighteenth day of May, 1875, from which the defendant perfected an appeal on the twenty-third day of July of the same year, and the judgment was affirmed in the following December. In February, 1876, the defendant moved for a new trial, including surprise as one of the grounds of the motion. This motion was heard on the twenty-eighth day of April, 1876, and was granted on the 25th of July following. The court, in reversing the order granting a new trial, referred to the fact that the defendant was charged with notice of the entry of the judgment against him as early as the time of perfecting his appeal, and that it might reasonably be presumed that he had actual notice of the judgment about the time it was rendered in May, because the record shows that the finding of the court ordering judgment against him was served upon his attorney on the 25th of that month. The court, however, determined that the period within which the discretion is to be exercised "is expressly limited to a year after notice of the judgment; and this time cannot be enlarged or extended by merely giving notice of the motion to vacate the judgment. The party is required to act, and must bring his motion to a hearing within the year or the power to relieve is gone. The provision goes upon the very reasonable assumption that a year affords an ample opportunity for a party to obtain relief, if he is diligent." There is nothing, we insist, in this language which would preclude the court from granting the relief after a year from the entry of the original judgment, had the motion to vacate it been diligently made or diligently pursued within the year, though the action of the court thereon had occurred at a later period.

In the case of *Flanders v. Sherman*, 18 Wis. 575, the order against which relief was sought was entered on the fifteenth day of June, 1861, while the application for relief therefrom was not made until October, 1862. The case, therefore, did not involve any question respecting the power of the court had the motion for relief been made within the time designated in the statute.

In the case of *Gerish v. Johnson*, 5 Minn. 23, the judgment was rendered on the thirty-first day of December, 1858, and docketed on the 20th of March, 1859. The record did not disclose when the application for relief was made, but the order of the court denying it was entered on the 24th of March, 1860. This order was affirmed upon several grounds, one being that it by no means followed that a party always had a year within which to make his application, and that he was in each instance bound to make the motion with diligence, and show the existence of some one of the causes specified in the statute. The court added: "It does not satisfactorily appear from the papers furnished the court when the motion was in fact made, but it does appear that it was heard at the March term of the court in Le Sueur county in 1860, which was a year and two months after the rendition of the judgment. This also was a sufficient ground for the court below to deny the motion; and, as it nowhere appears that the motion papers presented any grounds for relief whatever, we are bound to presume there were no merits in it."

The case of *Woolley v. Woolley*, 12 Ind. 663, was one in which an

application was made under a statute authorizing relief from a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect. The application for relief was filed the day before the year expired, and was granted the day after such expiration. The action of the court in granting this relief was reversed, but it appeared rather to have been reversed because the case presented did not fall within the statute than for any other reason. The court first stated the different cases in which courts were authorized to set aside judgments in civil actions, adding: "None of the foregoing classes of cases embraces that of an application to set aside a judgment or decree for fraud, where there was an appearance for both parties—an equitable proceeding well known to the common law. We say none of these proceedings embrace such a case. Perhaps that for granting new trials may, to the extent to which misconduct or fraud of the opposite party, had it been discovered at the time at which the trial took place, would have then been a ground for a motion for a new trial. But the question here is, Does the Revised Code provide a substitute for the general common-law mode of setting aside a judgment or decree for fraud?" The court, however, added: "Under the section upon which the present suit is founded, the court could not set aside the judgment after the expiration of the year." It will be seen that the case was not a proper one for proceeding for relief upon the ground of surprise or excusable neglect, because the parties were represented at the trial. The above quotation may, however, be regarded as expressing the opinion of the court that, though the case had fallen within the statute, still that the relief could not have been granted after the year. Conceding this, the statement is but a dictum.

On the other hand are cases authorizing relief to be granted after the expiration of the statutory time upon motions made within that time, where the delay is not due to laches of the party in prosecuting his motion, but rather to the action of the court to which he presented it. Thus, in *Butler v. Mitchell*, 17 Wis. 54, a motion was made within one month after the rendition of the judgment, and, being denied, an appeal was taken to the supreme court, which affirmed the order, but without prejudice to the right to renew the motion upon a proper affidavit of merits. The motion was renewed in the trial court about eighteen months after the rendition of the judgment, the delay being solely accounted for by the pendency of the former appeal. When the second motion was brought on for hearing, it was resisted on the ground of laches in making it, and that more than one year had intervened after the entry of the judgment from which relief was sought. The court answered: "The statute does not mean that the relief must actually be furnished within the year. Otherwise, the opposite party might, by appealing or contesting the matter to the utmost, use up the year, and thus defeat the remedy. And where the motion is made as promptly as was here, and prosecuted with reasonable diligence, and a final decision of this court is not obtained until after the expiration of the year, and that decision is to deny the motion for a mere defect, it is entirely competent for the court to grant such liberty. And the fact that it is nominally called a new motion does not prevent it from being

substantially a continuation of the same application. It is in the nature of an amendment of the papers on which the motion was founded. And we think it would not only defeat the ends of justice, but would be doing violence to the spirit and intent of the statute itself to say, because the litigation had been prolonged beyond the year, when it appeared that to supply a formal defect it was necessary to amend the application and present it again, that these facts deprived the court of all power to give the relief. We do not regard this statute as so imperative in its character as the statute of limitations. And if it were, the renewal of the motion on leave to supply a formal defect of the papers, should be considered rather as an amendment of the original motion." Somewhat similar is the case of *Howell v. Harrell*, 71 N. C. 161. A motion for relief from a judgment was made in due time, but, in deference to the opinion of the judge respecting the form of the application, it was abandoned, and a civil action commenced seeking the same relief. This again was abandoned in deference to the opinion of the trial judge, and a motion was made to reinstate the original motion, but, as more than a year had elapsed since the entry of the judgment, the trial judge was of the opinion that he could not allow such reinstatement, and he therefore denied relief. The supreme court on appeal reversed the order on the ground that such laches as were attributable to the applicant had resulted from the first erroneous decision of the judge, and therefore were excusable, and hence the moving party was entitled to have it heard upon the merits.

The case of *Sargent v. Kindred*, decided by the supreme court of North Dakota in May, 1896, was one in which the motion for relief was not made until more than a year after the notice of the judgment had been served upon the attorney of the defendant, and the court held, that the defendant was chargeable with the notice, and that the application was, therefore, made too late. The court also expressed the opinion that, even were the motion conceded to have been made in time, relief could not be granted, because it was neither decided, nor submitted to the court for decision, until more than a year from the time that the defendant knew of the motion; and the court said that the motion "must be made and submitted, and the order granting the relief must also be made, within the year. The language of the statute is explicit. It declares that the court shall have power to relieve a party from a judgment at any time within one year after notice thereof. It is not enough to satisfy the language of the statute that the application for the relief is made within the year, or that it is submitted within the year. But the court must take action within the year. It is true that a court, to prevent prejudice to a suitor through its own want of diligence, has power to direct that the order granting the relief be entered nunc pro tunc as of the time the motion was finally submitted. In this way, all possible injury to the litigants from the failure of the court to decide a motion within the year may be prevented, provided the party has brought his motion to a hearing within the statutory time. There is no hardship in this construction of the statute. Certainly, a year after notice that a judgment has been entered against the suitor is

ample time for him to prepare and submit his motion to have such judgment set aside. In practically every case the decision of the motion can be rendered within the year, and there is but little occasion for delay in deciding such motions after they are finally submitted. And if the court discovers that it is unable to render a decision within the prescribed period, it has power, and such power will invariably be exercised in favor of a litigant who has not been guilty of great laches, to direct that the order be entered *nunc pro tunc* as of the time the motion was finally submitted."

It should be remembered in each of the cases to which attention has been directed the statutes under consideration gave the moving party a year after notice of the judgment or other proceeding against him in which to apply for relief, and a party having notice of the proceeding of which he complains is justly chargeable with laches in failing to make his motion until within so short a time from the end of the year that it may not be heard within the time limited, or, when the motion is promptly made, in failing to bring it to a hearing within that time. In some of the states, the period within which relief may be granted is computed from the rendition of the judgment, instead of from the time when the aggrieved party has notice thereof. Under such a statute, to deny relief because the applicant could not be heard from any cause before the expiration of the statutory time would be to deprive the aggrieved party of much of the substantial benefit of the statute, and might result in denying him relief when he had been guilty of no laches whatever. Such a construction of the statute should not be tolerated.

In the principal case, the moving party was certainly guilty of great and inexcusable laches. The papers in the case showed that in March, 1892, she filed affidavits in support of a motion to disallow the costs claimed, but never brought this motion on to a hearing, and on June 16, 1894, more than twenty-seven months after the making of the former motion, she, by leave of the court, for the first time, submitted affidavits tending to show that her neglect to present objections at an earlier date was excusable, and it was not until September, 1894, or more than thirty months after the entry of the original judgment, that relief was granted.

JUDGMENTS—AMENDING AFTER TERM.—A court cannot correct a judgment as in fact rendered after the term has passed. The power to amend or change the judgment is then confined to the court having appellate jurisdiction: *In re Black*, 52 Kan. 64; 39 Am. St. Rep. 331, and note. See, also, the extended note to *Bramlet v. Pickett*, 12 Am. Dec. 351.

TIME—COMPUTING—LAST DAY FALLING ON SUNDAY.—The rule that where a non-negotiable note falls due on Sunday it is payable on the day following is established by the weight of authority, and has by analogy been applied to other cases when the day for the performance of a contract or other act happens to be on Sunday: Note to *Avery v. Stewart*, 7 Am. Dec. 250, 251. The general current of modern authority is, that where a statute requires an act to be performed a certain number of days prior to a day named, or within a definite period after a day or event specified, or where the time is to be computed either prior or subsequent to a day named, the usual rule is to exclude one day of the designated period and to include the other: Extended note to *Cressey v. Parks*, 46 Am. Rep.

WILLAMETTE REAL ESTATE COMPANY v. HENDRIX.

[28 OREGON, 485.]

AN EXECUTION ISSUED BY THE CLERK OF A COURT OTHER THAN THE ONE ENTERING JUDGMENT, unless authorized by some special statute, is void.

JUDGMENT AGAINST NONRESIDENTS.—A personal judgment rendered upon service of summons by publication, the record not disclosing that any property has been attached, is void.

JUDGMENT, JURISDICTION WHEN MUST APPEAR AFFIRMATIVELY.—Whenever a mode of acquiring jurisdiction not in accordance with the general course of the common law has been prescribed by statute, that mode must be strictly followed, and the facts necessary to sustain jurisdiction must appear on the face of the record.

SHERIFF'S DEED, RECITALS, WHEN NOT CONCLUSIVE. Though a sheriff's deed recites that the property was sold under an execution issued out of the county court, such recital cannot prevail in the face of a copy of the execution, received in evidence, from which it appears to have been issued out of another court.

SHERIFF'S SALE.—THE CONFIRMATION OF A SHERIFF'S SALE cannot cure infirmities in the judgment. Such a confirmation is a determination of the regularity of the proceedings under the writ only, and supplies all defects, except those founded on the want of jurisdiction.

PRESCRIPTIVE TITLE CANNOT BE ACQUIRED EXCEPT BY OCCUPANCY UNDER A CLAIM OF OWNERSHIP.—In the absence of occupancy, the claim of ownership accompanied by the payment of taxes and the sale of small parts of the property does not create title by prescription.

ADVERSE POSSESSION OF ONE OF SEVERAL LOTS.—Though property is described in a conveyance as consisting of lots and blocks, adverse possession of it cannot be predicated upon the occupancy of some lot therein by a purchaser from the grantee in such deed. Each lot or tract is distinct, and an entry and occupancy of one under a claim of title is not a constructive occupancy of the others.

Suit by Willamette Real Estate Company to quiet title to lots 3 to 10 in block 25, 6 to 10 in block 26, blocks 35 and 36, and four blocks known as the Courthouse Square in the town of Cornelius, Oregon. The defendant Hendrix was, on June 7, 1860, the owner of realty consisting of one hundred and forty acres, including the property in controversy, and a judgment was, in June of the same year, entered against him in favor of W. T. Newby in the county court of Washington county for three hundred and ten dollars. On October 23, 1861, a judgment was entered in the circuit court of the same county in favor of S. M. Gilmore and against the defendant Hendrix for eight hundred and ninety dollars and fifty-three cents in an action in which summons had been served by publication. March 18, 1862, an execution was issued on the Newby judgment, which recited it as

having been entered in the circuit court of Washington county, and as being enrolled and docketed in the clerk's office of that court. On the same day, execution issued on the Gilmore judgment. The sheriff, acting on the execution mentioned above, levied on the real property in controversy, and, after advertising the property, sold it to Adelia Snelling. On October 12, 1863, the sheriff executed a deed to the purchaser, reciting that the premises had been sold under an execution issued out of the circuit court in the case of Gilmore v. Hendrix, and under an execution issued out of the county court in the case of Newby v. Hendrix. On the deed was an indorsement by the judge of the circuit court declaring that no illegality being found in the proceedings concerning the sale, the deed was approved in open court. Adelia Snelling having died intestate, her administrator in July, 1866, sold and conveyed the property to Stephen Snell, who, on April 17, 1871, conveyed to William L. Halsey. He established and platted the townsite of Cornelius, and filed a plat thereof for record. December 5, 1872, he conveyed the property in controversy to plaintiff. The trial court entered a judgment in favor of the defendant quieting his title to the property, and the plaintiff appealed.

Albert H. Tanner, for the appellant.

Thomas N. Tongue and S. B. Houston, for the respondents.

401 MOORE, J. 1. It is contended by plaintiff that the county court, being a court of record, and invested with civil jurisdiction to be defined, limited, and regulated by law, not exceeding the amount of five hundred dollars (Const., art. 7, secs. 1, 12), was further invested by an act of the legislative assembly, approved June 4, 1859, (Laws 1859, p. 9), with authority to enter on the defendant's confession a judgment which should not be subject to review in a collateral suit. Conceding, without deciding, that the county court had such authority, we will examine the foundation of plaintiff's alleged title, namely, the judgment, execution, sale, and deed: *McRae v. Daviner*, 8 Or. 63; *Faull v. Cooke*, 19 Or. 455; 20 Am. St. Rep. 836; *Cloud v. El Dorado County*, 12 Cal. 128; 73 Am. Dec. 526; *Clark v. Lockwood*, 21 Cal. 220; *Blood v. Light*, 38 Cal. 649; 99 Am. Dec. 441. The sheriff's return shows that the real property was sold upon an execution issued out of the circuit court on a judgment by confession rendered in the county court. Every court has the inherent right to control its own process, and, unless authorized by law, no other

court can interfere with such right: *Harris v. Cornell*, 80 Ill. 54. ⁴⁹² There being no statutory provision authorizing the clerk of the circuit court to issue an execution out of that court upon a judgment rendered in the county court, the writ so issued must be regarded as an absolute nullity: 1 *Freeman on Executions*, sec. 15; *Chandler v. Colcord*, 1 *Oklahoma*, 260.

2. The defendant insists that, the Gilmore judgment having been rendered in the circuit court on a service of summons by publication, no jurisdiction of the person was obtained, and, the record introduced in evidence failing to show that the land had been attached so as to render a judgment given in the action quasi in rem, no jurisdiction of the subject matter was acquired, and hence the judgment is void; while the plaintiff contends that the court rendering the judgment being one of general jurisdiction, and the record being silent, it must be presumed from the judgment that the court complied with every statutory requirement, and thereby obtained jurisdiction. The sheriff's return indorsed on the execution issued on this judgment discloses that the property was levied upon by virtue thereof, and advertised for sale; but it does not show that any sale was made in obedience to its commands. "While," says Baldwin, J., in *Cloud v. El Dorado County*, 12 Cal. 128, 73 Am. Dec. 526, "it is undoubtedly the duty of the sheriff to make this return, and while it is important as evidence of a permanent and authentic character that he should do so, the title of the purchaser does not depend upon his performance of this duty. The purchaser has no control over the conduct of the officer in this respect; nor is it just or reasonable that he should be responsible for the remissness or negligence of the sheriff in the discharge of such an office." This doctrine was ⁴⁹³ affirmed in *Clark v. Lockwood*, 21 Cal. 220; *Blood v. Light*, 38 Cal. 649; 99 Am. Dec. 441, and lastly in *Frink v. Roe*, 70 Cal. 296. If the necessary preceding steps have all been properly taken, a sheriff's deed is evidence of title in the grantee, and the recitals therein are prima facie evidence of the facts recited: *Dolph v. Barney*, 5 Or. 191. "A sale," says Mr. *Freeman* in his work on Executions, volume 2, section 325, "may be made under several writs. Some of these writs may be valid, and the others void. If either of the writs under which a sale is made is valid, the officer has the power to sell, and consequently the power to convey. If, in his deed, he recites several writs, some of which are valid and some void, the recital of the void writs may be treated as surplusage, and the deed, being supported by the valid writ, and the power to sell and convey there-

by conferred, is as effective as if all the writs were unobjectionable."

3. The sheriff's deed being *prima facie* evidence of title in plaintiff's grantors, the question is presented whether the judgment rendered in the case of *Gilmore v. Hendrix*, upon which the deed must rest for its foundation, is valid, or at least not vulnerable to collateral attack. The judgment in this case is as follows: "S. M. Gilmore v. H. H. Hendrix. And now on this day comes the plaintiff, by M. McBride, his attorney, and the said plaintiff files affidavit of publication of notice of the pendency of this suit, to wit (here insert), in accordance with the order of this court made at the May term thereof, 1861; and said defendant, being called, comes not, but makes default. It is therefore ordered by the court that the default of the defendant be entered. And it appearing to the court that this suit is founded upon ⁴⁹⁴ a promissory note for the payment of money only, and that there is now due and owing from the said defendant thereon to the said plaintiff the sum of eight hundred and ninety dollars and fifty-three cents; it is therefore considered and adjudged by the court that the plaintiff have and recover off and from said defendant the sum of eight hundred and ninety dollars and fifty-three cents, together with his costs to be taxed, and that he have execution therefor." It appears from this record that the defendant was a nonresident of the state, and, not appearing or answering, the court acquired no jurisdiction to render a judgment in personam on the service of a summons by publication; and hence the authority to render the judgment, so as to become quasi in rem, must depend on the court's having obtained jurisdiction of the defendant's property by some legal process, before any order could be made authorizing the service of a summons by publication: *Pennoyer v. Neff*, 95 U. S. 714; *Goodale v. Coffee*, 24 Or. 346. The statute in force at the time of the rendition of the judgment contained ample provisions for and prescribed the mode of attaching the defendant's property to satisfy any judgment which might be rendered against it: Stats. 1855, sec. 119, et seq. It will be observed that the judgment contains no recital of the defendant's property being attached, and no other evidence thereof having been introduced, can it be presumed that the court obtained jurisdiction of the subject matter? "The jurisdiction," says Mr. Freeman in his work on Judgments, volume 1, section 123, "exercised by courts of record is, in many cases, dependent upon special statutes conferring an authority

in derogation of the common law, and specifying the manner in which such authority shall be employed. The decided preponderance of adjudged ⁴⁹⁵ cases upon the subject establishes the rule that judgments arising from the exercise of this jurisdiction are to be regarded in no other light, and supported by no other presumptions, than judgments pronounced in courts not of record. The particular state of facts necessary to confer jurisdiction will not be presumed; and, if such facts do not appear, the judgment will be treated as void." It is needless to cite further authority in support of this proposition, for the rule has been already settled in this court that whenever a mode of acquiring jurisdiction, not in accordance with the general course of the common law, has been prescribed by statutes, that mode must be strictly followed, and the authority for rendering the judgment in pursuance thereof must affirmatively appear on the face of the record: *Northcut v. Lemery*, 8 Or. 316; *Odell v. Campbell*, 9 Or. 298. From the failure to prove that the defendant's property had been attached, it follows that jurisdiction of the subject matter was not acquired, and the judgment rendered in the case of *Gilmore v. Hendrix* is consequently void.

4. The deed recites that the premises were sold on execution issued from the county court, and this, under the authority heretofore cited, is prima facie evidence of the fact, but such recital could not prevail here, in the face of a copy of the execution in evidence, from which it appears that the writ purports to have been issued from the circuit court. Nor could the court's approval of the sheriff's deed cure the infirmities of the judgment, for a confirmation of an execution sale of real property is a determination of the regularity of the proceedings under the writ only, and supplies all defects except those founded in a want of ⁴⁹⁸ jurisdiction: *Rorer on Judicial Sales*, sec. 123; *Leinenweber v. Brown*, 24 Or. 548.

5. It is contended that the plaintiff and its predecessors in interest had been in the adverse possession of the premises in controversy, under a claim of ownership, for a period of more than ten years immediately preceding the commencement of this suit, and that, the statute of limitations having run in its favor, the defendant's right of entry was barred. The evidence shows that the one hundred and forty acre tract was inclosed at the time the sheriff's deed was executed, October 12, 1863, and that a portion of the land was cultivated from that time until the plaintiff received its deed, December 5, 1872, and removed the fence from that part of the tract embraced in the townsite of

Cornelius; that from 1872 to the commencement of this suit the premises in controversy remained open and unclosed, during which time there was no visible evidence of any claim of ownership on the part of anyone; but that the plaintiff appointed persons living at Cornelius to act as its agent, paid the taxes annually assessed on the property most of the time, and sold and conveyed other lots to persons who in some instances erected buildings thereon. From this evidence, it is clear that no adverse title had been acquired by plaintiff's predecessors at the time it received its deed. "The legal title," says Thayer, J., in *Swift v. Mulkey*, 14 Or. 64, "draws after it the possession, and a right of entry is not barred, unless there has been a disseisin followed by an actual, open, notorious, and continuous adverse possession for the period of ten years next prior to the ⁴⁹⁷ commencement of the action. To be an adverse possession, it must be an occupancy under a claim of ownership, though it need not be under color of title." Adverse possession depends upon the intent of the occupant to claim and hold real property in opposition to all the world, and this intent is to be inferred from proof of the occupancy: *Rowland v. Williams*, 23 Or. 515. It must be admitted that the plaintiff claimed title to the locus in quo; but, never having occupied any portion of the premises, its claim of ownership, in the absence of occupancy, can never become the foundation of an adverse right. In *Curtis v. La Grande etc. Water Co.*, 20 Or. 34, Lord, J., in commenting upon the character of such occupancy, says: "To effect that result, the possession taken must be open, hostile, and continuous; he must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest." Tested by this rule, there is nothing to show that the plaintiff ever did anything on the land to notify the defendant that it had invaded the premises in dispute.

6. True, the deed of Halsey and wife described the property as lots and blocks in the town of Cornelius, but adverse possession of it cannot be predicated upon the occupancy of some lot therein by a grantee of the plaintiff. When the premises consist of several known lots or tracts, and are conveyed by the same instrument, each is distinct, and an entry and occupancy of one under color of title is not constructively an occupancy of all: *Wilson v. McEwan*, 7 Or. 87; *Hicklin v. McClear*, 18 Or. 126; *Stewart* ⁴⁹⁸ *v. Harris*, 9 Humph. 714; *Bailey v. Carleton*, 12 N. H. 9; 37 Am. Dec. 190; *Denham v. Holeman*, 26 Ga. 182; 71

Am. Dec. 198; Carson v. Burnett, 1 Dev. & B. 546; 30 Am. Dec. 143.

Plaintiff not having acquired any title by its deed, and there being no evidence of its occupancy of the premises, it follows that the decree must be affirmed.

EXECUTION—ISSUANCE.—An execution is defective and voidable if issued upon a judgment recovered in another county by one person to the use of another, which does not recite to whose use, and where also the original execution was issued by one justice and the execution based on it recited another justice, and where the certificate annexed to the transcript of the execution is signed by a person as clerk without saying of what county or court: Stevenson v. McLean, 5 Humph. 332; 42 Am. Dec. 434. See, also, the extended note to Graham v. Price, 13 Am. Dec. 201, on the effect of a variance between executions and judgments.

JUDGMENTS BY PUBLICATION OF SUMMONS.—If a nonresident is not personally served with process within the state, and does not appear in the action, no valid personal judgment can be entered against him, unless his property is attached in the action, and the effect of such judgment is restricted to the property so attached: Brown v. Campbell, 100 Cal. 635; 38 Am. St. Rep. 314, and note. A personal judgment rendered against a defendant in a bastardy proceeding without his having been arrested or taken into custody, and upon whom no process was served, except unauthorized notice by publication, is void: Moyer v. Bucks, 2 Ind. App. 571; 60 Am. St. Rep. 251, and note.

SHERIFFS—RECITALS IN AS EVIDENCE.—Recitals in a sheriff's deed as to his acts are prima facie evidence of the facts recited: Farrior v. Houston, 100 N. C. 369; 6 Am. St. Rep. 597, and note. Recitals in a sheriff's deed are prima facie evidence of execution levy and sale: Hardin v. Cheek, 3 Jones, 135; 64 Am. Dec. 600, and note.

EXECUTION SALE—EFFECT OF CONFIRMATION.—An order confirming an execution sale adjudicates merely that the proceedings of the officer as they appear of record are regular and a direction to the sheriff to complete the sale: Koehler v. Ball, 2 Kan. 160; 83 Am. Dec. 451, and note.

ADVERSE POSSESSION.—Possession must be actual, continuous, visible, and notorious, as well as hostile to the title of the owner. In order to be adverse: Smeberg v. Cunningham, 96 Mich. 378; 35 Am. St. Rep. 613, and note. To the same effect, see Meacham v. Bunting, 156 Ill. 586; 47 Am. St. Rep. 239, and note. In order to establish a right by prescription, the acts relied upon to create such prescriptive right must have been an invasion of the rights of the party against whom it is set up of such a character as to afford him grounds of action: Wimer v. Simmons, 27 Or. 1; 50 Am. St. Rep. 685.

ADVERSE POSSESSION—DIFFERENT TRACTS.—Where part of a tract of land is covered by two deeds, if the holder of the better title has possession of another part of his tract, but not of that part covered by both deeds, he has, by legal intentment, actual possession of his whole tract, unless the holder of the other title has an actual possession within the intersecting lines: Carson v. Burnett, 1 Dev. & B. 546; 30 Am. Dec. 143, and note. Possession of two tracts of land, adjoining one in dispute, for seven years is not such possession of the latter tract as will give the party in possession good title under the statute of limitations, although the three tracts were conveyed

by one deed, as separate tracts separately described: *Doe v. Cobb*, 1 Jones, 406; 62 Am. Dec. 173. Where a party is in actual occupancy of a part of the land in dispute, claiming the whole tract by adverse possession, he must show that his claim of title is founded upon an instrument in writing to the whole of the disputed premises of which the portion occupied is a part: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334, and note. See, also, the extended notes to *Finch v. Ullman*, 24 Am. St. Rep. 888, and *Taylor v. Buckner*, 12 Am. Dec. 358.

BROWER LUMBER COMPANY v. MILLER.

[2. ORSON, 565.]

CONTRACTS, THIRD PARTY WHEN NOT ENTITLED TO SUE THEREON.—Though a contract with a city for the doing of work upon its streets contains a provision that the contractor will pay all sums of money due from him for materials furnished or work done by others in connection with his contract, he is not answerable to persons who did work or furnished materials for one to whom he had sublet work to be done under his contract.

Ralph R. Duniway, for the appellant.

Gustavus C. Moser, for the respondent.

565 **WOLVERTON, J.** We presume that if Powell, Aschenbrenner, Kruger, and Hyde each has an action directly against the garnishees upon their several demands, the fact that such rights of action exist would constitute a good defense to an action by Miller and Giddings against the garnishees, and, if good against Miller and Giddings, it would also constitute a sufficient defense under the garnishee process. It is intimated, but not strongly insisted upon, that Wickliff's bond to the city forms a sufficient basis upon which actions by Powell and others against the garnishees may be founded, but this cannot be so, for two reasons: 1. Hamilton and Howard are not parties to the bond, and an action based thereon could not go against them; and 2. It is settled by *Parker v. Jeffery*, 26 Or. 186, 569 that they have no action upon the bond even as against Wickliff. In that case, which was an action upon a similar bond given in pursuance of the same ordinances, a party had furnished materials directly to the contractor, and it was held that the bond furnished him no remedy. It is stoutly contended, however, that Hamilton and Howard's liability to Powell and others is established by the clause in the contract wherein it is "further stipulated and agreed, on behalf of the party of the first part, that said party of the first part shall, within ninety days after the completion of the work herein agreed to be performed, pay all sums of money

due at the completion of said work, or thereafter to become due for materials used in and labor performed on or in connection with said work," upon the doctrine, as asserted generally by some of the authorities, that where a party makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him. Before reaching this question, there is another which is involved in some doubt, and that is, whether Hamilton and Howard occupy the same position under the contract, with reference to these parties, as Wickliff; but we will pass the latter, and assume that Hamilton and Howard are liable in all respects under the contract as if they were the original contractors.

It may be premised that the city of Portland was not directly liable to Powell or the other parties asserting demands against the garnishees at the time the contract was entered into, so that the consideration to be paid for the performance of its conditions does not in any way constitute a trust fund in the hands of the contractors for the payment of its obligations; nor can it be said that the contractors have, ⁵⁷⁰ for a consideration, undertaken to pay the obligations of the city. By the very strong current of recent authority, the doctrine contended for by counsel has been much limited and qualified, and, as was said by Mr. Justice Brown, in *Constable v. National S. S. Co.*, 154 U. S. 73: "It is by no means a universal rule that a person may sue upon a contract made for his benefit, to which he was not a party." In *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618, a recent and well-considered case from Minnesota, to which is added an exhaustive annotation of the authorities by the authors of that excellent series of reports, the *Lawyer's Reports Annotated*, Chief Justice Gilfillan, in tracing and discussing the limitations to the rule as generally stated, makes the following deductions from the New York authorities, to which he gives his sanction as correct in principle: "To give a third party who may derive a benefit from the performance of the promise an action, there must be: 1. An intent by the promisee, to secure some benefit to the third party; and 2. Some privity between the two—the promisee and party to be benefited—and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." "There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has a legal interest in the perform-

ance of the agreement"; and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." Like deductions are made from the Massachusetts authorities. From these a further and a more direct and explicit deduction ⁵⁷¹ is discernible, being that which finds support in trust relations, which relations give rise to an implied promise. Such is the result of an investigation of the subject by Bean, C. J., in *Parker v. Jeffery*, 26 Or. 186. He says: "In nearly if not quite every case coming under our notice in which the action has been sustained, unless on a bond or obligation authorized by law, there has been some property, fund, debt, or thing in the hands of the promisor upon which the plaintiff had some equitable claim, and from which the law, acting upon the relationship of the parties, or the fund, established the privity, implied the promise, and created the duty upon which the action was founded." This deduction is reinforced by the principle established by *Washburn v. Interstate Investment Co.*, 26 Or. 436, that where the principal contract is executory in its nature, and there is no fund in the hands of the promisor, or debt or obligation due from him, and he has simply obligated himself to pay the debts of another to a third party, who is neither a party to the contract or consideration, no action will lie in favor of such third party against the promisor. For additional authorities bearing upon the question not cited in the two authorities last referred to, see *Constable v. National S. S. Co.*, 154 U. S. 73; *Burton v. Larkin*, 36 Kan. 246; 59 Am. Rep. 541; *Anderson v. Fitzgerald*, 21 Fed. Rep. 294; *Weller v. Goble*, 66 Iowa, 113; *Durnherr v. Rau*, 135 N. Y. 219; *Parlin v. Hall*, 2 N. Dak. 473; *Morrill v. Lane*, 136 Mass. 93.

Now, do Hamilton and Howard bring themselves within the purview of the rule thus limited and circumscribed, and show themselves obligated in an actionable capacity to Powell, Aschenbrenner, and others? ⁵⁷² We do not think they do. An effort has been made to distinguish *Parker v. Jeffery*, 26 Or. 186, from the case made by the facts herein stated, but we think the principle established is alike applicable to the one case as to the other. The contract with the city is executory in its nature, and it contemplates that the consideration for the intended improvements shall be paid directly to the contractors when the work is completed, without limitations as to its use by them. To be sure, they stipulated with the city that they would, within ninety days, pay all sums of money due at the completion of the work,

or thereafter to become due, for materials used and labor performed in connection therewith, which is a wholesome and salutary provision, required by ordinance, and which inures incidentally and indirectly to the benefit of the material men and laborers; yet it would seem the primary object of the stipulation was for the benefit of the city, as it has exacted a bond in its individual capacity to insure its faithful performance, together with other conditions of the contract. Counsel for respondents invokes in aid of his contention the case of *St. Paul v. Butler*, 30 Minn. 459, but the case does not help him. In reality, it is an authority the other way. The contract therein stated provided that the contractor should "pay all just claims for all labor performed or materials furnished for or on account of said contract as aforesaid," but the bond entered into to secure its faithful performance was given to the city "for the use of all persons who may do work or furnish materials" in pursuance of its provisions. The court expressly held that neither the laborers nor materialmen had any claim against the contractors by reason of the contract, but decided that the bond gave the action upon the like principle as actions are given ⁵⁷³ under our statute upon official statutory bonds to the party sustaining an injury: See *Hill's Code*, secs. 340, 341; *Crook County v. Bushnell*, 15 Or. 169; *Hume v. Kelly*, 28 Or. 398. So we conclude that the contractors (the garnishees herein) have incurred no greater liability in this respect under the contract than they have or would have incurred under the bond, had they executed it instead of Wickliff, the effect of which liability upon the bond was declared in *Parker v. Jeffery*, 26 Or. 186, and the doctrine there enunciated and settled applies with like vitality and cogency here. It follows from these considerations that the judgment of the court below should be reversed, and remanded with directions to enter judgment in favor of plaintiff and against the garnishees for the sum of two hundred and forty-nine dollars and eighty cents, and it is so ordered.

Reversed.

CONTRACTS—THIRD PARTY, WHETHER ENTITLED TO SUE THEREON.—A third party who is only indirectly benefited by a contract has no right of action thereon: *Howsmon v. Trenton Water Co.*, 119 Mo. 304; 41 Am. St. Rep. 654, and note. This subject will be found thoroughly discussed in the monographic note to *Linneman v. Moross*, 39 Am. St. Rep. 531-535.

COMMERCIAL BANK v. SHERMAN.

[28 OREGON, 573.]

FOREIGN CORPORATION, TRANSACTION OF BUSINESS BY, WHAT IS NOT.—The purchase by a foreign corporation of a promissory note in this state with no purpose of doing any other act here is not a transaction of business within the meaning of the statute requiring every such corporation, before transacting business in the state, to execute and cause to be recorded a power of attorney in the county clerk's office in each county where it has a resident agent.

Action upon a promissory note made in June, 1891, at Portland, by J. L. Lewis and others, and delivered to the defendant, who, in October of the same year, sold and indorsed it to the plaintiff, a banking corporation, organized and doing business under the laws of Washington. The defendant claimed that the plaintiff was precluded from maintaining the action, because it had not complied with the statute of Oregon declaring that a foreign banking corporation, "before transacting business in this state, must duly execute and acknowledge a power of attorney, and cause the same to be recorded in the county clerk's office of each county where it has a resident agent, which power of attorney, so long as such company shall have places of business in this state, shall be irrevocable, except by the substitution of another qualified person for the one mentioned therein as attorney for such company." Judgment for plaintiff, and defendant appealed.

Paxton & Beach, Charles H. Carey, and J. W. Paddock, for the appellant.

W. Bryon Daniels, and Williams, Wood & Linthicum, for the respondent.

575 BEAN, C. J. It must be conceded that the contracts of any of the foreign corporations named in the title of the act of 1864 of which the section referred to is a part, carrying on business here without first having executed and caused to be recorded a power of attorney as required by the statute are void, and no action can be maintained thereon by the corporation: *Bank of British Columbia v. Page*, 6 Or. 431; *Hacheny v. Leary*, 12 Or. 40; *In re Comstock*, 3 Saw. 218; *Semple v. Bank of British Columbia*, 5 Saw. 88. But the record shows that, at the time the plaintiff made the contract upon which this action is based, it was not carrying on, or proposing to carry on, its corporate business in this state, and, so far as appears, the purchase of the note

in question was the only business ever done or contemplated by it here. The single inquiry presented by this record, therefore, ⁵⁷⁶ is whether a foreign banking corporation purchasing a promissory note in this state, and with no purpose of doing any other act here, is "transacting business" in the state, within the meaning of the statute. It seems to us this question must be answered in the negative. In our opinion, the statute, when reasonably construed, was intended to prohibit certain foreign corporations coming into this state for the purpose of transacting their ordinary corporate business without first appointing some resident agent upon whom service of summons could be had in case of litigation between them and citizens of the state, and was not designed or intended to prohibit the doing of one single isolated act of business by such a corporation, with no intention apparent to do any other act or engage in business here. It will be noticed the statute does not require the power of attorney to be recorded before "doing any business," but "before transacting business," and that it shall be filed in every county where the corporation has "a resident agent," and shall be irrevocable, except by the substitution of another qualified person for the one named therein, so long as the corporation shall have "places of business" in the state. These provisions would seem necessarily to indicate that the statute was intended to apply to a corporation whose actual or contemplated business in the state is such as to admit of its having resident agents or places of business therein. And, to have a resident agent or place of business, it must be carrying on, or intending to carry on, its ordinary corporate business, for a corporation doing but a single act of business, with no intention of doing more, could not, in the nature of things, be expected to have a resident agent or place of business. To require a foreign banking corporation to ⁵⁷⁷ execute and file the power of attorney required by the statute as a prerequisite to its right to purchase a promissory note or take a mortgage to secure a debt, or to do any other single act of business, when there was no purpose or intention to engage in banking here, would be a very narrow, harsh, and, we think, an unwarranted construction of the statute. The following authorities, although under statutes differing in detail from ours, tend to support this conclusion: Murfree on Foreign Corporations, sec. 65, et seq; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; Florsheim etc. Co. v. Lester, 60 Ark. 120; 46 Am. St. Rep. 162; Potter v. Bank of Ithaca, 5 Hill, 490; Gilchrist v. Helena etc. Ry.

Co., 47 Fed. Rep. 593. There is nothing in the former decisions of this court or of the federal court construing our statute, which, in our opinion, conflicts with these views. In *Semple v. Bank of British Columbia*, 5 Saw. 88, *In re Comstock*, 3 Saw. 218, and *Bank of British Columbia v. Page*, 6 Or. 431, the bank was regularly engaged in the transaction of its corporate business in the state. The case of *Hacheny v. Leary*, 12 Or. 40, involved the construction of a statute of the then territory of Washington as applied to a contract made in the territory. That statute differed in many respects from the one now before us, and, besides, the case discloses that the corporation had an agent in Washington actually engaged in the business of soliciting and receiving applications for insurance. For these reasons, the case is distinguishable from the one under consideration.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

CORPORATIONS—FOREIGN—DOING BUSINESS WITHIN STATE—WHAT IS NOT.—The taking of a single mortgage in this state by a foreign corporation, to secure a pre-existing debt for goods sold in another state, is not doing business within the state, within the meaning of a statutory or constitutional provision prohibiting the doing of such business, except when the corporation maintains one or more places of business within the state and an authorized agent on whom process against it may be served: *Florsheim etc. Dry Goods Co. v. Lester*, 60 Ark. 120; 46 Am. St. Rep. 162, and note.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

MUTUAL BENEFIT COMPANY'S PETITION.

[174 PENNSYLVANIA STATE, 1.]

EVIDENCE—DEATH—PRESUMPTIONS.—If a member of a benefit association, without being exposed to any specific peril, suddenly disappears under circumstances of such character as to refute the theory of abandonment of family, friends, and business, and soon after his name is stricken from the roll of members for non-payment of an assessment falling due after his disappearance, and his widow shortly thereafter brings an action to recover death benefits, it must be presumed that the member lived for seven years after his disappearance. The presumption of death does not arise until the expiration of the seven years. The burden of proof is on the widow to show that the member was dead at the time his name was stricken from the roll, and without such proof she cannot recover.

EVIDENCE—DEATH—PRESUMPTION OF.—A person who suddenly and mysteriously disappears, and is not seen, heard of, or known to be living, for seven years thereafter, is presumed to be dead; but the presumption of death does not arise until the expiration of that time, unless it is shown that, in the mean time, he has come in contact with some specific peril of such nature as to quicken the operation of time.

Action to recover a death benefit. Judgment for the defendant, and plaintiff appealed.

S. B. Huey, for the appellant.

G. P. Rich and H. C. Boyer, for the appellee.

• **PER CURIAM.** Appellant's claim on the fund for distribution was based on a certificate of membership issued by the Mutual Benefit Company, to her husband in 1876, coupled with averments of his death on October 10, 1881, and of her right as beneficiary to the sum of four thousand dollars payable on

the happening of that event. The burden of establishing the fact of his death on the last-mentioned date was on her; and for that purpose testimony was introduced to prove circumstances attending his disappearance on that day, and that, notwithstanding diligent efforts were made to ascertain his whereabouts, etc., nothing has ever been heard of him. It was also shown that his relations in life—business, social, domestic, etc.—were all of such a character as to refute the theory of abandonment of family, friends, business, and everything calculated to conduce to his comfort and happiness.

Guided by the rule adopted by this court in *Burr v. Sim*, 4 Whart. 150, 33 Am. Dec. 50, and rigidly adhered to in subsequent cases, among which are *Bradley v. Bradley*, 4 Whart. 173, *Whiteside's Appeal*, 23 Pa. St. 114; *Esterly's Appeal*, 109 Pa. St. 222, and *Welch's Appeal*, 126 Pa. St. 297, the learned auditor and court below held that there was nothing in the facts of the case, as shown by the testimony, to warrant the presumption that appellant's husband died at the time of his disappearance, October 10, 1881, or at any time within less than seven years thereafter. In this, we think they were clearly right.

In *Burr v. Sim*, 4 Whart. 150, 33 Am. Dec. 50, Mr. Chief Justice Gibson, after referring to the English rule, etc., said: "The presumption of death, as a limitation of the presumption of life, must be taken to run exclusively from the termination of the prescribed period; so that the person must be taken to have then been dead and not before. Indeed, that is a necessary conclusion from viewing it, not merely as a limitation, but as a countervailing presumption, which, as it does not supplant its predecessor before the end of the period, assumes no more than that the individual and the period expired together; and the predecessor, still being in force to rule the case in respect to the time covered by it, is sufficient to sustain an inference of intermediate existence throughout. Thus the presumption of life continues till it is displaced by a more potent one, which, however, has no retroactive force; and, ¹⁰ indeed, it would be of little use if it had, for to leave the time of the death still uncertain would leave a perplexity which it was its purpose to remove. It is undoubtedly true that additional circumstances of probability may justify a presumption that the death was still sooner; but these, where they operate, introduce a distinct and dissimilar principle." To justify the introduction of that dissimilar principle, and its application in any case, there must be, as was afterward said, some "evidence that the individual was, at some particular date, in contact with

a specific peril as a circumstance to quicken the operation of time." In the case now under consideration that element is entirely absent. There is nothing in the testimony to show that appellant's husband, when last seen or heard of, was exposed to any such specific peril, or to any peril sufficient to take the case out of the operation of the general rule above stated. Mere general perils are not sufficient.

Burr v. Sim, 4 Whart. 150, 33 Am. Dec. 50, and subsequent cases, in the same line, have established a rule of property in this state which cannot be changed by us without disastrous consequences. Irrespective of that, however, it is more than doubtful whether any change or modification of the rule would be at all desirable.

Decree affirmed and appeal dismissed, with costs to be paid by appellant.

EVIDENCE—DEATH—PRESUMPTIONS.—When a person goes abroad, and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of: *Whiting v. Nichol*, 46 Ill. 230; 92 Am. Dec. 248, and note. The presumption of death arises from the absence of a person from his domicile without being heard from for seven years: *Bardin v. Bardin*, 4 S. Dak. 305; 46 Am. St. Rep. 791; *Johnson v. Merithew*, 80 Me. 111; 6 Am. St. Rep. 162, and note. To the same effect see *Dowd v. Watson*, 105 N. C. 476; 18 Am. St. Rep. 920, and note. This subject is fully treated in the extended notes to *Hoyt v. Newbold*, 46 Am. Rep. 761-772, and *Sprigg v. Moale*, 92 Am. Dec. 704-708.

DEMPSEY v. DOBSON.

[174 PENNSYLVANIA STATE, 122.]

MASTER AND SERVANT—RIGHT TO INVENTIONS MADE BY SERVANT.—If a servant experiments at the expense of his master and for the latter, with a view to the immediate use of the result of such experiments in the master's business, the invention or recipe resulting from the experiments belongs to the latter, so as to give him the right to use it. The servant has a right to preserve the invention or recipes for his own future use; but this right is not exclusive as against his master; and if the servant does not record it in the master's books which it is his duty to keep, and records it in his own private book alone, the master is entitled to a copy when the servant leaves the employment, and is not liable in damages for detaining the servant's books in order to make and preserve such copy.

EVIDENCE.—AN UNANSWERED LETTER containing the writer's argumentative presentation of his view of his rights and grievances is a declaration in his own behalf and inadmissible in his favor.

Trespass for the wrongful taking of color-books. Judgment for plaintiff. Defendants appealed.

R. P. White, for the appellants.

F. C. Brewster and G. W. Harkins, for the appellee.

¹²⁹ WILLIAMS, J. The defendants are extensively engaged in the manufacture of carpets. The value of their products in the market and the demand for them by purchasers depend largely upon the artistic character of the patterns or designs upon which they are made, and the harmony and general effect of the shades of color by which they are brought out. The designs are prepared by persons employed for that special purpose. When a new design has been made and adopted by the manufacturers, it is sent to the color-room, which is in charge of a color mixer. The duty of the color mixer is to prepare the dyes or colors so as to reproduce in the carpet all the shades indicated by the design. He submits the results of his work to the designer. When approved, it becomes his duty to enter in a book kept for that purpose, and called a "color-book," the number of the carpet and the formula by which each shade of color used in its manufacture is produced. He is also required to keep a book in which a piece of yarn colored according to the formula for each shade in the carpet is preserved with the number of the carpet to which the shades belong. This is known as the "shade-book." When the manufacture of this particular carpet is about to be begun, the color mixer prepares the colors for actual use. When mixed and ready for use, they are put into large pitchers, and on each pitcher is put a label with the formula or recipe by which the color it contains was prepared, together with the number of the carpet upon which it is used; so that when a pitcher is emptied, it can be refilled by any of the employes about the color room by following the recipe appearing ¹³⁰ on the label. The designer and the color mixer, like the printer and the weaver, are employed, and their wages adjusted, with reference to their skill and experience in the department of work to which they are assigned. They are not independent contractors, producing designs or shades of color by a secret process of their own which they sell as patterns or colors to the manufacturer for a fixed price, but they are employes bringing their skill and experience, in the use of the materials furnished by their employer, into his service, for his benefit in the production of his goods. The designs and recipes so made for him are, as between his employes and himself, his for the purposes of his own manufacturing business. Even if his employé had obtained letters patent for his formula, protecting himself thereby against the public, still the employer's right to continue its use would be protected by the

United States courts: *Solomons v. United States*, 137 U. S. 342. The same conclusion was reached by this court in *Slemmer's Appeal*, 58 Pa. St. 155, 98 Am. Dec. 248, where we said: "If one employed by another, whilst receiving wages, experiments at the expense of his employer, constructs an invention, and permits his employer to use it without compensation paid or demanded, and then obtains a patent, a license to the employer to use the patent will be presumed." But this case is much stronger than that of one who obtains a patent as in *Slemmer's case*, for here the experiments resulting in the recipes were not only made at the expense of the employer, but for him, and with a view to the immediate use of their results in his business. It was the sole and only purpose for which the color mixer was employed and paid. In the manufacture of carpets the spinning of the yarn is no more a part of the process than is the preparation of the colors to be made use of in working out the pattern. The fact is, that the spinner and the weaver, the color mixer and the printer who uses the colors, are all alike in their relation to their common employer. The labors of all are necessary to the production of a carpet, and the results of the labor of all belong to the employer who pays for the labor. The recipes prepared by the color mixer, for the use of his employers in the manufacture of their carpets, belong to them, so far at least as to give them the right to continue the use of the various colors and shades produced by them. The plaintiff had a right, if he chose so to do, to preserve them for his own ¹³¹ use in the future, but his right was not an exclusive one. It was his duty, by virtue of his employment, and by reason of the relation his work bore to his employer's business, to enter all these recipes in his employer's color-book; for none of the patterns of carpet manufactured during the twenty years of the plaintiff's service could be reproduced without the use of the same recipes, for the preparation of the colors to be employed, that had been used when the pattern was first produced. This duty, to put it in the mildest form, the plaintiff had improperly neglected. His employers were left under the belief that their color-books had been used, and that the books he was attempting to carry away were in every sense of the word their own property. Had this been true, their conduct in requiring him to leave them in the mill would have given the plaintiff no cause of action. In respect to this subject, the mistake under which they labored was due to the plaintiff's failure in duty as an employé. He had pushed the blanks furnished to him to one side and had used only his own, and had left his em-

ployer in ignorance of his conduct. Now, let it be conceded that the books he was attempting to carry away were his own; it is nevertheless true that they contained the only record of the recipes used in the mill for twenty years, and that these recipes were a part of the stock in trade of his employers. Not perhaps the particular copy of them which the plaintiff had entered in his own books, but the processes and combinations they represented belonged, for the purposes of their business, to them, and, as between him and them, they had a right to some record or register of recipes.

If the plaintiff had a right to recover in this action because of the ownership of the books in which the recipes had been entered and the manner of his detention, when he attempted to take them away, the jury should have been instructed that the value of the recipes was not to be considered in estimating the damages. As between these parties, as we have already said, the plaintiff had no exclusive right to them. It was his duty as a color mixer to enter each formula in his employer's books. They had a clear legal right to the knowledge which such a record would afford them, and the copies they have made from his books should have been made for them by the plaintiff as the several colors were compounded during his long term of ¹² service. The plaintiff's claim for damages must rest on the fact that he owned the books that were kept from him. In addition to this, anything in the manner of the detention that shows unnecessary violence or disregard for the sensibilities or the self-respect of the plaintiff may be considered. But the jury should be told in this connection that they should also consider the conduct of the plaintiff—his disregard of his duty and his instructions in making no entries in his employer's color-books—his failure to disclose this fact to them, and leaving them under the honest belief that he was removing from their mill their own color-books. The portions of the charge embraced in the fifth, sixth, and seventh assignments of error, if stated as abstract propositions, would be unobjectionable, but as applicable to the facts of this case they were, in the view we have taken of this case, misleading. The plaintiff does not seem to have suffered any special inconvenience or injury because of the detention of his books, and he has no right to complain that the defendants are now in possession of one list or register of their own recipes. They are entitled to such a register, and it should have been made for them by the plaintiff. If he had discharged his whole duty as an employé the misunderstanding which led to the detention of his books could not have occurred,

and this litigation would never have arisen. The first assignment must also be sustained. The letter written after the plaintiff's color-books had been returned to him, demanding that the copy that had been made should be given up to him, was inadmissible. It was an argumentative presentation of his view of his rights as an employé and of the grievance of which he complained. It was unanswered. It was the declaration of the plaintiff in his own behalf, and was no more admissible because reduced to writing than it would have been if delivered orally. The point is substantially ruled in *Fraley v. Bisphan*, 10 Pa. St. 320; 51 Am. Dec. 486.

The judgment is reversed for the reasons now given and a venire facias de novo awarded.

Rights of an Employer to Inventions Made by his Employees.

A master simply as such, in the absence of contract, has no exclusive right to the inventions of his servant. "Persons are not deprived of their right to their inventions while in the services of others, unless they have been hired and paid to exercise their inventive faculties for their employers. A contract by which one person agrees to pay a sum of money for the time, labor, and skill of another, for a given period, gives the employer no right to an assignment of a patent that is issued to his employé for an invention made during the period of his employment," although the employé is assisted by the employer who pays for the materials used in getting up the invention: *Hapgood v. Hewitt*, 11 Biss. 184; affirmed, 119 U. S. 226; *Solomons v. United States*, 137 U. S. 342.

An employé who is the first discoverer of a process is entitled to a patent therefor, as against his employer, at whose request and expense he was making experiments which led to the discovery: *Damon v. Eastwick*, 14 Fed. Rep. 40. One who has employed a skilled workman, for a stated compensation, to take charge of works, and to devote his time and services to devising and making improvements in articles manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of an express agreement to that effect: *Dalzell v. Durber Mfg. Co.*, 149 U. S. 315; *Dice v. Joliet Mfg. Co.*, 11 Ill. App. 109; affirmed, 105 Ill. 649. "The mere fact," outside of any specific contract, that the appellant was in the employment of the appellee and received wages, and even used the material of appellee in the manufacture of his models and even received assistance in making models from the latter's employés would not give it the property in the invention, to the exclusion of the former. An invention is the product of the mind, and the making of models and performing of the experiments are only mechanical operations, and mere labor performed for appellant under his direction, for which he would be liable to be charged, or the time lost deducted from his wages or time. As between employer and employé, the right to the invention belongs to the one who conceives the idea, and follows it out to practical invention:

Agawam Co. v. Jordan, 7 Wall. 602; *Collar Co. v. Van Dusen*, 23 Wall. 563"; *Dice v. Joliet Mfg. Co.*, 11 Ill. App. 114.

If an employer hires a man of an inventive mind to invent for him, under a special agreement that he shall own the invention when made, it, when made, becomes in equity the property of the employer, and he is entitled to an assignment of any patent therefor taken out by the employé: *Joliet Mfg. Co. v. Dice*, 105 Ill. 649; *Continental Windmill Co. v. Empire Windmill Co.*, 8 Blatchf. 295.

If an employé makes an invention of value and takes out letters patent for it, his employer, if he makes use of the invention without the consent of the patentee, becomes liable to pay the patentee therefor, but if the employé is directed to devise or perfect an instrument or means of accomplishing a prescribed result, and he obeys and succeeds, and takes out letters patent for his invention or discovery, he cannot thereafter plead conclusive title thereto as against his employer: *Solomons v. United States*, 137 U. S. 342.

If an employé assigns his invention to his employer, who takes out a patent on it, and the employé then makes new devices for, and as a part of, the patented article, he cannot claim, after leaving the employment, that such devices are not the ones patented, and, if he makes them himself, he is an infringer: *Time Tel. Co. v. Hummer*, 19 Fed. Rep. 822.

If one engages the services of an inventor under a contract that he shall devote his ingenuity to the perfecting of a machine for the employer's benefit, the latter can lay no claim to improvements conceived by the employé after the expiration of such agreement: *Appleton v. Bacon*, 2 Black, 699.

A person employed for the purpose of perfecting certain machinery, and bound to devote his skill and labor to the interest of his employer, is not by that fact under obligation to abstain from applying for a patent in his own name for such machinery: *Green v. Willard Barrel Co.*, 1 Mo. App. 202.

Right to Use Patented Article.—It is a rule of universal application that, if an employé, without any express agreement, uses the time, tools, and money of his employer, with his consent, in making an invention, and then applies it practically in the employer's business, the law implies a license to the employer to continue to use the invention in his business even after the relations between the employer and the inventor have been dissolved, although the employé has taken out a patent therefor: *McClurg v. Kingsland*, 1 How. 202; *Slemmer's Appeal*, 58 Pa. St. 155; 98 Am. Dec. 248; *Solomons v. United States*, 137 U. S. 342; *Lane etc. Co. v. Locke*, 150 U. S. 193. "When one is in the employ of another in a certain line of work and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practical form his invention, and explicitly assents to the use by his employer of such invention, a jury, or the court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment, and the benefits resulting from his use of the property, and the assistance of the employés of his employer, as to have given to his employer an irrevocable license to use such invention": *Solomons v.*

United States, 137 U. S. 346; *Jencks v. Langdon Mills*, 27 Fed. Rep. 622. If an employé, by using the tools, time, and money of his employer with his consent, makes an invention and applies it in his employer's business, the employer may continue to use it, and, if the improvement is a process, it has been held that the employer may continue to practice the process for the whole period of the patent: *McClurg v. Kingsland*, 1 How. 202. If an employé is hired to invent and does so, and puts his invention into use in his employer's business, the latter has the right to use the particular device until it is worn out, although he acquires no rights in the patent itself: *Whiting v. Graves*, 3 Bann. & A. Pat. Cas. 222. If the employé constructs his invention for the use of his employer, and uses it until he applies for a patent, the employer has a right to use the patented article until it is worn out: *Magonn v. New England Glass Co.*, 3 Bann. & A. Pat. Cas. 114. An inventor and employé, having supervised and directed the building of his machine for his employer, a license in favor of the latter to use it as long as it lasts is implied: *American Tube Works v. Bridgewater Iron Co.*, 26 Fed. Rep. 334. A contract for the exclusive right to an employé's inventive skill for a specified period carries an exclusive license to use all inventions made during that period, under all patents and extensions, and also a license to use all inventions previously patented, but first made available during that period: *Wilkins v. Spafford*, 3 Bann. & A. Pat. Cas. 274. If patented improvements are developed and perfected at the sole expense of an employer, by employés who receive extra pay because of their known ability as inventors, these facts alone make a very strong case in favor of the right of the employer to use such improvements without further compensation: *Bensley v. Northwestern Horse Nail Co.*, 26 Fed. Rep. 250. If an inventor, while employed by a manufacturer as superintendent, prepares new designs for use in his employer's business, for some of which he has obtained patents, and after one of the patented designs has thus been used in the business for some time, he leaves the employment and assigns the patent right, with the exclusive right to manufacture, to a third party, the latter cannot enjoin the original employer from manufacturing from the assigned design as the latter has an implied grant, license, or privilege to use the design, arising from the former relation between himself and the inventor: *Herman v. Herman*, 29 Fed. Rep. 92. If it appears that the invention for which the patent in question was granted was developed while the employé was in the service of the employer, that the experiments and work in making the models were done at his factory, that the patent was taken out by his counsel, at his expense, and that articles were made at his factory, and put upon the market as his goods, without any charge made or demanded for the use of the invention, though made and sold under the supervision of the patentee while such employé, the employer is entitled to an irrevocable exclusive license for the use of such patent: *Eustis Mfg. Co. v. Eustis*, 51 N. J. Eq. 565. In one case, a manufacturing company was preparing to put upon the market a new machine. Its superintendent, knowing this intention, voluntarily disclosed to the company a device of his own, and by direction of the company, with its materials and at its expense, voluntarily applied

the device to the machines. It was held that this did not imply an agreement for the absolute assignment to the company of a patent for the device, but implied a perpetual license to the company to apply the device at its factory and sell the machines anywhere: *Fuller etc. Mfg. Co. v. Bartlett*, 68 Wis. 73; 60 Am. Rep. 838. In another case, an inventor was employed, at a salary by a manufacturer, to devise a new and improved machine and superintend the making thereof, with knowledge that his employer intended to construct the machines for sale. After the new machine was invented, the inventor left the employment and obtained a patent, and the manufacturer continued to make and sell the machines. The original patterns were destroyed by fire subsequently, but new ones were made by the employer, and he continued to make and sell the machines. The inventor claimed, but was refused, a royalty on the machines sold, and, afterward brought a suit for infringement of patent against the users of machines purchased from the manufacturer. It was held that the employer had an implied license to make and sell the machines, and that this license was not terminated by the destruction of the original patterns: *Washington etc. Mfg. Co. v. Kinney*, 68 Fed. Rep. 500. An employé who is the owner of a patent cannot introduce his patented device into his employer's business without the latter's consent, and without a special agreement to pay him and afterward demand royalties or profits or damages for the use of such device, especially when the device has been developed and brought to a practical condition at the expense of the employer: *Barry v. Crane etc. Mfg. Co.*, 22 Fed. Rep. 396.

EVIDENCE—LETTERS, WHEN NOT ADMISSIBLE AS.—A party cannot be permitted to read in evidence an unanswered letter from himself to the adverse party for the purpose of proving the truth of facts stated in it, though it was in reply to a letter to himself which had been put in evidence: *Fearing v. Kimball*, 4 Allen, 125; 81 Am. Dec. 690. A letter written by one party to a transaction to the other party after the transaction, giving his version of it, and not answered by the other party, is not competent evidence against the latter as an admission: *Learned v. Tillotson*, 97 N. Y. 1; 49 Am. Rep. 508.

GIBERSON v. PATTERSON MILLS COMPANY.

[174 PENNSYLVANIA STATE, 369.]

EVIDENCE.—DECLARATIONS AND ADMISSIONS OF AN AGENT made after a transaction is fully completed are not admissible against his principal.

EVIDENCE—PRINCIPAL AND AGENT.—DECLARATIONS of a superintendent of a mill to the effect that a hanger therein had been condemned, and should be removed, if made away from the mill some days after a servant in the mill has been injured by the breaking of such hanger, are not admissible in evidence in favor of such servant and against his master.

NEGLIGENCE—INSTRUCTIONS.—In an action by a servant to recover for personal injuries sustained through the alleged negligence of the master, an instruction which ignores the possible effect of the negligence of a fellow-servant, upon which there is evidence, is erroneous.

I. Johnson and W. H. Harrison, Jr., for the appellant.

A. A. Cochran and A. D. MacDade, for the appellee.

³⁷³ STERRETT, C. J. Plaintiff was injured by the breaking of an iron hanger—used for holding up shafting in defendant company's mill—while he and a fellow workman, named Taylor, was putting the hanger in place. On the trial, the court permitted plaintiff to prove declarations of the superintendent of the mill—made several days after the occurrence and away from his place of business—to the effect that the hanger had been condemned, and should not have been put up there, etc. In his charge, the learned trial judge commented on this testimony, and instructed the jury that if what the superintendent had said in relation to the hanger were true, the plaintiff might recover. In refusing to affirm defendant's tenth request for instructions recited in the seventh specification, he also said, *inter alia*: "The great question, gentlemen, in this case, is, Can you rely with certainty upon the statement of the plaintiff, his wife, and daughter, that Mr. Davis, the superintendent, knew that this was imperfect machinery, and that it was before condemned?"

In admitting the declarations of the superintendent of the mill, made in the circumstances disclosed by the testimony of the witnesses, and in afterward instructing the jury as he did, in relation thereto, we think there was error. It has been held, in a long line of cases, that admissions made by an agent as to past occurrences are not competent evidence to affect his principal: *Huntingdon etc. R. R. Co. v. Decker*, 82 Pa. St. 119, and cases there cited. Speaking for this court, Mr. Justice Mercur, in that case, said: "It is a well-established rule that the declarations of an agent, made at the time of the particular transaction which is the subject of the inquiry, and while acting within the scope of his authority, may be given in evidence against his principal, as a part of the *res gestae*. It is equally well settled that the declarations of an agent, made after the transaction is fully completed and ended, are not admissible." ³⁷³ This principle has been recognized with approval in subsequent cases, including *Dampman v. Pennsylvania R. R. Co.*, 166 Pa. St. 520. It therefore follows that the first four and the seventh specifications must be sustained.

The learned judge's answer to defendant's request for charge recited in the fifth specification is also erroneous, in that it ignores the effect that may have resulted from the possible negligence of Taylor, plaintiff's fellow-workman, in unskillfully and negligently adjusting the set-screws too tightly—so much too

tightly that the hanger was thereby broken. This was by no means an unimportant matter, because there is some testimony tending to show that the hanger was broken in consequence of carelessly and improperly tightening the set-screws, by either Taylor or the plaintiff.

Judgment reversed, and a venire facias de novo awarded.

AGENCY—DECLARATIONS OF AGENT AS TO PAST TRANSACTION.—An agent, after a transaction has been completed, cannot bind his principal by any admission or declaration he may make concerning its character: *Borland v. Nevada Bank*, 99 Cal. 89; 37 Am. St. Rep. 32, and note; *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; 30 Am. St. Rep. 87, and note; *Plymouth County Bank v. Gilman*, 3 S. Dak. 170; 44 Am. St. Rep. 782. To the same effect see *Phelps v. James*, 80 Iowa, 398; 41 Am. St. Rep. 497.

PLUCKER v. TELLER.

[174 PENNSYLVANIA STATE, 529.]

PLEDGE—SALE OF—NOTICE.—A pledgee is, within certain limits, a trustee for the pledgor, and must act for the latter's interests, as well as his own, but their interests are not identical; and when they may require different action, the pledgee is entitled to regard his own interest alone, after having put the pledgor on his guard by notice that he must look out for himself.

PLEDGE—EXECUTION SALE OF PROPERTY—TRUST—NOTICE.—If default is made in the payment of a pledged mortgage, and the pledgee at the request of the pledgor forecloses the mortgage and sells the property at sheriff's sale, after giving explicit notice to the pledgor that he would act only for himself and would not bid the property in for any more than enough to protect his interests, and that, if the pledgor desired to bid anything above that amount he must be on hand, the pledgee may purchase the property at such sale in his own right, free of any trust in favor of the pledgor, and the latter is not entitled to any share of the profits realized by the pledgee on a resale of the property. In such case the burden of proof is on the pledgee to show that he is entitled to purchase clear of any trust for the pledgor, but in any event he is entitled to commissions paid by him for the resale of the property.

Assumpsit to recover profits made from the sale of realty. On April 25, 1891 plaintiff borrowed twelve hundred dollars from defendant, and assigned to him a mortgage for two thousand five hundred dollars as collateral security. On October 21, 1891, the loan being then almost due, and the mortgagor being in default, plaintiff requested the defendant to foreclose the mortgage. The defendant foreclosed the mortgage, had the property sold at sheriff's sale, bid it in himself, and afterward resold it at a profit. This suit was brought to recover such profit. Judgment for plaintiff. Defendant appealed.

J. G. Johnson, G. P. Rich, and H. C. Boyer, for the appellant.

O. Rambo, for the appellee.

534 MITCHELL, J. The principle that a pledgee shall not make a profit out of the pledge without liability to account for it to the pledgor is beyond question, but it is not applicable to the facts of the present action. It is not the case of a sale by the pledgee against the will or in derogation of the interest of the pledgor, or without notice to him, but one made by the pledgor's direction or request. The interest on the mortgage pledged, as well as on the prior mortgage, being paid, its value as an investment and as collateral security for the debt was depreciating, and the appellee himself called upon the appellant to realize on it by selling it out. This could not have been done by the terms of the pledge, which only authorized appellant to sell and transfer the mortgage, a power which, of course, would have to be strictly pursued. By waiting a few days until his debt matured, appellant, under the terms of the pledge, could have sold the mortgage at public or private sale, with the right to purchase and hold free of any trust or claim on the part of plaintiff. This, however, he did not do, but, acquiescing in plaintiff's request, he sued out the mortgage, and in due course the property was put up by the sheriff for sale. Appellant was under no obligation to bid, but chose to do so in order to protect his interest in the mortgage as security for his debt. Had he bought in the property without further notice to the plaintiff, the presumption might still have been that the purchase was to preserve the pledge for their mutual benefit according to their respective rights, and therefore that the relation of trust still continued, and the sale made, as the learned judge below held that it did, a mere substitution of the land for the mortgage. But appellant did not take this course. He gave explicit notice that he would act only for himself, and would not bid up the property for any more than enough to protect the loan, and that if plaintiff desired to bid anything above that amount, it would be necessary for him to be on hand himself. This relieved appellant from any trust in case he purchased, and put him in the position of an ordinary purchaser at a mortgage sale, who takes a clear title, even though he be the mortgagee.

535 This feature clearly distinguishes the present case from *Brown v. Tyler*, 8 Gray, 135, 69 Am. Dec. 239, *In re Gilbert*, 104 N. Y. 200, and the other New York cases cited by appellee. In fact, this case is more closely analogous to *Bloomer v. Sturges*, 58 N. Y. 168, in which the mortgagee was made a party defend-

ant to the assignee's bill of foreclosure, and his interest was held to have been extinguished. The principle of all the cases is, that the pledgee, being within certain limits a trustee, is therefore presumed to act for the pledgor's interest as well as his own, but their interests are not identical, and, where they may require different action, the pledgee is entitled to regard his own, after having put the other party on his guard, by notice to him that he must look out for himself. This is what appellant did. When he bought, therefore, he bought for himself, and in his own right. He thereby elected to take the property on account of the debt. If he had subsequently sold it at a loss he could not have called upon the plaintiff to make good the deficiency, for there was evidence that the latter had distinctly refused to preserve his interest by any separate bid of his own at the sale. On the other hand, appellant, having taken the risk was entitled to the profit on the resale. The burden of showing the circumstances that entitled him to buy clear of any trust for the pledgor being on the appellant, the case must go to the jury on that point.

In any view of the case, it was error to disallow the claim for commissions. If the jury should find in plaintiff's favor, he would thereby get the profit of a good sale, and he should pay the commissions earned by the firm which made it.

Judgment reversed and venire de novo awarded.

PLEDGE-SALE-NOTICE.—A pledgee of personalty cannot, to the injury of his pledgor, transfer the pledge or divest the pledgor of the title thereto until he has demanded payment and given the pledgor opportunity to redeem, and then only at public sale and on notice: *Drake v. Cloonan*, 99 Mich. 121; 41 Am. St. Rep. 586; *Jeanes' Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624. At common law, the pledgee had no right to sell the property pledged without judicial process, unless he gave the pledgor reasonable notice to redeem, and the pledgor was also entitled to notice of the pledgee's intention to sell, and of the time and place of sale: *McDowell v. Chicago Steel Works*, 124 Ill. 491; 7 Am. St. Rep. 381. See, also, the note to *Cooper v. Simpson*, 16 Am. St. Rep. 670, and the extended note to *Griggs v. Day*, 32 Am. St. Rep. 730, 731.

PLEDGE-SALE BY PLEDGEE TO HIMSELF.—It appears to be possible by agreement between the parties to authorize the pledgee to purchase the pledged property at a sale made by himself. In the absence of such an agreement, a sale of the pledgee to himself, whether his name is used or the property is bid off in the name of another for his benefit, is void, and leaves him the owner of the pledge as before such sale: Extended note to *Griggs v. Day*, 32 Am. St. Rep. 731.

WAGONER'S ESTATE.

[174 PENNSYLVANIA STATE, 556.]

GIFTS.—DELIVERY OF PROPERTY with intent to give is absolutely necessary to the validity of a gift. Words alone are not sufficient.

GIFTS.—DELIVERY.—A gift of a bond with a warrant of attorney to confess judgment, when delivered by the donor to a third party to be held by him until the donor's death and then given to the donee, who has knowledge of this arrangement, is a valid gift in trust, which becomes absolute by delivery by the trustee to the donee after the donor's death, notwithstanding the fact that the bond is to bear interest during the donor's life, and this mistake is rectified by the indorsement of the payment of interest on the bond without the actual payment thereof. In such case, the fact that the bond is subject to redelivery to the donor in case he outlives the donee does not invalidate the gift, if there is no express provision for such redelivery reserved in the trust.

W. M. Hayes and J. C. Hayes, for the appellant.

A. T. Parke, for the appellee.

⁵⁵⁰ DEAN, J. William A. Wagoner, on the 1st of April, 1893, being possessed of a considerable estate, both personal and real, died intestate, unmarried, and without issue. There were many collateral relatives, among them a niece, Frances S. Dorlan, this appellant. She had lived in the house of her uncle thirty ⁵⁵¹ years; the fifteen preceding his death she was the only member of his family. During the last years of his life, she did the household work and much other, such as taking care of cows, milking, churning, cleaning stables, and working the garden. About October, 1891, the decedent called on John H. Skiles, a justice of the peace, and asked him to prepare a deed from him to Frances for thirty-two acres of his land. Skiles suggested she might not want the land, and that a severance of this quantity might spoil the farm; he designated a will as the best method of carrying out his purpose toward his niece; the uncle said he would think about it, and left. In about six months, he called again on Skiles, and executed in favor of his niece a bond dated April 1, 1891, in sum of two thousand dollars, payable to her absolutely in one year, with interest at rate of five per cent, to which was appended the usual warrant of attorney for confession of judgment. This bond, after formal execution, he handed to Squire Skiles, to be by him safely kept and delivered to Frances after his death. Skiles suggested to him that the bond would draw interest during his life, and Wagoner said he, Skiles, should mark the interest as paid on the first day of April of each year. On the first day of April, 1892, he did indorse the inter-

est as paid for the preceding year. Some time after the bond had been deposited with Skiles, the uncle told his niece that "There was a bond of two thousand dollars at Squire Skiles, and [she] was to leave it there as long as he lived, and at his death [she] was to go and get it." In a few days after his death she called for the bond, and Skiles gave it to her.

The administrator having filed his account of the personality showing a balance, an auditor was appointed to distribute; the niece presented the bond as a debt against her uncle's estate; the other collateral heirs resisted her claim. The auditor, on the facts as stated, was of the opinion: 1. There was no actual delivery of the bond to the niece; 2. The deposit of the bond with Skiles was not in trust for her, because the evidence did not show the uncle had parted with his dominion over it.

He therefore declined to allow her claim on the bond. She also, evidently in anticipation of an adverse decision in this particular, made a claim for wages, for six years preceding her uncle's death, on a quantum meruit; this also the auditor disallowed, ⁵⁶² because, as the evidence showed, she had been regularly paid at the rate of fifty dollars per year, and, settlements having been made on this basis, there was no implied promise to pay more. In this particular, he was clearly right. Having made his report, and exceptions being filed thereto, the orphan's court overruled the exceptions and confirmed the report absolutely. From that decree, we have this appeal. All the errors assigned are resolved by the answer to one question, viz., Under the facts, did a right to the bond pass to the niece?

No one will question the correctness, in the abstract, of the legal propositions stated so clearly and concisely by the auditor:

"In all gifts, a delivery of the things given is essential to their validity; for although every other step is taken that is essential to the validity of a gift, if there is no delivery, the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it; it is an indispensable requisite, without which the gift fails, regardless of the consequences": Thornton on Gifts and Advancements, sec. 131.

"The consummation of every parol gift is delivery. There must be an actual transmutation of possession and property; and the real question in all such cases is whether the donor has parted with his dominion over it": Thornton on Gifts and Advancements, sec. 134.

On these and like authorities, the auditor concludes there was no gift, for there was no delivery. And as to the argument that

the bond was delivered to Skiles, to be by him held in trust for her, the auditor holds:

"Delivery of the property in question, with the intent to give, is absolutely necessary to the validity of the gift. The owner must part with his dominion and control of the thing before the gift can take effect. There must be an actual and positive change of possession. Words of gift are not sufficient. They alone convey no title, and are not the basis of any action": 8 Am. & Eng. Ency. of Law, 1314, and other authorities to the same point. The auditor then states the question for his decision thus: "It is clear from the testimony that the money represented by the bond for two thousand dollars was intended by the decedent to be a gift to Frances S. Dorlan, to take effect after his death. The question here raised is, whether or not the facts show a sufficient delivery to execute the gift."

⁵⁶³ It seems to us the undisputed facts found by the auditor do not warrant the inferences drawn from them by him, that the donor had not parted with his control over the bond. Here was an unlearned man disclosing to one assumed by him to be entirely competent to assist him his purpose to reward his favored niece by an absolute gift of two thousand dollars, of which she was to come into the full enjoyment at his death. No other reasonable inference can be drawn from Skiles' testimony. The donor first wants to make her an absolute deed for part of the farm; he is deterred from doing this because of Skiles' suggestion that it might depreciate the value of the whole farm; his mind then turns to the execution of his purpose by delivering the bond to Skiles for her. Skiles then draws the bond, and the donor executes it and places it in Skiles' possession, to be handed her after his death. If the evidence had gone no farther, we think no one could question the creation of a trust in Skiles to be carried into effect on the happening of the contingency, the uncle's death and her survivorship. The uncle placed in the hands of Skiles an obligation for two thousand dollars to be delivered to the niece at his death, and then notified the beneficiary that he had created the trust and of the terms of it. Equity would not lend its aid in the creation of a voluntary intended trust, but this trust was fully created by the donor; all that remained for equity was to enforce it.

One of the facts from which it is assumed the donor still exercised dominion over the bond is, that he authorized Skiles to indorse the interest paid during his lifetime; but this, obviously, was a plan suggested by Skiles' mistake in drawing the instru-

ment; instead of expressing in it the intention of the obligor that it should be payable at his death, he made it payable in one year, with interest at five per cent; then, the very difficulty raised by his own blunder, he mentions to the obligor, viz., that it will bear interest in his lifetime. Wagoner, no wiser than he, then suggests that the mistake of expressing what was not meant could be cured by indorsing on the instrument what was not true, to wit, that he had paid annually the interest. What he did intend he clearly expressed to the scrivener, who wrote what he did not intend, and then was adopted a clumsy device to avoid the effect of a scrivener's mistake. But in all this there was no intention to retain control over the gift; only an effort to carry out the intention of the giver.

564 But did the contingency that the gift was not to take effect except in case of the survivorship of the niece render it void? The gift here was to Skiles as trustee, the trust to be executed by the trustee by delivery to the donee at his death. Then the donor informs the niece of the gift, and that at his death she is to go to Skiles and get the bond. The delivery to the trustee for purposes of the trust was absolute; if the niece survived him, the bond was to be delivered to her; if the remote contingency that the aged uncle survived the niece happened, doubtless it was his secret intention, if that contingency occurred to him the bond should be redelivered to him; but he annexed no such reservation to the trust; he retained no such control or dominion over it in the mean time; the death of either determined only the duty of the trustee. A chancellor on Skiles' evidence as to what was said by the donor to him when the bond was put in his possession, and the declaration of the donor to the donee, would have restrained Skiles from delivering it to either during the lifetime of both, and on the death of the niece first, might have ordered its cancellation, but if the uncle died first would have compelled its delivery to the niece. Skiles testifies he would have given the bond back to Wagoner if he had asked him for it; that is wholly immaterial; Skiles' duty as a trustee is not measured by what he would have done, but by what he ought to have done under the express terms of his trust, with express notice of it to the beneficiary.

The delivery to him was a good delivery to her, as is held in *Stephens v. Huss*, 54 Pa. St. 20, and *Stephens v. Rhinehart*, 72 Pa. St. 434. In this last case, deeds for lands had been executed by a grantor and delivered to a third party to be by him delivered to the grantees after the grantor's death, and they were so delivered.

This court, Sharswood, J., says: "That the delivery of the deed in controversy after the death of the grantor took effect by relation to the first delivery seems a point very well settled by the decided cases." Then is quoted with approval the opinion in *Foster v. Mansfield*, 3 Met. 414, 37 Am. Dec. 54: "Where the future delivery is to depend upon the payment of money or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still, ⁵⁸⁵ it will not take effect as a deed until the second delivery, but, when thus delivered, it will take effect by relation from the first delivery." And other cases to same effect are cited. There is no distinction in this respect between an instrument constituting the evidence of a gift of land and one evidencing a gift of money. In *Hummel's Estate*, 161 Pa. St. 215, the donor delivered to a third party three promissory notes under seal to be delivered to a nephew and niece after his death, or payable after his death. It was held, the present chief justice rendering the opinion, that the delivery was complete as evidence of an existing debt payable in the future, and the gift was irrevocable. In *Candor's Appeal*, 27 Pa. St. 119, the decedent executed a bond in two thousand dollars payable ten years after date, or at his death, to his daughter, and delivered it to a trustee to be handed to her. Although he afterward undertook to revoke the gift by his will, and died before the expiration of the ten years, this court held the gift irrevocable. We are clearly of the opinion, that this was an express trust by parol, which took effect as soon as created; the enjoyment of the subject of the trust by the beneficiary could be defeated only on the happening of the one contingency, her death before her uncle's; the subject of it having passed completely out of his control, that control could only be resumed by him on the happening of the same contingency; a subsequent event, his survivorship, might, through the interposition of equity, restore to him the bond, but a change of intention on his part never could.

The decree of the court below is reversed, and it is directed that the fund be distributed in accordance with this opinion.

GIFTS—DELIVERY—INTENT.—To constitute a valid gift between living persons, there must be delivery of the subject matter of the gift, with the intent on the part of the donor to transfer the right of property to the donee or to some one for his use: *Dougherty v. Moore*, 71 Md. 248; 17 Am. St. Rep. 598, and note. Nothing can take effect as a gift which does not manifest an intention to relinquish the right of dominion on one hand and create it on the other: *Estate of*

Smith, 144 Pa. St. 428; 27 Am. St. Rep. 641, and note. A gift of personal property made with the intent to take effect immediately and irrevocably, and fully executed by complete delivery, is binding as a gift *inter vivos*, even if the donor was in extremis and died soon after: *Henschel v. Maurer*, 69 Wis. 576; 2 Am. St. Rep. 757. To constitute a valid gift *inter vivos* the donor must part with the dominion of the property given, and his acts showing his intent to so part with the dominion must be as pronounced and decisive as it is possible with the subject matter of the gift: *Jones v. Weakley*, 99 Ala. 441; 42 Am. St. Rep. 84.

GIFTS—DELIVERY IN TRUST.—It is not necessary that delivery should be to the donee in person. It may be made to some person for him, or to a trustee for that purpose: *Love v. Francis*, 63 Mich. 181; 6 Am. St. Rep. 290; *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641, and note.

JOHNSON COMPANY v. MILLER.

[174 PENNSYLVANIA STATE, 605.]

CORPORATIONS—INSOLVENCY—SALE OF PROPERTY.—If after a railway company has bought rails and distributed them along a projected line of road, it is enjoined from proceeding with the construction of the road before the rails are laid, and, becoming insolvent, resells the rails to the manufacturer in part payment of the unpaid purchase price, the resale is valid after possession taken thereunder, as against another creditor of the company who subsequently attaches them as its property.

CORPORATIONS—SALE OF PROPERTY.—After the operation of a corporation has become a matter of direct public interest and concern, its property, which is reasonably essential to the exercise of its franchises, cannot be sold by it or its creditors piecemeal, so as to stop its operations or defeat the objects of its charter, but all of its property which has not yet become a part of its structures, and for which it has no present use, may be thus sold.

G. M. Roads, F. G. Farquhar, and F. P. Krebs, for the appellant.

R. H. Koch and H. B. Graeff, for the appellee.

⁶⁰⁶ **FELL, J.** The issue in this case was framed to determine the title to certain steel rails seized by the sheriff of Schuylkill county under an attachment as the property of the Inter-County Street Railway Company. The railway company was authorized by its charter to construct and maintain a railway from Tamaqua, Schuylkill county, to Lansford, Carbon county. After a part ⁶⁰⁷ of the road had been built, the company was enjoined from proceeding further with its construction until the consent of the township and borough authorities and other parties in interest should be obtained. The railway company at this time was indebted to the Johnson Company for rails, spikes, bolts, and fish-plates, and, being unable to use or pay for these articles, it resold them to the Johnson Company at the invoice price in partial

discharge of the debt. Possession of the property resold was taken by the plaintiff before the attachment issued, and the only questions raised at the trial related to the right of the railway company to sell the property, and to the validity of the exercise of the right if it existed. The property attached in Schuylkill county, the title to which is in dispute in this proceeding, consisted of eighty-two steel rails. These rails had been delivered along the line of the proposed road, but none of them had been used in its construction, if there had been any construction in Schuylkill county.

The claim of the attaching creditor is based upon the ground that the railway company, being insolvent, could not lawfully prefer one of its creditors by a sale or transfer of property necessary for its operations. It is undoubtedly the rule that when the operations of a corporation are matters of direct public interest and concern, its property which is reasonably essential to the exercise of its franchises cannot be aliened by the corporation or sold by its creditors piecemeal so as to stop its operations or defeat the object of its charter: *Susquehanna Coal Co. v. Bonham*, 9 Watts & S. 27; 42 Am. Dec. 315; *Reynolds v. Reynolds Lumber Co.*, 169 Pa. St. 626; 47 Am. St. Rep. 935. The grant by the state to the Inter-County Railway Company was for a use in which the public was interested, and it may be assumed that, if the company had reached the stage of active operation, and the rails in question had become a part of its roadway, they could not, under the circumstances, have been sold, as the company was insolvent and the effect of the sale would have been to strip it of property necessary for the exercise of its franchises. The right contested, however, was that of a company which had not completed or operated any part of its road to sell rails which had not become part of its structure, and for which it had no present use. Its right to make the sale, if the surplus had resulted from an overpurchase, or had been caused by the shortening of its route or the abandoning of a part ^{cos} of it, could not be questioned. Its franchises remained; it was merely forbidden to proceed with its work until the necessary consent should be obtained. Until this condition was complied with, it could not use these rails, and we see no reason why it was not at liberty to sell them. The sale was effected by means of a written instrument regularly executed by the proper officers of the company in pursuance of a resolution of the board of directors. At the meeting of the board, five of the eight members were present, and the action was

unanimous, and has not since been objected to by anyone interested in the company. Under the circumstances disclosed by the testimony, the appellant has no standing to question it.

The judgment is affirmed.

EXECUTION AGAINST PROPERTY OF QUASI PUBLIC CORPORATION.—The property of a public corporation, such as a railroad or bridge company, which is essential to the exercise of its corporate franchises and to the discharge of the duties it has assumed toward the general public, cannot, without statutory authority, be sold to satisfy a common-law judgment either on execution or by an order or decree of court: *Overton Bridge Co. v. Means*, 33 Neb. 857; 29 Am. St. Rep. 514, and note; *Gardner v. Mobile etc. R. R. Co.*, 102 Ala. 635; 48 Am. St. Rep. 84, and note.

CORPORATIONS—RIGHT TO DISPOSE OF PROPERTY.—A private corporation may dispose of its property without express statutory authority: *Benbow v. Cook*, 115 N. C. 824; 44 Am. St. Rep. 454; *Finch v. Ullman*, 105 Mo. 255; 24 Am. St. Rep. 383, and note. To the same effect see *Homes etc. Mfg. Co. v. Homes etc. Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448, and note.

CUSHING v. PEROT.

[175 PENNSYLVANIA STATE, 66.]

CORPORATIONS—LIABILITY OF STOCKHOLDER.—JUDGMENT AGAINST A STOCKHOLDER in a corporation and execution levied on his real estate in the state where the corporation is created for an amount that exhausts his liability therein is a bar to an action in another state to enforce his liability as a stockholder.

CORPORATIONS—LIABILITY OF STOCKHOLDERS.—If the liability imposed by statute upon stockholders in a corporation is contractual, it may be enforced outside the limits of the state.

CORPORATIONS—RECEIVER'S RIGHT TO RECOVER ON STOCKHOLDER'S LIABILITY.—It is presumed, in the absence of decision in a sister state, that the liability of a stockholder in an insolvent corporation created in that state, and not already sued upon, passes to its receiver as an asset for the payment of corporate debts. He alone can sue upon such liability.

CORPORATIONS—RECEIVERS—LIABILITY OF STOCKHOLDER AS ASSETS.—After a corporation has become insolvent and a receiver has been appointed for it, the liability of its stockholders, contractual under the statute and not as yet sued upon, constitute an asset for the payment of the corporate debts, and he alone has the right to sue and recover on such liability.

CORPORATIONS—RECEIVERS—RIGHT TO RECOVER ASSETS.—A receiver represents not only the corporation for which he is appointed, but all its creditors, and as to the latter, it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all, and the receiver, who represents all alike, is the proper party to assert the common right and pursue the

common remedy for the common benefit, as to all claims not in suit at the time of his appointment.

CORPORATIONS—RECEIVER'S RIGHT TO SUE.—Although a creditor or class of creditors of a corporation have special claims against special liabilities upon which suit has not been brought, this does not deprive the receiver for the corporation of the right to sue for and recover them all into his hands for proper distribution.

Assumpsit to enforce liability of a stockholder in a corporation created in Kansas and imposed by the laws of that state. Plaintiff brought the action to recover a debt owing to him by defendant, who was a stockholder in the Western Farm Mortgage Trust Company, a Kansas corporation, for which a receiver had been already appointed. Judgment for plaintiff. Defendant appealed.

W. C. Hannis and A. S. Letchworth, for the appellant.

A. W. Horton, for the appellee.

⁷² MITCHELL, J. The affidavit sets up three grounds of defense: 1. That defendant is a citizen and resident of Pennsylvania, and is not bound by the laws of Kansas, under which the liability is claimed to arise; 2. That he is a creditor of the Western Farm Mortgage Trust Company, as well as a stockholder, and presumably that he claims a right of setoff against the liability, if it exists; and 3. That suit has already been brought and judgment obtained against him in Kansas on his liability as a stockholder, and execution has been levied on his real estate there.

The second defense is not averred with sufficient precision to ⁷³ be available to prevent judgment, even if it were good in substance, which is not entirely clear on the authorities.

The third defense, though it is not averred with the precision as to dates, amounts, etc., which it should have, nevertheless sets up a substantial bar to plaintiff's suit. A levy in execution is presumed to be satisfaction, and the affidavit avers that the levy on his real estate in Kansas was for an amount that exhausted his liability there. This would be a good defense, even in Kansas, for the constitution of that state limits the individual liability of stockholders to "an additional amount equal to the stock owned by each stockholder," and it is expressly said, in *Howell v. Manglesdorf*, 33 Kan. 194, that the defendant "may also set up as a defense that he is discharged by having already paid the amount of his individual liability to other creditors of the corporation." On this point, the defendant was entitled to go to a jury, and it was error to enter judgment against him.

The first point, though averred with the generality and looseness

that pervade the whole affidavit, raises questions of great nicety, involving general principles of jurisprudence, the comity between states, and the conflict of laws with regard to both rights and remedies. The difficulty of these questions is shown by the conflicting views in a large number of courts of the last resort. The plaintiff asks us to enforce against a citizen of Pennsylvania a liability created solely by the local statutes of Kansas, and to enforce it in the form prescribed by those statutes, although that form is repugnant not only to our own established mode of procedure in analogous cases, but also to strong considerations of convenience and natural justice. The first question that arises is the nature of the liability created by the statute. If it is penal, the authorities are all agreed that it will not be enforced outside of the jurisdiction of the state imposing it. If, however, it is contractual, or, in the phrase preferred by some writers, statutory only, the authorities differ widely whether it should be enforced at all, and, if enforced, whether in the form directed by the statute, or in that of the *lex fori*. In regard to the Kansas statute under consideration, my individual opinion is, that by the weight both of reason and authority, the liability created by it is contractual and should be enforced by any court having jurisdiction of the parties. And ⁷⁴ I understand our own case of *Aultman's Appeal*, 98 Pa. St. 505, to tend toward that view. But for reasons to be given presently, we are not required to enter into this discussion. The cases have been collected and cited in the argument, and the whole subject will be found ably treated in 23 *American & English Encyclopedia of Law*, title *Stockholders*, pages 867 and 890-894.

As to the mode of enforcement, the decisions of the supreme court of Kansas seem to have settled that the statute contemplates a separate action at law against each stockholder: *Abbey v. Grimes Dry Goods Co.*, 44 Kan. 415; *Howell v. First Nat. Bank*, 52 Kan. 133. The courts of some other states, however, notably of Massachusetts, have refused to sustain such actions, on the ground that the relations of the creditors and of the stockholders among themselves cannot be properly determined in that way. Certainly, by far the most convenient and just method is by bill in equity to which all the stockholders can be made parties and their rights settled. This is the established mode of procedure in Pennsylvania in analogous cases. The special fact, however, that makes it unnecessary in the present case to determine the ultimate rights of the plaintiff, or the mode of their enforcement, appears in the statement where it is set forth that a receiver for the cor-

poration was appointed before this suit was begun. If the defendant's liability under the statute to the creditors of the corporation in which he is a stockholder is contractual—and it is only in that aspect that it will be enforced at all outside of Kansas—then it was, like any other claim, an asset for the payment of the corporate debts, and as such the right to sue on it passed to the receiver. This is the general rule, so far as we are aware, and is so manifestly in accordance with justice, as well as convenience, that in the absence of an express decision of the supreme court of Kansas to the contrary, we must presume that such is the law in that state. No such decision has been brought to our notice. In *Abbey v. Grimes Dry Goods Co.*, 44 Kan. 415, it does appear that the corporation had made an assignment for the benefit of creditors, but the court took no notice of this fact, probably considering it unnecessary to do so, as the case was reversed solely on the points raised in the pleadings, as clearly appears by the reference in the opinion to the absence of a judgment against the corporation, which would seem to be a fatal objection, but which the ⁷⁵ court merely referred to by saying that it had not been discussed, and would not be decided.

It is true that Mr. Cook, in his treatise on Stocks and Stockholders, section 218, says broadly, that the right to sue on the statute "is not to be numbered among the assets of the corporation. . . . A receiver has no power to enforce such a liability." But Mr. High in his standard work on Receivers, section 317 a, says more cautiously: "The authorities are not wholly reconcilable as to the right of a receiver of a corporation to maintain an action in behalf of its creditors, to recover of shareholders an individual liability imposed by charter or statute upon shareholders for the protection of creditors."

The cases relied upon by Cook in support of his text are from Illinois and New York. The former appear to go to the extent claimed, as it is said in *Arenz v. Weir*, 89 Ill. 25, that "this insurance company having passed to a receiver diminishes in no degree the liability of a stockholder to a creditor of the company. The creditor stands on an independent platform above that of the receiver, having no concern with the corporation, and the stockholder is bound under the law to answer to him. The stockholder is not under the control or in the power of the receiver, but holds a fund, so to speak, out of which the creditors of the company may be paid." I do not find that this doctrine has been changed by that court, but it is apparent that it rests on the particular wording of the statute involved, and not on general

principles, for in *Wincock v. Turpin*, 96 Ill. 135, three judges of the seven dissented on this point, and in *Munger v. Jacobson*, 99 Ill. 349, a similar liability was enforced in a bill by the receiver. The case of *Jacobson v. Allen*, 20 Blatchf. 525, was by the receiver of an Illinois corporation, and the decision was based on *Arenz v. Weir*, 89 Ill. 25.

The New York cases cited by Cook look the same way, but are less positive than those in Illinois, and it is equally clear that they rest on the special phraseology of the statutes. *Billings v. Robinson*, 94 N. Y. 415, was a suit by a receiver and decided on the ground that the corporation had released the defendant before this suit was brought. The court said: "The receiver who is plaintiff is not shown to represent any creditor having any equities against Robinson (defendant). . . . So far as the case shows, the receiver represents in this action only ⁷⁶ the corporation which assented to the substitution of Marshall's liability to that of Robinson." And that in New York a receiver can recover, unless prevented by the language of the particular statute, appears to follow from the cases of *Story v. Furman*, 25 N. Y. 214, and *Attorney General v. Guardian etc. Ins. Co.*, 77 N. Y. 272. In fact, in no case that I have seen are the inconveniences of separate actions by the creditors, and the advantages of one suit by a receiver in behalf of all, more forcibly set forth than by *Folger, J.*, in *Pfohl v. Simpson*, 74 N. Y. 137.

In *Patterson v. Stewart*, 41 Minn. 84, 16 Am. St. Rep. 671, under an act making the directors of a corporation ordering or assenting to a violation of any of its provisions jointly and severally liable for all corporate debts subsequently contracted, it was held that the appointment of a receiver did not prevent an action by a single creditor against a director, but the decision was put upon the special provisions of the statutes (whose "chaotic condition" is referred to in the opinion by Mitchell, J.), and particularly on the fact that the liability was unlimited, and "what one creditor may collect will not reduce the amount which another may recover." And in *Minnesota etc. Mfg. Co. v. Langdon*, 44 Minn. 37, the same learned judge intimates that as this point was not the principal one in that case, it may have to be reconsidered, and it was held that the statutory right to recover from stockholders capital which had been unlawfully refunded to them as dividends without provision for the corporate debts was an asset which vested in the receiver for the benefit of all the creditors. The case was put upon the broad ground of the receiver's rights and powers. "Everything becomes assets in his hands

which was assets as to creditors, as well as what was assets as to the corporation."

These are all the cases we have been able to find on the subject, and in the absence of a controlling weight of authority, and, as already said, especially in the absence of an express decision of the supreme court of Kansas, we are not willing to depart from the settled general rule. The objections to doing so appear to us unanswerable. A receiver represents not only the corporation, but all its creditors, and as to the latter it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his "appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all, and common to all, and hence the receiver who represents all alike is the proper party to assert the common right and pursue the common remedy for the common benefit. We do not, of course, refer to pending suits already begun by creditors before the appointment of the receiver. As to them his power to interfere may be doubted. But as to others he is clearly the proper party. If any creditor or class of creditors have preferred claims, or, as argued here, special claims against special liabilities, that does not deprive the receiver of the right or relieve him from the duty to gather them all into his hands for proper distribution. In this manner, the rights of all will be protected and justice be done in a single proceeding in which every one will get what is his due, no one will be called upon to pay more than his fair proportion and the expense, delay, inconvenience, and inevitable occasional injustice of separate actions by different creditors against different stockholders, with their attendant legion of resulting actions for contribution, will be avoided. This is so consonant with convenience and natural justice, as well as with our own settled procedure in analogous cases, that we will not be easily moved to depart from it.

We hold, therefore, that the right to sue, if there is any, is in the receiver, and that plaintiff cannot maintain the present action. The ultimate questions whether the courts of this state will enforce the statutory liability under the law of Kansas at all, and, if so, whether against separate stockholders, are only in the form established by our own practice in similar cases, we leave to be decided when they arise.

Judgment reversed.

CORPORATIONS—ENFORCING LIABILITY OF STOCKHOLDER IN ANOTHER STATE.—If the statutes of a state in which a corporation is organized create a liability against its stockholders for their proportion of its debts, this liability may be enforced by an action against them or any of them, in any other state in which jurisdiction over them can be obtained: *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32; 41 Am. St. Rep. 831. The statutory liability of stockholders in a foreign corporation cannot, as a general rule, be enforced except in the domicile of the corporation, where the law of that domicile is the one which creates the right and the remedies for its enforcement: *Marshall v. Sherman*, 148 N. Y. 9; 51 Am. St. Rep. 654, and note. See, also, the extended notes to *Fowler v. Lamson*, 37 Am. St. Rep. 169, and *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 868.

CORPORATIONS—RECEIVERS—ENFORCEMENT OF STOCK SUBSCRIPTIONS BY.—If a receiver has been appointed, the suit to compel the stockholders to pay their unpaid subscriptions should be prosecuted in his name, unless some sufficient cause is shown to the contrary: Extended notes to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 833, 834, and *Germantown etc. Ry. Co. v. Fittler*, 100 Am. Dec. 553-555. A receiver of an insolvent corporation, appointed at the instance of its creditors, is clothed with all their rights, and may sue to recover stock subscriptions, although the corporation could not maintain such suit: *Cole v. Satsop R. R. Co.*, 9 Wash. 487; 43 Am. St. Rep. 858.

CORPORATIONS—RIGHT OF RECEIVERS OF TO SUE.—After a receiver has been appointed for and has taken possession of the corporate property, he is the proper person to maintain an action to set aside chattel mortgages on the corporate property as the rights of creditors in that respect become vested in him: *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352; 50 Am. St. Rep. 330, and note. See, also, the extended note to *Chautauque County Bank v. White*, 57 Am. Dec. 451.

CORPORATIONS.—UNPAID SUBSCRIPTIONS ARE ASSETS which a corporation may assign, and which will pass to the assignee under a general assignment for the benefit of creditors: Extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 808, 833. The capital stock of a corporation, both that which has been paid and that which remains unpaid, is regarded in law as a trust fund for the debts of the corporation: Extended note to *Germantown etc. Ry. Co. v. Fittler*, 100 Am. Dec. 552.

ASWELL v. SCRANTON.

[175 PENNSYLVANIA STATE, 173.]

MUNICIPAL CORPORATIONS—STREETS—CHANGE IN GRADE—DAMAGES.—If property is rendered more accessible by a change in the grade of a street, the benefit thereby derived must be set off against the damages inflicted, although all the property on the street receives a similar benefit. Such benefit is not within the rule excluding general benefits from consideration in determining the damages to a particular piece of property.

MUNICIPAL CORPORATIONS—STREETS—CHANGE IN GRADE—DAMAGES.—If every parcel of property along a street is made more accessible by a change of grade, then every such property is specially benefited, and the amount of that benefit should be set off against the damages, if any, inflicted by the improvement as

made. The lotowner is entitled to compensation only for the actual loss suffered.

MUNICIPAL CORPORATIONS — STREETS — IMPROVEMENT OF—DAMAGES.—The loss to a property owner suffered by improvement to a street may be measured with exact justice by the depreciation in value of his property resulting from the improvement complained of. If his property is injured that others may be benefited, his loss should be made good. If the improvement increases the value of his property, as much or more than it may cost him to repair, or to readjust himself to the changed state of things, he is not a loser and cannot recover.

J. H. Torrey, city solicitor, for the appellant.

I. H. Burns and F. T. Okell, for the appellee.

179 WILLIAMS, J. The several assignments of error in this case are merely different methods of presenting the same general question. It is raised upon the following facts: The plaintiff is the owner of a lot at the intersection of Tenth and Oxford streets in the city of Scranton. It was at the bottom of a deep depression in the surface and was reached at some inconvenience and danger on account of the steepness of the descent, and the irregularity of surface of the streets by which it was reached. There were two dwellings and a stable upon the lot, and the plaintiff herself resided on it. In 1891, an ordinance was passed fixing a uniform grade for Tenth street between Luzerne and Washington streets. Oxford street was about midway between these points. When the street was put upon the grade provided for in the ordinance, its surface was raised some eight or ten feet at the crossing of Oxford street, and this made it desirable for the plaintiff to raise her house and to fill some portion of her lot. This proceeding was entered upon to ascertain what amount, if any, should be paid by the city to the plaintiff as damages suffered by reason of the change of the grade of Tenth street. The learned judge before whom the trial was had instructed the jury that the measure of the plaintiff's damages was the difference between the market or selling value of her lot before the improvement was made and its value as affected by the improvement. In ascertaining this difference, he told them that they were to consider any direct benefit or advantage conferred on the property by the grading of the street; and any disadvantage or injury inflicted upon it by the alteration of the grade. This was entirely correct. The question now raised is over his application of these rules to the facts of this case. To guide the jury in the estimation of the value of the property, as affected by the improvement, he said to them: "If this testi-

mony, however, on the part of the city is based upon the general appreciation of property in that ¹⁸⁰ neighborhood, and not upon the special appreciation of the property of Mrs. Aswell, the jury cannot take that into consideration, because she is not to be affected by the general appreciation of property in that neighborhood, but only by the appreciation of the value of her property." In a point pressed by the plaintiff he was also asked to instruct the jury that they should not take into account the general increase in value of property in the neighborhood consequent on the grading of the street, as the plaintiff was fairly entitled to that along with the other property owners and the general public whose property was benefited by the improvement. This point he affirmed, adding, "As we have already instructed you in our general charge, it must be the particular benefit to this property." Now, this was an improvement extending only over two squares, and intended by filling and grading to make a practicable roadway by which this part of Tenth street could be traversed and property along it be reached with ease and safety. If the improvement of this short piece of street had any effect by way of increasing the value of real estate in that general region of the city, it is not apparent upon an examination of the testimony. It did increase the value of such pieces of property along it as were made easily accessible by means of the improved street; and such improved accessibility was not a general benefit to be excluded, but a special benefit to be included in fixing upon the proper market or selling price of each piece of property so affected. The mere fact that a line of railroad or a street has been projected across a region of country may improve the general value of land in the region. That is a general benefit in which the entire public may share, but the lots that are made available for building purposes by the street when actually opened have conferred on each a benefit that is peculiar, and, although it may be shared by several owners, is not shared in by the public. In *Setzler v. Railroad Co.*, 112 Pa. St. 56, the proposition is stated in these words: "The question in each case is, whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere general appreciation of property in the neighborhood." Substantially the same thing was said in *Long v. Harrisburg etc. Ry. Co.*, 126 Pa. St. 143. In *Dawson v. Pittsburgh*, 159 Pa. St. 317, the general increase in value from the ¹⁸¹ development of a neighborhood by improvements is clearly distinguished from the real and special benefits to particular owners. The former are to be excluded

from the calculation of benefits. The latter are to be included. The effect of the charge was to open the way for the jury to reach a conclusion that we have uniformly said they must not adopt, viz., that the advantage derived from an improvement to justify the jury in considering it must be something unlike and above the advantages derived by any other person. The last case upon this subject, as I now recollect, is *Mahaffey v. Beech Creek R. R.*, 163 Pa. St. 158, in which our brother Fell, delivering the opinion of the court, said: "The plaintiff's property was not the only property taken, and presumably not the only property which received special advantages. Against the demand of each claimant, it was for the jury to consider the advantages special to his property." So it may be well said as to this improvement on Tenth street. The plaintiff's was not the only property affected. Each piece of property along the two squares over which the grade was established, and the street made, was probably made more accessible and more valuable. The amount of benefit conferred depended on the extent to which access to the property had been improved, but "against the demand of each claimant" for damages were to be put the advantages special to his property in improved accessibility or otherwise. If every property along the street was made more accessible, then every property along the street was specially benefited, and the amount of that benefit should be set off against the damages, if any, inflicted by the improvement as made. It is the actual loss suffered for which the lotowner should be compensated. That loss may be measured with exact justice by the depreciation in value of his property resulting from the improvement complained of. If his property is injured that others may be benefited, his loss should be made good; but if the grading or other improvement increases the value of his property as much as or more than it may cost him to repair, or to readjust himself to the changed state of things, he is not a loser and ought not to recover.

The judgment is reversed and a venire facias de novo awarded.

MUNICIPAL CORPORATIONS—CHANGE OF GRADE—DAMAGES.—SETOFF OF IMPROVEMENTS caused thereby. This question is discussed in the extended note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 845, 846.

WOODRUFF v. WARNER.

[175 PENNSYLVANIA STATE, 302.]

JUDICIAL SALES—FRAUD—AGREEMENT AMONG BIDDERS.—A purchase of a judgment from an execution creditor by another execution creditor, who buys at a judicial sale with an agreement that the former shall not bid, does not render the sale absolutely void in law. The question whether such sale is void or not depends upon the question of actual fraud which is always to be answered by the jury, and if it is determined that no fraud was contemplated or committed on the judgment debtor or his creditors, the sale is valid.

H. F. Maynard and I. N. Evans, for the appellant.

J. C. Ingham and D. A. Overton, for the appellee.

306 GREEN, J. The appellant, Warner, was the assignee of a judgment held by his assignor, against Harrington, at the time of the sheriff's sale of the land in question, which then belonged to Harrington. The judicial sale at which Bronson purchased the land was held in 1888, and the terms of that sale were duly carried out by a sheriff's deed to Bronson, and by the payment by Bronson to Cook and Coykendall, the other judgment creditors of Harrington, of the amount agreed upon for their judgments under the agreement made by Bronson with them at the time of the sheriff's sale in 1888. The appellant's judgment was kept revived, and in 1894 Warner issued execution and sold one of the farms which had been sold to Bronson at the previous sheriff's sale. Having taken possession of this farm under this second sale, Bronson's assignee, for the benefit of creditors, brings this action of ejectment to recover both farms. As Harrington knew all about the arrangement for the purchase of the farms by Bronson, and urged him to make the purchase, he has no defense to the action, and is not an appellant.

The only question, therefore, is, whether, as against the Warner judgment, the former judicial sale to Bronson was a fraud. It is not claimed that there was any actual fraud in the arrangement made between Cook, Coykendall, Bronson, and Harrington at the first sale, but it is alleged that the agreement constituted a legal fraud against Harrington and any of his lien creditors at that time. The first point of the defendant asks the court below to instruct the jury that the agreement between Bronson, Coykendall, and Cook on the day of the first sheriff's sale, if carried on without the knowledge of Warner, was a fraud upon Warner or his assignor of the judgment, and the sale made in pursuance of it was, therefore, void, and this is the whole contention in the case. The court below affirmed the point if the agreement was made for the

purpose of defrauding the creditors of Harrington or defrauding Harrington. And in the answer to the defendant's second point, and in the general charge, the court instructed the jury that if they should ³⁰⁷ find that there was fraud in fact in the agreement for the purpose of defrauding Harrington or his creditors, they should find for the defendant, but, if they should, find that there was no such fraud in fact they should find in favor of the plaintiff. The jury found that there was no fraud in fact, and hence the only question now is, whether the agreement between the three creditors at the first sale was a fraud in law. The court below answered the defendant's points and charged the jury in exact accordance with the decision of this court in the case of *Oram v. Rothermel*, 98 Pa. St. 300. The court below in that case affirmed a point very similar to the one refused in this case, only that it put the facts more strongly against the validity of the arrangement between the judgment creditors than is done in the defendant's point in this case. There a judgment creditor was an actual bidder at the sheriff's sale, and the sale was stopped, and during the stoppage the execution creditor bought the judgment of the bidder upon the express condition that he would not again bid for the property, which condition the judgment creditor carried out, and made no more bids, and the property was struck off to the purchaser at a much less price than it was claimed to be worth. This court reversed the judgment because the element of actual fraud was left out of the point and ruling. Paxson, J., delivering the opinion, said: "The vice of the plaintiff's second and third points is, that they wholly ignore the question of actual fraud, and, by affirming them, the learned judge laid it down as an inflexible rule of law that the purchase of a judgment by another judgment creditor at a judicial sale, with an understanding that the former should not bid, rendered a sale to the latter absolutely void, without regard to the fact whether a fraud was contemplated or committed.

"This instruction was too broad. It withdrew from the jury the question whether an actual fraud was committed. All the authorities require that this question shall be submitted to the jury: *Dean v. Connelly*, 6 Pa. St. 239; *McMichael v. McDermott*, 17 Pa. St. 353; 55 Am. Dec. 560. Even if a fraud were intended, yet, if none was committed, neither the defendant nor his creditors have any just ground of complaint. . . . And even a combination between creditors does not necessarily indicate fraud. Creditors whose money is in peril have rights as well as debtors. It was said in ³⁰⁸ *Smull v. Jones*, 1 Watts & S. 128: 'Lien

creditors, as well as others, may purchase jointly at sheriff's sale, if all be open and fair. A combination of interests for that purpose is not necessarily corrupt. It is the end to be accomplished which makes such a combination lawful or otherwise; if it be to depress the price of the property by artifice the purchase would be void; if it be to raise the means of payment by contribution, or divide the property for the accommodation of purchasers, it will be valid.' . . . The crucial test of all such arrangements is, whether it is fair and without intent to depress the property and get it at an undervalue. This question must, in all cases, be referred to the jury, and it was error in the court below to rule it as a question of law, irrespective of the element of fraud in fact."

The learned court below followed this ruling precisely, and did commit to the jury the very question indicated. The case of *Slingluff v. Eckel*, 24 Pa. St. 472, is cited and relied upon now by the appellants, and it was also cited in the case above referred to. But this is what we said of it then: "*Slingluff v. Eckel*, 24 Pa. St. 472, merely decided that when one judgment creditor agreed to pay the claim of another judgment creditor if the latter would not bid, the contract was a fraud against the defendant if he had not acceded to it, and, even if he had, the other creditors might be affected by it. The court very properly declined to enforce such a contract upon grounds of policy. This presents a very different question from the one we are considering. The issue here is, whether the defendants had been injured by an actual fraud." At the conclusion of the opinion, Black, J., said: "It is not now proper to decide how far several persons who would otherwise bid against each other at sheriff's sale, may associate themselves together, unite their interests, and allow one to bid for all," thus practically eliminating the substantial question involved here. Neither of the other cases cited for the appellant raises the precise question presented here.

There was no evidence to show that there was any agreement to buy off a bidder, or to depress the price of the property, or suppress competition, or to do any thing to defraud either the creditors of Harrington or anyone else.

This same subject was considered in *Barton v. Hunter*, 101 Pa. St. 406, and the same ruling was made as in *Slingluff v. Eckel*, 24 Pa. St. 472. Mercur, J., said: "To work this result, the purchaser must have ~~soo~~ been guilty of some falsehood or trick before, or at the time of, the sale which succeeded, and he must have obtained the property for less than it otherwise would have sold. All of

these are essential elements to defeat the title of the purchaser. A mere fraudulent intent or effort, if not successful, is not sufficient, nor is the mere fact that the property was purchased at less than its value."

In *Mead v. Conroe*, 113 Pa. St. 220, we held that where a judgment creditor bought the prior judgments, liens against his debtor's real estate, including a judgment upon which an execution had been issued, and upon which said real estate was advertised by the sheriff, and at said sheriff's sale purchased the real estate at a price considerably less than its actual value, and permitted his debtor to remain in possession of it, it is no ground for the inference of a fraudulent purpose to hinder, delay, and defraud the creditors of his debtor.

We think the points of the defendant were properly answered, and the instructions to the jury were correctly given. We see no error in the several assignments, and they are all dismissed.

Judgment affirmed.

JUDICIAL SALES—AGREEMENT AMONG BIDDERS.—An agreement among several whereby one is to buy land about to be offered at sheriff's sale for the benefit of all the parties to the contract, each furnishing his proportion of the money, to the buyer, is void, as against public policy, if made to prevent fair competition in bidding or for other fraudulent purpose: Note to *Barton v. Benson*, 12 Am. St. Rep. 885; but in *Guilck v. Webb*, 41 Neb. 706, 43 Am. St. Rep. 720, it was held that an agreement to make a joint bid at a judicial sale, although it may indirectly have the effect of keeping others from bidding, is not illegal, unless it is intended to avoid competition.

DAHLEM'S ESTATE. MERCANTILE TRUST COMPANY'S APPEAL.

[175 PENNSYLVANIA STATE, 456.]

CONTRACTS—MENTAL CAPACITY.—A mortgage is not rendered void by the fact that the mortgagor was in a weak state, both bodily and mentally, at the time that it was executed, especially if the transaction upon which the mortgage is founded was agreed upon when the mortgagor was undoubtedly competent, and he understood what he was doing at the time when the mortgage was executed.

MORTGAGES—ACKNOWLEDGMENT OF—DEFECTIVE CERTIFICATE.—The omission of the date in the certificate of acknowledgment of a mortgage does not render the lien of the mortgage void, provided the date of acknowledgment clearly appears from the whole instrument.

MORTGAGES—DATE OF ACKNOWLEDGMENT.—IT IS PRESUMED that a mortgage dated, executed, and recorded on the same day was acknowledged on that day, although the date of acknowledgment does not appear from the certificate.

J. P. Hunter, for the appellant.

G. B. Gordon, for the appellee.

⁴⁵⁵ MITCHELL, J. The general facts of this case, and the main question of distribution of the fund, appear in Dahlem's Estate, Yost's Appeal, 175 Pa. St. 444, and need not be further discussed here. Two other points, however, are raised by this appeal of the administrator.

The mental capacity of the decedent at the time he executed the mortgage was a question of fact, and we see no good ground to differ with the conclusion of the auditing judge upon it. The decedent was in a weak state, both bodily and mentally, at ⁴⁵⁶ the time of execution, but the contract had been signed and the whole transaction agreed upon when he was undoubtedly competent, and the weight of the evidence is, that he understood what it was that he was completing at the time he put his name to the mortgage. The testimony of two of the witnesses against his competency, Long and Dr. Ruple, is strongly discredited by the fact that they signed as subscribing witnesses to the execution of the mortgage by the man who they now say was incompetent to know what he was doing.

The remaining question concerns a defect in the certificate of acknowledgment of the mortgage. The justice of the peace who took the acknowledgment filled up by mistake the printed blank for the acknowledgment of a married woman, striking out the separate examination clause, but setting out the date, mortgagor's name, etc., correctly. Though thus inartificial in form, this acknowledgment was good in substance, but, apparently noticing the informality after signing it, the justice canceled it by drawing lines through it, and then wrote and signed another acknowledgment by the mortgagor, which was the only one recorded, but in which, unfortunately, the day of the month was omitted. This is the defect which is claimed to invalidate the whole record, and therefore the lien of the mortgage.

The statutes require that before a mortgage shall be recorded it shall be acknowledged or proved in the manner provided, and the act of May 28, 1715, section 3, specifies that the officer taking it shall certify such acknowledgment or proof, "with the day and year when the same was made, and by whom." All official certificates should be made with precision and certainty. That is the fundamental object in making them. Yet it may well be doubted whether the requirement of the date, at least as to the day, is absolutely mandatory in the case of mortgagors, especially

since the act of March 28, 1820, by which the lien dates from its record without regard to the date of execution. There is no limit of time for acknowledgment. It, or the proof which is its equivalent, may be made at any time after execution. It must be before recording, and that, in ordinary cases, would seem to be the only mandatory requirement.

It is not, however, necessary to decide this question in the present case, because the date of the acknowledgment, though not expressly set out in the certificate, clearly appears by evidence ⁴⁵⁷ within the instrument itself. The mortgage was dated, executed, and recorded on June 1st. It must, therefore, necessarily have been acknowledged the same day, unless the justice took the acknowledgment before it was executed, of which there is no evidence, and which will not be presumed: *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552. The court is entitled to look to the whole instrument, and, as it is thus seen to contain within its four corners conclusive evidence of the date of acknowledgment, the informality of the certificate in that respect must be considered as obviated. Any other result would be sacrificing to mere form the substantial compliance with the requirements of the statutes, which our cases hold to be sufficient: *Ross' Appeal*, 106 Pa. St. 82; *Hornbeck v. Mutual etc. Assn.*, 88 Pa. St. 64.

The cases cited by appellant are not against this result. In *Myers v. Boyd*, 96 Pa. St. 427, the certificate entirely failed to show by whom the acknowledgment was made, and it was held that this was too substantial a defect to be passed over. And in *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552, already cited, the date of the acknowledgment was alleged to be written over an erasure, yet this court held that the deed was admissible in evidence, saying: "Where a deed is found in the hands of a grantee, having on its face the evidence of its regular execution, it will be presumed to have been made on the day of its date, and this presumption is greatly strengthened if it is accompanied by an acknowledgment of the same date, in proper form before a proper officer."

The precise question as to the omission of the day in the certificate of acknowledgment does not appear to have been decided heretofore in this state, but it arose in Maryland in *Kelly v. Rosenstock*, 45 Md. 389, under a statute requiring the certificate of acknowledgment to contain "the time when it was taken," and it was held that when the date clearly appeared from the whole instrument it was a sufficient compliance with the statute, and

that the certificate of the clerk of the court of the official character of the justice and the indorsement for record were parts of the instrument for that purpose. The case is on all fours with the present, and is fortified by a reference to *Carpenter v. Dexter*, 8 Wall. 526.

None of the assignments of error can be sustained.

Appeal dismissed at the costs of the appellant.

DEEDS—DEFECTIVE ACKNOWLEDGMENT.—The registry of a deed is not affected by the fact that the deed bears date the 13th of March, while the certificate of acknowledgment describes it as bearing date the 30th of March, if the identity of the deed certified to and the deed recorded sufficiently appears from other parts of said certificate and its annexation to the deed: *Horsley v. Garth*, 2 Gratt. 471; 44 Am. Dec. 393. An officer taking the acknowledgment of a deed must certify the same with the day and year when it was made and by whom, and he will be presumed to have performed his duty, and will not be supposed, without proof, to have taken the acknowledgment before the deed was executed. The deed will be presumed to have been made on the day of its date, when it is found in the hands of the grantee, having on its face evidence of its regular execution: *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552, and note. See, especially, the extended note to *Livingston v. Kettelle*, 41 Am. Dec. 173.

FIDELITY ETC. TRUST COMPANY v. FRIDENBERG.

(175 PENNS. LVANIA STATE, 500.)

POLICE POWER—GENERAL WELFARE—PENALTY.—The right of the sovereign power to direct that which is for the welfare of the general public cannot be abridged by contract stipulations between individuals; nor can a party to a contract be mulcted into a penalty because of obedience to the mandate of the commonwealth.

DEEDS—CONDITIONS—FORFEITURE—POLICE POWER. The erection of a fire escape in compliance with police power regulations is not a violation of a condition in a deed prohibiting the construction of an addition to a building beyond a certain height. No forfeiture can be asserted by reason of such erection.

ESTATES—FORFEITURE—LACHES.—No court, either of law or equity, declares an estate forfeited unless compelled to do so by unbending and rigid rules, and certainly never when the complaining party has a remedy in an action for damages, and has stood for years without asserting by action his intention to insist upon a forfeiture.

DEEDS—CONDITIONS—FORFEITURE—LACHES.—If, in violation of a condition in a deed that buildings standing on the property conveyed shall be torn down within one year from the time of the conveyance, and that thereafter no building shall be maintained upon the property exceeding a certain height, buildings are so erected and maintained for more than twenty-five years before the grantor or his successor in interest brings suit in equity to compel their removal, he cannot, ten years after the dismissal of his bill for gross laches in seeking to enforce his right, maintain an action in ejectment to enforce a forfeiture of the estate for such violation of the condition in the deed.

G. L. Crawford and H. G. Clay, for the appellants.

F. C. Brewster, for the appellees

⁵⁰⁶ DEAN, J. The land at the southwest corner of Ninth and Chestnut streets, ⁵⁰⁶ Philadelphia, fronting one hundred and twenty-five feet on Chestnut and extending back two hundred and thirty-five feet to George, now Sansom street, on July 27, 1825, was owned in fee by Edward Shippen Burd; on that day he conveyed twenty-four feet of it on the western side, fronting on Chestnut, and running back to Sansom street to Thomas C. Rockhill, in fee, upon this condition:

"That all the buildings heretofore erected and now standing upon the said lot of ground hereby granted, shall, within one year from the date hereof, be completely prostrated, and that he, the said Thomas C. Rockhill, his heirs or assigns, shall not at any time hereafter erect or build, or permit or suffer to be erected or built, on the above-described lot of ground, any buildings whatever, other than privies, milk or bathing houses, walls or fences not exceeding nine feet in height from the surface of the curbstones immediately in front of the said lot on Chestnut street, according to the city regulation thereof, excepting a messuage on the Chestnut street front of said lot, not exceeding sixty feet in depth, with a piazza adjoining the same to the south for a staircase only, not exceeding twenty-five feet in depth, and a stable and coach-house on the George street front of the said lot, which stable and coach-house shall not be at a greater height, nor extend in depth further north, than the stable and coach-house of the said Edward Shippen Burd, built and now standing upon the ground to the eastward thereof. Also, upon this further condition, that the north or front wall of any building at any time hereafter to be erected or built upon the said Chestnut street front shall be built precisely on a line east and west with the northern wall of the western wing of the said Edward Shippen Burd house, built and now standing upon the lot of ground on the south side of the said Chestnut street, between the said lot of ground and Ninth street; that is to say, at the distance of ten feet one inch and five-eighths part of an inch from the south line of the said Chestnut street; also, that the ground between the said north wall of the said building so to be erected on Chestnut street and the south line of the said Chestnut street shall be forever left open for a public pavement and footway free from every obstruction or encumbrance whatever, except steps, cellar-doors, and scrapers."

The grantor continued in the ownership of the remaining part ⁵⁰⁷ of the lot until his death in 1848. He left a will, in which he devised this part to his wife for life, with the benefit of all the conditions and restrictions placed by him upon the Rockhill lot, with a right in her to insist upon a full performance of them; and, further, expressly prohibited his executors from ever canceling or releasing them, and devising to the executors the fee in trust for the uses and purposes set out in his will. The lot conveyed to Rockhill is 908 Chestnut street, that immediately adjoining it on the east is 906. The title to the Rockhill lot, by regular conveyances from him and subsequent grantees, is vested in these defendants. That to 906 is in these plaintiffs. The latter, averring a violation of the conditions, brought ejectment against defendants to enforce forfeiture of the conditional estate which passed by the Rockhill deed. On the trial in the court below, the evidence clearly showed a plain disregard of the restrictions as to the buildings on the lot beyond the sixty-foot limit from the front on Chestnut street, and also a violation of the conditions as to size and character of buildings on Sansom street front. The defendants allege the violation had existed for a period of more than twenty-one years before suit brought, and that, at the date they obtained their title, the forbidden structures had been upon the lot for a period of at least seventeen years. It was not disputed that: 1. The brick building on the rear of 908, fronting on Sansom street, for many years had not been used as a stable and coach-house, but had been turned into a brush factory, with a frame building attached, and in 1875 this had been turned into a drinking saloon, and then was a building with three floors; 2. That to this building toward Chestnut street had been attached a brick edition; 3. That a pigeon-house and other buildings had been put upon the lot between it and the main building upon Chestnut street two feet higher than the nine feet stipulated for in the restriction.

There was some evidence that a bulk window had been constructed on the Chestnut street front, in violation of the restriction, and also that a fire escape had been constructed in front above the first story. As to the bulk window, it was conceded by plaintiffs at trial below it had been there for more than twenty-one years before suit. Concerning the fire escape, as it ⁵⁰⁸ was put there under the police power of the commonwealth and the municipality, we are of opinion it is not within the power of the contracting individuals to prohibit it; therefore, no forfeiture can be asserted because of it. Rights under a contract are always

subject to this modification, whether within the contemplation of the parties or not at the date of the contract. The right of the sovereign power to direct that which is for the welfare of the general public cannot be abridged by contract stipulations between individuals. Nor can a party to a contract be mulcted into a penalty because of obedience to the mandate of the commonwealth.

One of plaintiff's predecessors in title, J. F. Orne, in 1881, filed a bill in equity to restrain defendants from maintaining the buildings in violation of the restriction, and for an order on them to remove the same. The defendants, by answer, averred the buildings on the lot substantially the same as when the property was conveyed to them in 1875, and that, at the date of filing the bill, they had been in existence for a period of more than twenty-one years. A master was appointed to take testimony, find facts, and suggest a decree. He found that prior owners of lot 908 had erected on the lot buildings in violation of the condition; and they had been there for many years before the equity suit was instituted, and, further, were occupied and used for purposes wholly different from those stipulated for. He further concludes that defendants should be restrained, and, in accordance with his suggestion, the court below decreed an injunction. From this, defendants appealed to this court, and in October, 1891, the decree was reversed, and bill dismissed. The case is reported as *Orne v. Fridenberg*, 143 Pa. St. 487; 24 Am. St. Rep. 567. The opinion is by Paxson, C. J., and holds that, as plaintiff was guilty of gross laches in enforcing his right, equity would not interpose by a restraining order. Many cases are cited as sustaining this decision, the sum of them being, as quoted by the chief justice from 2 High on Injunctions, 1159, that "in conveyances of real property, the courts require due diligence upon the part of plaintiff seeking the relief, and laches or acquiescence on his part in the violation of the restrictive covenant will ordinarily defeat his application. Indeed, equity requires the utmost diligence in this class of cases upon the part of him who invokes its preventive aid, and a slight degree of acquiescence ⁵⁰⁰ is sufficient to defeat the application, since every relaxation which plaintiff permits in allowing the erections to be made in violation of the covenant, amounts pro tanto to a disaffirmance of the obligation."

Although the principle of equity which justifies a chancellor in refusing an injunction where the purpose of the restriction has been defeated by changes in the character of the neighborhood and the surrounding improvements is adverted to, the judgment is

based on the first ground; the laches of plaintiff extinguished his right in equity. The opinion ends with this intimation: "While we think, for the reasons given, that the plaintiff is not entitled to an injunction, he may still sue at law and recover damages, if he can show he has sustained any."

In June, 1893, more than a year and a half after this decree, the present plaintiffs brought this ejectment to enforce a forfeiture of the estate, because of the violations of the conditions of the grant heretofore noticed. A number of written points were presented to the court below, among them the sixth, which asked, on the facts, which undoubtedly showed a technical violation of the conditions of the deed, a peremptory direction to find for plaintiffs, conditioned that the offending structures should be removed within three months. The court declined to give the instruction prayed for, but submitted to the jury to find from the evidence whether the alleged breaches had continued for a period of more than twenty-one years before suit brought to enforce the forfeiture; if so, then the plaintiffs could not recover; if their existence was within twenty-one years, plaintiffs could recover the land by reason of the breach. And, further, if the buildings had been there less than twenty-one years, yet had stood for any considerable period without objection by plaintiffs, then defendants were entitled to reasonable notice to remove them, before an ejectment to enforce forfeiture could be successfully prosecuted.

* The verdict was for defendants, and plaintiffs appeal, assigning eleven errors to the charge and answers to points.

Without taking up and passing upon the assignments of error in their order, we do not see how, in any view of the undisputed facts, plaintiffs can now enforce the forfeiture of defendants' estate in the lot. In the equity proceedings, it was found as a fact that, many years before 1881, the forbidden structures ⁵¹⁰ stood upon the lot, and were used for purposes other than those specified and allowed in the condition. Up to that date, no suit had been instituted either to stop their erection or compel their removal. Then it was sought to have them removed by the mandate of a chancellor, who refused to grant it, because the plaintiffs had been guilty of gross laches. Eleven years after the institution of that suit, at the commencement of which the master found the violation had existed for many years, this common-law action is commenced to enforce the condition by a forfeiture of the estate. In the equity suit, the prayer was, that the condition be enforced by an order for the removal of the

building; if equity would not tolerate such a remedy, then, by reason of gross laches will the law, after eleven years more of neglect, adopt a more drastic one? If ever there was a case to which the maxim that conditions which defeat an estate are odious is applicable, it is this one. No court, either of equity or law, will declare an estate forfeited, unless compelled to do so by rigid and unbending rules; and certainly never, where the complaining party has a remedy in an action for damages, and has, as here, stood by for years without asserting by action his intention to insist on a forfeiture. There was inexcusable delay, and it was judicially so pronounced in the equity suit; the institution of that proceeding was itself, in effect, an admission that the condition could not be enforced by an action at law to retake the land. That suit proceeded on the theory that at that date there was no adequate remedy at law to compel performance of the condition, or such remedy had been lost by delay. Then equity declared, on the merits of the case presented substantially as they are here, specific performance of the stipulations ought not to be decreed. It did not dismiss the bill because of a doubt as to the contract legal right, or a doubt as to whether the legal right had been infringed, or because there was an adequate remedy at law for enforcement of the condition, but because, through inaction, plaintiffs had no remedy at all, which, operating on the subject of the grant, would compel specific performance of the contract. How can a common-law action now enforce a forfeiture of the land, if such remedy would have been ineffectual eleven years ago?

Suppose, instead of filing a bill in equity in 1881, Orne had brought ejectment to enforce a forfeiture; Fridenberg would ⁵¹¹ have set up the same equitable defense as in his answer to the bill; he would have claimed no forfeiture could be asserted, because of plaintiff's long delay. The trial judge, sitting as a chancellor, and blending equity with the law, would have been bound to instruct the jury, as decided by this court in *Orne v. Fridenberg*, 143 Pa. St. 487, 24 Am. St. Rep. 567, that if the buildings had been on the land for many years when defendant purchased and no suit to enforce a forfeiture had been begun, their verdict should be for defendant. With a final judgment entered on that verdict, could plaintiffs, on the same facts, have maintained a second ejectment? The defense being purely equitable, the judgment would have been conclusive on the facts which raised the equity. The only difference is, in the equity suit, the master found the facts which this court adjudged a complete equitable defense. That is an end of strife on that question.

It is argued laches is no defense to future prevention if there be no estoppel, and further, whatever may have been the supineness of plaintiffs in the past, there is in that no waiver of recurring breaches.

What will be the legal conclusion from permissive violations of the condition in the past, if proceedings be instituted to restrain threatened violations in the future, we are not called upon to decide. The question before us is whether, under the facts, a forfeiture can be enforced for permissive breaches in the past? As in the case of *Lehigh Coal etc. Co. v. Early*, 162 Pa. St. 338: "The right of re-entry might have been enforced upon breach of the condition in the deed, if done at once or within a reasonable time; but the condition being subsequent, if the breach was acquiesced in by the grantor and valuable improvements made, a forfeiture of the estate after long delay will not be permitted."

As the court below should have affirmed defendants' sixth point, "that, under all the evidence and the law in this case, the verdict must be for defendants," no harm was done plaintiffs by submitting the evidence to the jury, and entering judgment on the verdict found by them for plaintiffs.

The judgment is affirmed.

CONTRACTS IN VIOLATION OF LAW—INVALIDITY.—Business transactions in violation of law cannot be made the foundation of a valid contract: *Buckley v. Humason*, 50 Minn. 195; 36 Am. St. Rep. 637. Contracts are illegal when in contravention of the provisions of some statute: *Goodrich v. Tenney*, 144 Ill. 422; 36 Am. St. Rep. 459, and note. An agreement which discloses an intention to contravene a statute in fraud of the public or to the injury of private parties savors of a conspiracy, and is vicious and unenforceable: *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793, and note.

DEEDS — BREACH OF CONDITIONS — FORFEITURE—LACHES.—The right of entry for breach of a condition subsequent may be waived or lost by laches: *Scovill v. McMahon*, 62 Conn. 378; 36 Am. St. Rep. 350.

DEEDS—CONDITIONS SUBSEQUENT—FORFEITURE.—It is a general principle running through the whole doctrine of estates upon conditions subsequent, that such conditions as they "go in destruction and defeasance of estates are odious in law, and shall be taken strictly": *Extended note to Cross v. Carson*, 44 Am. Dec. 744.

BURT v. REAL ESTATE EXCHANGE.

[175 PENNSYLVANIA STATE, 619.]

CORPORATIONS, INSOLVENT—LIABILITY FOR UNPAID STOCK SUBSCRIPTION.—A subscriber to the stock of a corporation, with notice that his stock is to be sold unless assessments are paid, cannot, after the corporation becomes insolvent, escape liability for the unpaid portion of his subscription by voluntarily assigning his certificate in blank and delivering it to the treasurer of the corporation at the request of the latter.

CORPORATIONS, INSOLVENT.—TRANSFERS OF STOCK in a failing corporation, made by the transferor for the purpose of escaping his liability as a shareholder to a person, who from any cause is incapable of responding in respect to such liability, are void as to creditors of the corporation and other shareholders, although, as between the parties themselves, the transfers may be valid.

H. Budd, for the appellant.

T. D. Finletter, for the appellee.

621 **McCOLLUM, J.** The Real Estate Exchange of Philadelphia is an insolvent corporation, now and since October 26, 1891, in the hands of a receiver. It was incorporated November 11, 1886, and its authorized capital was seventy-five thousand dollars, divided into shares of fifty dollars each. The appellant subscribed for ten shares of the stock, paid ten per cent thereon, and received a certificate for the same. Ninety per cent of his subscription for it is still unpaid. In May, 1888, he caused the stock to be sold at auction, and it was bought by W. F. Deakyne for two dollars. As the corporation refused to transfer the stock to Deakyne without payment of a previous assessment upon it, the sale was not perfected. On the 16th of May, 1888, the appellant was notified that the assessment was payable on or before the 1st of June, and, as he did not pay it at or before that time, he was, on the 11th of July, informed by the treasurer of the corporation that unless payment was made within the next ten days, his stock, or so much thereof as was necessary to meet the assessments upon it, would be disposed of at public sale. At the expiration of the ten days he was still in default, and the treasurer, in a letter dated July 28, 1888, called his attention to it, and said: "It is incumbent on the exchange to advertise your stock for sale. If you wish to avoid the expense, and avoid undesirable publicity, you can do so by calling at the exchange before August 6th, and executing a transfer of your stock in blank." Acting upon the suggestion in the letter, he caused a transfer of his stock to be made in accordance with it, and after that he appears to have considered himself as released from all liability arising from his connection with the corporation. But

as the creditors of the concern did not accept his view of the effect of the transaction, he was made a party to this suit, in which it was adjudged that he was not released from liability as a stockholder, and that he should pay to the receiver the unpaid assessments on the stock he subscribed ⁶²² for. Is the adjudication in accordance with the law applicable to the controlling facts of the case? These, as found by the master, may be summarized thus: 1. When the appellant transferred his stock, the corporation was insolvent; 2. The transfer was made for the purpose of escaping liability as a shareholder; 3. It was not entered on the books of the corporation, and there was no designation at any time or place of a transferee; 4. While the appellant testified that the treasurer told him the letter of July 28th "was sent by the direction of the board," and "that the transfer of the stock in blank would be a release of all claims for past assessments," no action of the board authorizing the issuance of the letter, or permitting the transfer in satisfaction of his liability as a shareholder, was shown. The findings of the master appear to be well sustained by the evidence, and the accuracy of them is not called in question by any specification of error. It seems to be conceded that, upon the facts as found by him, the appellant is not released from liability to the creditors, but it is claimed that his liability is secondary and enforceable only after the other assets of the corporation, including the balances due on the subscriptions of the shareholders who have not executed transfers of their stock in blank, are exhausted. But this claim manifestly ignores the equities of such shareholders, and the allowance of it would constitute a discrimination against them for which there is no warrant in the charter of the corporation, or in the law applicable to the facts of the case. The vice of the appellant's contention lies in the assumption that his relation to the creditors and shareholders of the corporation was changed by the transaction we have described, while the fact is, that their rights and equities against him were unaffected by it. As against them, the transaction did not constitute a valid transfer of his stock. "A transfer of shares in a failing corporation, made by the transferor with the purpose of escaping his liability as a shareholder to a person, who from any cause is incapable of responding in respect to such liability, is void as to creditors of the company, and as to other shareholders, although, as between the transferor and the transferee, the transfer may be out and out": Aultman's Appeal, 98 Pa. St. 505. The appellant, having transferred his stock in blank for the purpose of escaping his liabilities as a shareholder,

and having failed to designate any transferee of it capable of ⁶²³ responding in respect to such liability has no legal or equitable cause to complain of the decree appealed from. The specifications of error are overruled.

Decree affirmed and appeal dismissed at the costs of the appellant.

CORPORATIONS—UNPAID STOCK SUBSCRIPTIONS—TRANSFER OF STOCK.—A bona fide transfer of stock perfected upon the books of the corporation, if required, discharges the transferor from liability to the corporation or its creditors for installments and calls thereafter to become due: Extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 830-833. But it is clear that a shareholder cannot relieve himself at his own pleasure from liability either to the corporation or to its creditors for unpaid subscriptions by any attempted withdrawal from the company: Extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 821.

KNOWLES v. PENNSYLVANIA RAILROAD COMPANY.

[175 PENNSYLVANIA STATE, 623.]

HIGHWAYS—OBSTRUCTION.—A railroad company cannot escape liability for damages arising from its erecting and maintaining a fence across a highway on the ground that such obstruction is incidental to raising its roadbed to conform to a grade authorized by municipal authority, if the work of raising the roadbed is not commenced for more than two years after the fence is erected.

NUISANCE—PRIVATE ACTION for a public nuisance is maintainable by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance. Interference with a common right does not of itself afford a cause of action by an individual, but special or particular damage consequent on the interference does.

NUISANCE—PRIVATE ACTION FOR—SPECIAL DAMAGE. One having a contract for hauling a large amount of dirt from one side of a railroad to the other sustains special damages from the unauthorized obstruction of a highway by the railroad company, if, by reason of such obstruction, his most convenient way for hauling the dirt is blocked, and his work is retarded and his profits very much lessened by being thus compelled to haul the dirt over a longer route. He may maintain a private action to recover such damages.

Trespass to recover damages caused by the obstruction of a highway. Judgment for plaintiff. Defendant appealed.

D. W. Sellers and T. Hart, Jr., for the appellant.

T. A. Fahy, for the appellee.

⁶²⁷ **McCOLLUM, J.** The defendant company contends that, if the plaintiff has sustained any damage by reason of its erec-

tion and maintenance of the fence across Tacony road, he must "have recourse to the city for compensation" for it. This contention appears to be based on the theory that the obstruction complained of was incident to the work of raising its roadbed to conform to the revision of grades authorized by the ordinance of March 31, 1887, and that for damage done in the proper performance of such work, the company is not responsible. But it is obvious that the question whether the company or city is liable for the damage caused by the company's elevation of its roadbed in accordance with the revision of grades is not in this case. The ^{old} fence was erected by the company across Tacony road on the 14th of December, 1891, and it was maintained there until the latter part of October, 1893, when the company removed it, and for five months thereafter the public used the highway as it had done before the erection of the fence. The work of elevating the company's roadbed at the point where the same was crossed by the Tacony road was not begun until April, 1894, two years and three months after the erection of the fence. It is obvious, therefore, that the obstruction complained of in this case had no connection with the revision of grades or the elevation of the roadbed. It was not authorized by the ordinance of March 31, 1887, nor by any action of the city thereunder. It was, by the company's own confession in removing it, as needless and unwarranted at any time before April, 1894, as it would have been if erected at any time before December 14, 1891. It was clearly an unlawful obstruction, and the company's liability for the damage caused by it is not affected by "a change of grade at Princeton and Cottman streets," nor by "the revision of grades authorized by the ordinance of March 31, 1887." For the reasons above stated, the case in hand cannot be likened to the case of an obstruction caused or made necessary by the work of elevating the roadbed under the arrangement between the company and the city. We therefore overrule the second, third, and fourth specifications of error.

The important question in the case is, whether the plaintiff has sustained such loss or damage in consequence of the obstruction of the highway as will support his action against the wrongdoer. "A private action for a public nuisance is maintainable by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance. Interference with a common right does not of itself afford a cause of action by an individual. Special or particular damage consequent on the interference does. There is no diffi-

culty in this general statement of the rule and the exception. It is supported by all the cases. The difficulty is in the application to the facts of the cases wherein the rule has been invoked": 16 Am. & Eng. Ency. of Law, 971. The business of the plaintiff was excavating and hauling dirt and stone for grading and building purposes. At the time the fence was erected across Tacony road, he had contracts with different parties for hauling at least five thousand loads of dirt from the high ground on the west side of the railroad to fill up and grade the lots on the low ground on the east side of it, and was actually engaged in hauling the same. He was to receive under his contracts fifteen cents a load for hauling it. The natural route from the place where the dirt was taken to the place of deposit was over the Tacony road. At least three loads of dirt could be delivered over this route in the time required to deliver one load over the route the plaintiff was compelled to take after the fence was erected. It was worth forty cents to deliver a load over the latter route, while fifteen cents was sufficient compensation for delivering a load over the former. It is clear, therefore, that the plaintiff suffered material loss or damage by reason of the obstruction which was the original subject of complaint in this action.

In an amended statement filed on the 12th of November, 1894, the plaintiff averred that a gutter in front of his property formerly conveyed the surface water into a wooden conduit, through which it flowed into a ditch on the west side of the railroad tracks, and that the defendant company, after the erection of the fence, willfully and negligently permitted the eastern end of said conduit, at its junction with the ditch on its land, to become clogged with rubbish and dirt which prevented the free passage of the water, and forced it back upon the Tacony road, so as to form a stagnant pool in front of his premises, which interfered with access to the same, and was prejudicial to the health of himself and family. He testified on the trial in support of these averments, and was corroborated to some extent by other witnesses. It seems to us, however, that the testimony in regard to the stagnant pool and its effect upon the plaintiff's property and the health of himself and family is not convincing or satisfactory. It is noticeable that it is not averred in the amended statement that the stagnant pool was formed before the roadbed was raised, and that the testimony of Leonard and Saunders indicates that it was not. But as there is no specification of error which calls in question the sufficiency of the testimony or the accuracy

of the instructions in regard to it, we need not further consider this branch of the case.

It is not possible to reconcile all the cases in which the question whether a private action is maintainable for a loss occasioned ^{and} by a public nuisance has been considered and passed upon. In England, as well as in our own country, the decisions on this point are conflicting. The loss or damage which is adjudged in some cases to be special and to authorize a suit by the injured party against the wrongdoer is held in other cases to furnish no basis for a private action. But a review or extended reference to the decisions of the courts of other states or of England is not deemed necessary, because the case in hand must be determined in accordance with our own adjudications, and these we think fully sustain the ruling of the learned court below, and the judgment based thereon. In *Hughes v. Heiser*, 1 Binn. 463, 2 Am. Dec. 459, the plaintiff declared that he had prepared rafts with intent to navigate them down a river which was a public highway, and that he did navigate them until he came to a dam erected by the defendant, by which he was prevented from passing down the river with his rafts. It was held that special damage was shown, and his action for it was sustained. To the same effect is *Powers v. Irish*, 23 Mich. 429. In *Dudley v. Kennedy*, 63 Me. 465, "Being prevented from fulfilling a transportation contract because of an obstruction of a navigable river by a boom, was deemed sufficient special damage" to support the suit. In *Pittsburg v. Scott*, 1 Pa. St. 309, Duquesne Way was obstructed by the defendant and the plaintiff (the city of Pittsburg) claimed, inter alia, that it was obliged by reason of the obstruction to haul by a circuitous route the stones, dirt, and other material required in repairing the public wharf along Allegheny river, between said way and said river. The plaintiff also claimed that its revenue from the wharf was greatly diminished by the obstruction, and that the defendant prevented its wharfmaster from collecting tolls. It was held that the action was maintainable on either ground. It was also held that it was immaterial, so far as the right of action was concerned, whether there was a total or partial obstruction of the way. *Pittsburg v. Scott*, 1 Pa. St. 309, was approved and followed in *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482, and cited with *Hughes v. Heiser*, 1 Binn. 463, 2 Am. Dec. 459, by Sharswood, J., in *Pennsylvania etc. Land Co. v. Graham*, 63 Pa. St. 290; 3 Am. Rep. 549. No decision of this court has been brought to our notice which overrules or qualifies either of the Pennsylvania cases we have cited as applicable to the case in

hand. It is said that *Heffner v. Commonwealth*, 28 Pa. St. 631 108, and *Gold v. Philadelphia*, 115 Pa. St. 184, are in conflict with them. The former was an application for a writ of mandamus to compel the town council of the borough of Pottsville to open a public alley. The relator, in his petition for the writ, alleged inter alia that the opening of the alley would greatly enhance the value of his property. An answer was filed to the petition, and the relator demurred to it. Judgment was entered on the demurrer by the court below, in favor of the relator, and from the judgment so entered an appeal was taken to this court, where the judgment was reversed in an opinion by Woodward, J., who said that the relator had "no more right to call on the municipal authorities to open an alley to put money into his pocket than he would have to require them to build him a house." The latter was a case in which an innkeeper, "a tenant under a lease from year to year of the premises," alleged that her business had declined in consequence of the neglect of the city to keep a certain street in repair. It was held that she could not recover. Mr. Justice Paxson, in delivering the opinion of the court, said: "It is significant that no Pennsylvania case has been called to our attention, nor am I aware of any, in which a recovery has been sustained under similar circumstances. Nor must we be misled by cases referring to business or trading corporations. They differ from municipal corporations in this, that the former are organized for private purposes and for gain; whilst municipal corporations are organized solely for the general good of the people. When a duty is imposed upon a municipal corporation for the benefit of the public, no consideration or benefit is received by such municipality, as in the case of a trading corporation, hence no implication arises of liability to the individual citizen for any injury he has suffered in common with other citizens, resulting from a neglect of such duty. To sustain a contrary doctrine would be disastrous to municipalities, and consequently to the general public. If we once throw open the door to a recovery in such cases, how are we to measure the extent to which a public highway may be out of repair to entitle owners of property abutting thereon to recover damages? The case of *Pennsylvania R. R. Co.'s Appeal*, 128 Pa. St. 509, cited by the plaintiff, has no application, for the reason that it arose between a private corporation and a citizen. The former was attempting to lay a switch in ⁶³² front of the plaintiff's property, having, as this court held, no authority to do so. The plaintiff claimed and proved a special injury, and the company was enjoined." It is evident from the above extract

from the opinion in *Gold v. Philadelphia*, 115 Pa. St. 184, that the court did not regard the case then under consideration as like any Pennsylvania case in which an action for damages caused by a public nuisance had been sustained.

We conclude from the evidence in the case before us, and from the decisions of this court applicable to it, that the plaintiff suffered special injury by reason of the erection and maintenance of the fence across Tacony road, and that he was entitled to compensation for it in this action. The first specification of error is overruled.

Judgment affirmed.

NUISANCE—PUBLIC—PRIVATE ACTION FOR.—One who sustains, by reason of a public nuisance, a special damage, different from that which is common to all, may maintain an action for such damage, though there are others injured to the same extent as he: *Wylie v. Elwood*, 134 Ill. 281; 23 Am. St. Rep. 673, and note. Before a private person can sustain an action for a public nuisance, he must show that the damage suffered by him differs from that suffered by the public in kind as well as in degree: *Zettel v. West Bend*, 79 Wis. 316; 24 Am. St. Rep. 715, and note with the cases collected.

AM. ST. REP., Vol. LII—55

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

BERRY v. WIEDMAN.

[40 WEST VIRGINIA, 86.]

PARTIES, DEFECT OF.—The administrator of a deceased husband, where there are no debts, and no relief is sought against the personal estate, is not a necessary party to a suit by the wife of the deceased to compel a conveyance to her of lands standing in his name at his death, but which she claims were purchased with her moneys, and held in trust for her.

HUSBAND AND WIFE, TRUST RESULTING IN HER FAVOR.—When a husband buys property with his wife's money, taking a conveyance in his own name, there arises a resulting trust in her favor, unless a different intention on her part is shown. The burden of proof is on him to show that she intended a gift.

HUSBAND AND WIFE, PRESUMPTION OF GIFT.—The fact that a conveyance of land is taken in the name of a husband, the purchase money for which was furnished by his wife, does not create the presumption of a gift from her to him.

TRUST, RESULTING, LACHES IN ASSERTING.—A wife is not precluded, after the death of her husband, from maintaining a suit to enforce a resulting trust in her favor to lands purchased with her moneys, by the fact that the purchase was made, and the conveyance taken, twenty-five years before his death, if they, during all that time, lived upon the land as their common home, and he also admitted her ownership thereof.

COSTS IN EQUITY.—Parties who resist a suit to have a resulting trust enforced in favor of a widow out of lands standing in the name of her deceased husband, but which she claims were paid for out of her separate estate, ought not to be excused from the payment of the costs of suit, if a decree is entered against them after a defense interposed by them making necessary a trial and the expenditure of money.

Joseph Moreland, for the appellants.

P. J. Crogan, for the appellee.

(866)

³⁷ DENT, J. At July rules 1891, in the clerk's office of the circuit court of Preston county, Helen A. Berry, plaintiff, filed her bill in chancery against Caroline Wiedman, S. A. Litman, Carl Litman, and Mrs. A. J. Morris, heirs of her husband, Oliver Berry, deceased, to compel a conveyance to her of the legal title to a certain house and lot situated in Evansville, in said county. She alleges that the lot was originally purchased and paid for with money advanced to her by her father, but that the deed was made to her husband; that he always recognized the property as hers; and that she, with this understanding, during the years 1887, 1888, and 1889, built thereon, with her separate funds, a house costing more than the property would sell for. After her husband's death, which occurred in the year 1891, his heirs set up claim to the ownership of the property, and thereupon she brought her suit to compel a conveyance of the legal title. On the fourteenth ³⁸ day of September, 1891, the defendants appeared, and filed a joint answer, in which they denied the plaintiff's ownership of the property, or that she had invested any money in building the house thereon, but claimed that the whole property was bought and improved by Oliver Berry, deceased, out of his own funds. To this answer a general replication was entered, and the parties went to proof. On the first day of April, 1893, the circuit court entered a decree in favor of plaintiff, from which the defendants have appealed, and now here assign numerous errors.

1. Want of proper parties; that the administrator of the personal estate of Oliver Berry should have been made a party. There were no debts, and no decree was sought against the personal estate, and therefore the administrator was not a necessary party.

As to the wife of A. J. Morris, she appears to have been properly summoned as Mrs. A. J. Morris, and she was before the court in her husband's name, and no objection to this was made in the court below; but the answer is filed for all the defendants, denying the plaintiff's equity, and this court will not now permit the husband, who was not summoned in the case, to come in here, after a fair hearing, without objection, on the merits, and say that it was his, and not his wife's, answer that was filed. Courts of equity will not permit themselves to be trifled with in this way. According to the rule laid down by this court in the case of Rader v. Neal, 13 W. Va. 373, the husband was not a necessary party.

It does not affirmatively appear that Isaac Litman was a necessary party, as there is nothing in the case to show that he has any interest in the subject matter of the litigation, and unless the error affirmatively appear, the decree will not be reversed.

The next four assignments of error relate to the merits. The proof on the part of the plaintiff clearly establishes the following to be the facts: That in January, 1866, the plaintiff and Oliver Berry, deceased, were married; that shortly prior to their marriage he had bargained for the property in controversy, but had not paid for the same, or obtained the deed therefor; that after the marriage, plaintiff's father, as ³⁹ an advancement to her, furnished the money to pay for the property, and the deed was then taken in the name of the husband; that from time to time she received other funds from her father's estate, amounting in the aggregate to about eight thousand dollars; that in the years 1887, 1888, and 1889, with her separate funds, she erected a dwelling-house on the property, at an expense of from one thousand dollars to fifteen hundred dollars; that the lot on which this was erected was a small portion of the original property, worth about one hundred dollars, the residue having been sold; that the husband and wife had lived in peace together from the time of their marriage, in January, 1866, up until his death, March 18, 1891, over twenty-five years; and that he continually recognized the property in controversy to be the property of his wife, and had no estate at the time of his death.

To contradict this state of affairs, the defendants show that Oliver Berry received about one thousand dollars from his father's estate prior to his marriage with plaintiff; that he was a frugal and industrious man, and should have been, and was generally considered, worth a large sum of money, to wit, something like six thousand dollars, at the time of his death; and that he and his wife lived unhappily together, she being overbearing to him, and treating him cruelly.

Defendants' evidence is founded on mere matter of hearsay and supposition, and it seems to me that it clearly appears from this case, taken as a whole, that what little estate Oliver Berry had at the time of his marriage was expended in payment of debts, or used in the support of his family; that the fortune that he was supposed to have was really the money, and the increase thereof, received by his wife from her father's estate; and that, outside of her means thus received, he never was worth anything on his own account. All this he had a right, even prior to the code of 1868, to recognize and treat as her property, when the same was not used in any manner to defeat the rights of his creditors. The decisions referred to by defendants' counsel in his exhaustive brief were in cases where the rights of creditors were involved. A very different rule prevails where there is no ⁴⁰ such contro-

versy, but it is merely a litigation between the wife and the collateral heirs of the deceased husband. So far as the latter are concerned, the husband has the right to give his wife his property, his time, his labor and skill, and they have no reason to complain. They are only entitled to receive such estate as rightfully belonged to the husband, and was undisposed of at the time of his death. In morals, a wife who has lived with her husband for twenty-five years has a far superior right to collateral heirs, whose right of inheritance is merely a legal provision, through want of direct heirs, and contains within it no moral obligation. It is true, the defendants charge that they did not live happily together. The proof does not sustain this charge, and, if it did, such a fact would have little to do with determining the status of the property in controversy. The husband and wife sometimes did not perfectly agree, but this is not uncommon. On the contrary, it is rather the rule than the exception, because married people generally consider they have a proprietorship in each other; and therefore, if they do sometimes express their differences in language too severe or harsh, it is a matter entirely within and between themselves, and with which the public at large have nothing to do. Affections sometimes must be lacerated, before they will knit together properly and form two souls into one. Such difficulties are always magnified and exaggerated by repetition. The only question here is, whether the plaintiff has shown a legal right to the property in controversy. "When a husband buys property with his wife's money in his own name, there arises a resulting trust in her favor" (14 Am. & Eng. Ency. of Law, sec. 17, p. 580; 1 Perry on Trusts, sec. 127), unless a different intention on her part is shown; and the burden of proof is on the husband to show she intended a gift to him, which is, however, *prima facie* established by proof of her knowledge and consent": 14 Am. & Eng. Ency. of Law, sec. 17, p. 580. The fact that the deed of the lands was made to the husband, in the absence of proof that it was made so by the wife's direction, consent, or knowledge, is no evidence of such gift, and warrants no presumption against the wife's interest: *Wales v. Newbould*, 9 Mich. 45. In the case of ⁴¹ *Pusey v. Gardner*, 21 W. Va. 470, this court held that "courts will not enforce a resulting trust, after a great length of time, or laches on the part of the supposed cestui que trust. Lapse of time, when not a statutory bar, operates in equity as evidence of assent, acquiescence, or waiver: Approved in *Smith v. Turley*, 32 W. Va. 14. Lapse of time, as

an equitable bar, only raises a presumption, which may be rebutted. "Courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed cestui que trust, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate. But if the trust is admitted, and there has been no adverse holding, lapse of time is no bar; and laches will not be allowed to avail as a defense, where fraud has been practiced on the cestui to keep her in ignorance of her rights until just before filing the bill. Any excuse for delay that takes hold of the conscience of the chancellor, and makes it inequitable to interpose the bar is sufficient": 1 Perry on Trusts, sec. 141. And in the case of *Cranmer v. McSwords*, 24 W. Va. 595 (fifth point of syllabus), this court propounded the law as follows: "While ignorance of law will not prevent the operation of a statute of limitations, the rule is different in equity—a court of conscience. In such court, moral as well as legal grounds may be considered, and a satisfactory moral excuse may be entertained, although it result from ignorance of law."

A long period of time had elapsed from the making of the deed until this suit was instituted, to wit, upward of twenty-five years—sufficient, ordinarily, to bar a proceeding of this kind. But during all this time the plaintiff and husband occupied the property as their common home; he, as far as the evidence discloses, always admitting, in her presence, her ownership. While under a fiction of law, her possession was his, yet he had no adverse holding to her; and equity has little regard for mere fictions of law, but always looks at the facts and circumstances as they really exist. Even according to the evidence of defendants' witnesses, "she was lord of all she surveyed." "There was none her right to dispute," in so far as the property in controversy was concerned. Even if he did sometimes assert an ownership in the ⁴² property in her absence, he never did so in her presence, nor to any witnesses who would be likely to inform her of his claim; and such conduct on his part would only tend to show that he was attempting to deceive her as to the true legal condition of the property, lull her into a state of security, and perpetrate a fraud upon her. A wife's knowledge of law has always been recognized as limited, and therefore a court of equity vigilantly looks after her interests with tender solicitude. It is clearly established, beyond dispute or question, that her money built the dwelling-house. Many of the receipts filed show on their face that they were taken by the husband in her name, and

he admitted to several witnesses, not only that she built the property, but that it belonged to her. His admissions are proper evidence against, but not in favor of, his heirs.

The counsel insist that the administration account should have been settled, to ascertain whether he had not repaid her for the investments in the property. There was nothing of this kind alleged in the pleadings, and there is no evidence that she ever received one dollar of his estate. On the contrary, the evidence tends to show that he was supported and cared for by her out of her separate property—the only source of income for many years prior to his death.

The legal evidence in this case vastly preponderates in favor of plaintiff, and establishes beyond dispute her moral and equitable right to the property in controversy; and therefore the circuit court permitted no error in compelling a conveyance of the legal title to her by the defendants, and, on their failure, by a commissioner appointed for the purpose.

As to the question of costs, if no defense had been made, or no resistance of the plaintiff's rights undertaken, there might have been some justice in the claim that the defendants should not pay costs. But when parties make a rigid defense, and compel the expenditure of time, money, and the examination of witnesses, to secure their defeat, they ought not to expect to escape the payment of unnecessary costs occasioned by their own conduct. The decree is affirmed.

HUSBAND AND WIFE—RESULTING TRUST ARISES IN FAVOR OF WIFE WHEN.—If a farm is purchased for a wife with her money, upon an understanding between her and her husband that she shall receive title to it, and the deed is by mistake made to him without her knowledge, there is raised a resulting trust in favor of the wife, and the husband becomes a trustee of the legal title for her: *Miller v. Baker*, 166 Pa. St. 414; 45 Am. St. Rep. 680, and note with the cases collected; *Grantham v. Grantham*, 84 S. O. 594; 27 Am. St. Rep. 839, and note. See, also, the note to *Beecher v. Wilson*, 10 Am. St. Rep. 888.

HUSBAND AND WIFE—PRESUMPTION OF GIFT TO HUSBAND.—The presumption when a husband receives money from his wife and uses it in the purchase of property in his own name, is that she intended to give and not to loan it to him: *Beecher v. Wilson*, 84 Va. 813; 10 Am. St. Rep. 883, and note. If permanent securities, purchased with the money of a wife, are placed in the name of her husband with her assent, she will be presumed to have intended them to be his property; but shares of stock so purchased and marked on the back with her initials are presumed to belong to her estate: *Springfield Inst. for Savings v. Copeland*, 160 Mass. 380; 39 Am. St. Rep. 489, and note.

HUSBAND AND WIFE—RESULTING TRUST—LACHES.—A wife whose husband purchases land with her money and takes the title in his name without her knowledge or consent, and who resides on the land with him, occupying it as their homestead until his

death, some twenty years after she knows that the title was taken in his name, but without his ever asserting any hostile right in the land, and with his constantly admitting her equitable right thereto, is not guilty of laches so as to defeat her action brought against her husband's heirs, soon after his death, to enforce a resulting trust in her favor in such land: *Fawcett v. Fawcett*, 85 Wis. 332; 39 Am. St. Rep. 814. See, also, the note to *Bell v. Hudson*, 2 Am. St. Rep. 799.

CLIFTON v. MONTAGUE.

[40 WEST VIRGINIA, 207.]

LEASE, ESTOPPEL TO DENY THAT THE PROPERTY IS AS DESCRIBED THEREIN.—If a lease is made of certain premises, described by name, "together with all the appurtenances thereto belonging, including six salt wells," and the lessee was acquainted with the premises when he accepted the lease, he is estopped from denying that they contained six salt wells. Therefore, he cannot maintain an action for damages against his lessor on the ground that there were but five such wells.

LANDLORD AND TENANT.—THERE IS NO IMPLIED WARRANTY by a lessor of the fitness of the premises for the purposes for which they are leased. Hence, one receiving a lease of premises, including six salt wells, cannot maintain an action against his lessor to recover damages arising from the wells or premises not being in a fit condition for the production of salt.

LANDLORD AND TENANT—REPAIRS.—In the absence of an express covenant on the part of a lessor, he cannot be held answerable for repairs made by the tenant of the leased premises.

LANDLORD AND TENANT—IMPLIED COVENANTS.—Though a lease describes the property leased as the "Bedford Salt Furnace Property," including six salt wells, with the right to mine coal to run such furnace, there is no covenant implied that the wells have any particular fitness for the purpose of supplying salt water for the use of the furnace, nor that such wells are in a state of repair fitting them for the purpose for which they were designed.

LEASE, PAROL UNDERSTANDING.—A lessee, in an action of covenant, is confined to the terms of his written lease, and cannot recover upon an oral understanding existing contemporaneously with its execution.

LANDLORD AND TENANT.—THE MAXIM OF CAVEAT EMPTOR applies between lessor and lessee; and it is for the latter to make the examination necessary to determine whether the premises are sufficient, and are adapted to the purposes for which they are leased.

Malcolm Jackson, Tomlinson & Wiley, and Chas. E. Hogg, for the plaintiff in error.

John U. Myers, for the defendant in error.

208 **ENGLISH, J.** This was an action of covenant brought in the circuit court of Mason county by George Clifton against T. G. Montague. The action was predicated upon a lease executed by said T. G. Montague to said George Clifton and W. H. Cavan,

dated August 23, 1890, whereby, in consideration of ²⁰⁰ the rents and covenants therein contained, the said T. G. Montague leased unto said Clifton and Cavan, for the period of three years from that date, the premises known as the "Bedford Salt Furnace Property," together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same, and the buildings of the party of the first part located thereon, situated in and near the village of Clifton, Mason county, West Virginia, with the right to mine coal in the manner therein prescribed, to run said furnace, etc., upon the considerations and limitations therein set forth.

The plaintiff, in his declaration, averred that the defendant, by said lease, for himself, impliedly and by operation of law, did covenant with the said George Clifton and W. H. Cavan that said premises and property included six salt wells, as in the said deed specified, suitable for pumping brine therefrom and supplying the same to said furnace in the manufacture of salt on said premises, and that the defendant had not performed, fulfilled, and kept the covenants contained in said deed according to the tenor and effect, true intent and meaning thereof, in this, that there were not six salt wells on said premises as called for in said deed, suitable and proper for pumping brine therefrom and supplying brine to said furnace for the manufacture and sale of salt, but that there were only five salt wells on said premises suitable for pumping brine therefrom and supplying brine to said furnace in the manufacture and sale of salt.

On the tenth day of February, 1893, the defendant cravedoyer of the lease, and demurred to the plaintiff's declaration, which demurrer was overruled, and thereupon the defendant pleaded covenants performed and covenants not broken, and issue was thereon joined. On the eighth day of May, 1893, the plaintiff was allowed to amend his declaration at bar by inserting an additional count, in which count the breach was alleged as follows: "And plaintiff avers that, after said lease had been made and entered into as aforesaid, the said defendant, through his agent and employes, continued to work on said well in the act of putting it in proper order and repair for some time thereafter, but said defendant failed and ²¹⁰ refused to finish the work of repairing said well; and by the negligence of his (defendant's) agents and employes, while said repairs were in progress, said well was rendered wholly worthless and made incapable of use by said lessees, Clifton and Cavan, and said well was practically destroyed, leaving in effect

but five salt wells on said premises; and by reason of said negligence of the said defendant, through his agent and employes, in working on said well as aforesaid, said well was so much injured and impaired as not to be practically susceptible of being put in proper and suitable condition for use in connection with salt furnaces. And plaintiff avers that the defendant, in thus holding out to Clifton and Cavan before said lease was executed his purpose and intention of repairing said sixth well, whereby said lessees were induced to enter into said lease, after the execution to abandon as aforesaid the repairs of said well, and by defendant's own acts, as aforesaid, to render said well wholly worthless, was and is a gross fraud thereby practiced upon said lessees."

On the sixteenth day of May, 1893, the demurrer to the declaration as amended was sustained, and the plaintiff filed a second amended declaration by adding two new counts thereto, in the first of which counts the plaintiff averred that "the said defendant, since the making of said deed, hitherto had not performed, fulfilled, and kept the covenant in said deed contained on his part to be performed, fulfilled, and kept according to the tenor and effect, true intent, and meaning of said deed, in this, to wit, that there were not six salt wells on said premises as called for in said deed, but that there were only five salt wells on said premises, and not six, as stipulated in said deed of lease.

"And plaintiff further averred that, in consequence of there being but five salt wells on said premises, the said George Clifton and W. H. Cavan were forced and compelled to provide another salt well at their own cost and expense, and at great delay and loss of time, and they were thereby greatly hindered and injured in the business of the manufacture and sale of salt on the said premises described and leased in and by said deed, of all of which the said defendant ²¹¹ afterward, to wit, on the first day of December, 1892, and long prior thereto, had notice." In the second count the plaintiff avers as a breach of covenant, "that the said defendant, since the making of the deed aforesaid, hitherto has not performed, fulfilled, and kept the covenants in said deed contained on his part to be performed, fulfilled, and kept according to the tenor and effect, true intent and meaning of said deed, in this, to wit, that the said defendant failed and neglected to deliver unto the said plaintiff and said W. H. Cavan the six salt wells in said deed of lease stipulated for, and only delivered unto them five salt wells, instead of the six wells called for in said lease, and that, in consequence of the failure and neglect of the said defendant to deliver unto the said plaintiff and said

W. H. Cavan the six salt wells stipulated for in said deed of lease, and by reason of his delivery of only five salt wells unto said plaintiff and said Cavan, the said George Clifton and W. H. Cavan were forced and compelled to provide another salt well at their own cost and expense, and at great delay and loss of time, and they were thereby greatly hindered and injured in the business of the manufacture and sale of salt on the said premises described in and by said deed, of all of which the said defendant afterward had notice."

At the September term, 1893, the defendant cravedoyer of the writing obligatory sued on in this action, and demurred to the plaintiff's declaration as amended and to each count thereof, in which the plaintiff joined, which demurrer was sustained by the court as to counts Nos. 1 and 2, and overruled as to counts Nos. 3 and 4, being the last two counts added, by way of amendment, to said declaration; and the defendant pleaded covenants performed and covenants not broken, and issue was joined thereon. The case was submitted to a jury, and after the plaintiff had introduced all of his witnesses and examined them before the jury, and rested his case, the defendant, by his attorney, moved the court to exclude from the jury all the evidence introduced by the plaintiff, which motion was sustained by the court; and the plaintiff, by his counsel, excepted, and asked that the evidence so excluded be certified by the court and made part of ²¹² the record, which was accordingly done; and the jury found a verdict for the defendant, and thereupon the plaintiff moved the court to set aside the verdict and award him a new trial, because said verdict was contrary to the law and the evidence, which motion the court overruled. The plaintiff excepted. Judgment was rendered for the defendant, and this writ of error was obtained.

The first error assigned and relied upon by the plaintiff in error is as to the action of the circuit court in sustaining the demurrer to the plaintiff's declaration and first amended declaration. If, in considering the questions raised by this assignment of error, we turn to the rules prescribed by the elementary works in regard to the action of covenant as a remedy, we find in Chitty's Pleading, sixteenth edition, volume 1, page 129, the author says: "The rules respecting this action are few and simple. It is a remedy provided by law for the recovery of damages for the breach of a covenant or contract under seal. It cannot be maintained except against a person who, by himself or some other person acting on his behalf, has executed a deed under seal, or who, under some very peculiar circumstances, which will be no-

ticed hereafter, has agreed by deed to do a certain thing. In the case of a covenant under seal, an action of covenant may be supported, whether such covenant be contained in a deed poll or indenture, or be express or implied by law from the terms of the deed." Upon this question as to the existence and extent of implied covenants, Mr. Justice Swayne, in delivering the opinion of the court in the case of *Sheets v. Selden*, 7 Wall. 423, says: "The tendency of modern decisions is not to imply covenants which might and ought to have been expressed if intended. A covenant is never implied that the lessor will make any repair, The tenant cannot make repairs at the expense of the landlord, unless by special agreement. If a demised house be burned down by accident, the rent does not cease. The lessee continues liable, as if the accident had not occurred." In the case under consideration the lessees covenanted and agreed to pay to the lessor, his personal representative or assigns, two hundred and fifty dollars per month, at the end of each calendar month, for the use of the furnace and the bittern ²¹³ flowing therefrom, and for the use of stable and ten dwelling-houses upon said premises, and, in addition thereto, to pay a royalty for the coal to be mined by them in the quantity and manner therein prescribed. And it was further provided that, if said lessees failed or neglected to pay the party of the first part the rent and royalty for the space of five days after the same became due, without further demand, the said lessor might re-enter and take possession of said premises without legal process, and put an end to said tenancy, without waiving any security held by him for such rent and royalty. Said lessees also covenanted to keep said furnace plant in proper and sufficient repair, and, at the termination of the lease, to surrender and deliver possession of the premises and property therein described unto the said lessor, his heirs or assigns, in good working order and condition, unless destroyed by fire or other unavoidable casualty not caused by the negligence or carelessness of said lessees, their servants or agents. Now, over was craved of this lease when the demurrer was entered; and, in determining the questions raised by the demurrer, we must take the lease by the four corners, and gather from the entire instrument the true intent of the contracting parties. It appears therefrom that two hundred and fifty dollars per month was to be paid for the use of the furnace and the bittern flowing therefrom, and that the lessees expressly covenanted to keep the furnace plant in order and sufficient repair. Now, what is meant by the words "furnace plant"? Webster defines the word "plant," in a commercial

point of view, as follows: "The whole machinery and apparatus employed in carrying on a trade or mechanical business, also sometimes including real estate and whatever represents investment of capital in the means of carrying on a business, but not including material worked upon or finished products; as the plant of a foundry, a mill, or a railroad." By the express terms and provisions of the lease, then, the lessees were to keep said furnace plant in proper and sufficient repair. The words "furnace plant," under the above definition, we must regard as broad enough to cover the six salt wells, and especially is this the case when the lease on its face describes the property ²¹⁴ leased as the "Bedford Salt Furnace Property," together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same, etc., and when we look further, it is apparent that the lessees covenanted and agreed to surrender and deliver possession of the premises and property thereinbefore described unto the party of the first part, his heirs or assigns, in good working order and condition, unless destroyed by fire or other unavoidable casualty not caused by the negligence or carelessness of said lessees, their servants or agents. Now, it is not to be presumed that said lessees would have covenanted to return the property described in the lease (which, in express words, includes six salt wells) if there were only five salt wells on the property, or that they would have entered into a covenant under seal for the lease of six salt wells when in reality there were only five on the property. Bigelow, in his valuable work on Estoppel, on page 611, says: "Generally speaking, it is often said that a man is presumed to know the truth in regard to facts within his own special means of knowledge. More definitely, the rule has been stated thus: What a person is bound to know has regard to his particular means of knowledge, and to the nature of the representation, and is then subject to the test of the knowledge which a man, paying that attention which every man owes to his neighbor in making a representation, would have acquired in the particular case by the use of such means." In the case at bar, the lessor, in describing the property leased speaks of it as the following premises and properties, to wit: "The premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells," etc., located thereon. The lessees, we must conclude, had the means of knowledge within their power as to the number of salt wells on this salt property. The number of salt wells on the property was not a matter of insignificance, but, on the contrary the grava-

man of the complaint in the plaintiff's declaration is, that there were only five salt wells instead of six, as set forth and described in the lease. We must, then, regard the words "including six salt wells" as a particular ²¹⁵ and definite recital of a material fact, and under the head of Estoppel, in 7 American and English Encyclopedia of Law, page 7, the law is stated thus: "Particular and definite recitals are conclusive evidence of the material facts stated," meaning the material facts stated in a deed. And Bigelow on Estoppel, on page 345, says: "Between grantor and grantee, the recitals of the deed will, doubtless, be conclusive evidence in a proper case." The recital contained in the deed of lease as to the number of salt wells on this property we must regard as conclusive of the fact; and the lessee, having accepted and acted upon said lease for more than two years, with ample opportunity of knowing, not only the contents of the lease, but the character and quality of the property leased, is estopped from saying there were only five salt wells instead of six upon said salt property.

The plaintiff, then, having placed himself in a position which precludes him from denying that there were six salt wells on said property, the next question to which we direct our attention is, as to whether the defendant, Montague, by his lease, covenanted that the said wells should yield any particular quantity of salt water, or have any particular productive capacity. So far as express covenants are concerned, the lease is silent as to the fitness of these wells for producing salt water. Is there any implied covenant, or covenant by operation of law, that said wells shall be fit for the purpose for which they were leased? If the wells were sufficient the lessees, by a provision contained in the lease, might have terminated their tenancy at the end of any month by failure to pay the rent for five days; but they saw proper to run the furnace for more than two years, and this would indicate that the property had some fitness for salt making. The weight of authority, however, as we understand it, is that there is no implied warranty as to the fitness of the leased premises for the purposes for which it is leased. So, in the case of *Harlan v. Lehigh Coal & Nav. Co.*, 35 Pa. St. 287, it was held that "a lease of the right to mine coal in the land of the lessor is the grant of an interest in the land, and not a mere license to take the coal. In such a case, there is no implied warranty that the land contains coal veins," and that ²¹⁶ "if the parties to a coal lease were under a mutual mistake as to the existence of coal veins in the land demised, the proper remedy of the lessee is by a proceeding to rescind the contract; he

cannot have relief in an action in affirmance of it." In the case of *Sutton v. Temple*, 12 Mees. & W. 52, Park, B., held as follows: "With respect to the other and principal question in this case, viz., whether a contract or condition is implied by law, on the demise of land that it shall be reasonably fit for the purpose for which it is taken, if the question were *res integra*, I should entertain no doubt at all that no such contract or condition is implied in such a case. The word 'demise' certainly does not carry with it any such implied undertaking. The law merely annexes to it a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term. If we included any such contract as is now contended for, then in every farming lease, at a fixed rent, there would be an implied condition that the premises were fit for the purposes for which the tenant took them, and it is difficult to see where such a doctrine would stop. In the case of *Clark v. Babcock*, 23 Mich. 164, it was held that a lease of a salt well implies no covenant that the well shall be of any productive capacity. In the absence of any distinct agreement, the lessee takes it as he finds it. And in the case of *Kline v. McLain*, 33 W. Va. 32, this court held that "a lessee of a storeroom cannot recover in an action of *assumpsit* against his lessor for damages sustained by reason of the failure of said lessor to repair damages to such building caused by unavoidable accident, when there is a written lease between said contracting parties, in the absence of an express covenant that said lessor should make such repairs." And that "where a written lease of such building provides that the lessee shall keep the same in repair, except as to 'unavoidable accidents and natural wear and tear,' the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents, and a demurrer will be sustained to a declaration setting forth these facts in a special court," that "the lessee in such an action will be confined to the terms of the written contract ²¹⁷ declared upon, and cannot recover upon a verbal contract or understanding made or had contemporaneously with said written lease." Washburn on Real Property, volume 1, page 537, section 7, states the law as follows: "Without an express contract on the part of the lessor, he cannot be held liable for repairs made by the tenant upon demised premises, nor would he be bound by a parol promise to make repairs, if such promise is founded only upon the relation of landlord and tenant." Among the cases which might be cited upon

this point, a canal company made a lease of water power which had been created by the construction of the canal. It was held not to constitute a covenant on the part of the lessors to keep the canal in repair or supply it with water; and, if the canal was discontinued, the lessee was without remedy: *Trustees v. Breet*, 25 Ind. 410. So, the lease of a water power out of a mill-pond then existing was not held to constitute an obligation on the part of the lessor to keep the dam in repair: *Morse v. Maddox*, 17 Mo. 569. And a grant for a right to take water from a well does not bind the owner of the well to repair it."

Reading then, the lease upon which this action was predicated in the light of the authorities I have had an opportunity of examining, I cannot construe the words "including six salt wells, tools and fixtures of the same," as implying six salt wells of any particular or peculiar fitness for the purpose of supplying salt water for the use of the furnace; neither can I hold that a salt well which is accidentally obstructed by the tubing is not a salt well; and, we have seen, if the well is out of repair, in the absence of a special covenant, the lessor is not bound to repair, but the lessee takes the property as he finds it.

Under our construction, then, said lease contained no covenant, either impliedly or by operation of law, that said premises and property included six salt wells suitable for pumping brine therefrom and supplying the same to said furnace in the manufacture of salt on said premises. If it was true that there was a covenant implied that the six salt wells should be fit and suitable for pumping brine for said furnace, then it is true, such implied covenant might be set forth in ²¹⁸ the declaration, but, as there is no such implied covenant, the plaintiff must be confined in his pleading and proof to the covenants contained in the instrument sued upon; and the pleader in this instance having gone beyond the scope of the covenants contained in the lease, and being unauthorized to do so by any implied covenant, the circuit court, in my opinion, committed an error in sustaining the demurrer to the said first declaration.

The plaintiff, in his amended declaration, avers that, "before said lease was executed, the defendant well knew that there were but five salt wells on said premises suitable to be used and pumped in the manufacture of salt; and defendant also knew that to render said Bedford Salt Furnace fit to well and properly make salt in the usual and ordinary way, the other and sixth well complained of therein would have to be repaired and made suit-

able as a salt well to be used in connection with said furnace; and that while the defendant, through his agents, was proceeding to repair said well, the said lease was made; and that, after said lease was made, the defendant continued to work on said well in the act of putting it in proper order and repair for some time thereafter, but said defendant failed and refused to finish the repairs on said well, and by negligence of defendant's agents and employes while said repairs were in progress, said well was rendered wholly worthless, leaving, in effect, but five salt wells on said premises; and that plaintiff was induced to enter into said lease by the defendant holding out to said Clifton and Cavan, before said lease was executed, his purpose and intention of repairing said sixth well, and afterward to abandon said well, and by defendant's own acts to render said well wholly worthless, was a gross fraud upon said lessees," etc. Now, when it is remembered that this is an action of covenant, and the instrument sued on contains nothing implying an assurance that said well should be put in repair, and the law itself does not imply that the property leased shall have any particular suitability or fitness for the purpose for which it is leased, and when we consider, further, that the landlord is not bound to repair, in the absence of a special covenant to that effect, we need but to refer to the ²¹⁹ ruling of this court in the case of *Kline v. McLain*, 33 W. Va. 32, where it is held that "the lessee in such an action will be confined to the terms of the written contract declared upon, and cannot recover upon a verbal contract or understanding made or had contemporaneously with said written lease"; and I can reach no other conclusion than that the demurrer was properly sustained to the amended declaration.

The plaintiff filed a second amended declaration, including two counts, which was also demurred to; but the court overruled the demurrer to said second amended declaration, as before stated. Did the court err in so ruling? These counts we regard also as demurrable, for the reason that the lease, which (oyer having been prayed) must be read in connection with the declaration, contains, as we construe it, no covenant, express or implied, that the property therein described contained six salt wells of any particular capacity, or that they were fit for the purpose for which they were leased. In the case of *Cowen v. Sunderland*, 145 Mass. 364, 1 Am. St. Rep. 469, Devens, J., delivering the opinion of the court, says: "It is a general rule, well established by the decisions of this court, that the lessee takes an estate in the

premises hired, and takes the risk of the quality of the premises in the absence of an express or implied warranty by the lessor or of deceit. . . . The rule of caveat emptor applies, and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe and adapted to the purposes for which they are hired." In the first of said counts it is complained that there were only five salt wells on said premises, and not six, as stipulated in said deed of lease; and, while it is true that the lease describes the premises as including six salt wells, yet, when we remember that caveat emptor applies, and the plaintiff, under his hand and seal, has admitted that there were included in the premises six salt wells, he cannot be heard to deny it. The second count avers that the defendant, by said deed, impliedly and by operation of law, did covenant with plaintiff and said Cavan to deliver unto them six salt wells on said premises for the purpose of the manufacture²²⁰ of salt under said deed of lease, and the breach complained of is, that only five salt wells were delivered to them instead of six, as called for in said lease. My construction of the lease, however, is that there was no implied covenant to deliver to said Clifton and Cavan any number of salt wells. The property leased to them is described in the lease as "the premises known as the 'Bedford Salt Furnace Property,' together with the appurtenances thereto belonging, including six salt wells," etc.; and, in speaking of the six salt wells, the evident intention was to describe the property included in the lease.

The deed itself will carry the right of possession. Ample time was given for examination. The deed bears date the 23d of August, 1890; and according to the averments of the declaration, possession was not taken thereunder until the twenty-eighth day of October following. So that, if the rule caveat emptor is applied, the plaintiff cannot complain, as he had ample time to examine the premises and ascertain what was included in the lease, and yet he took possession, and operated the property for more than two years thereafter; and, as to the implied covenant averred, it was held in *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, that "in the case of a contract drawn technically in form, and with obvious attention to details, a covenant cannot be implied, in the absence of language tending to a conclusion that the covenant sought to be set up was intended." Looking to the contents of this lease, it is apparent that the same is carefully and technically drawn, providing for the mining of coal, and furnish-

ing the same to the furnace and engines, and allowing a deduction from the royalty in the event the furnaces stop for more than five days without fault of the lessees, allowing the lessor to re-enter and reoccupy the premises, upon the failure to pay rent and royalty for five days after the same falls due, providing that the property should not be sublet without the written consent of the lessor, and also that if the property should be seized by legal process for the debts of the lessees, the same should revert to the lessor. Also containing a covenant that ²²¹ the lessees should keep the furnace plant in proper and sufficient repair, and setting forth in detail how the coal banks, entries, railroad tracks, and drains shall be managed, and further providing for the return of the property described, including the six salt wells, at the termination of the lease to the lessor, his heirs or assigns, in good working order, unless destroyed by fire or unavoidable casualty, not caused by the negligence or carelessness of the lessees, their servants or agents. Can it be presumed that, with more than two months' time to examine the property between the date of the lease and the time when the furnace was fired up, the plaintiff would accept and act under said lease, reciting, as it did, the vital and important fact that said premises included six salt wells, when in fact there were only five thereon? And the fact that under these circumstances, which appear on the face of the declaration, the lessees accepted the property under said lease, and actively operated the furnace thereon for more than two years, so far as appears, without any effort on their part to repair said sixth well, negatives the presumption that there was any implied covenant that there were six salt wells of any particular productive capacity on said premises. It appears by averment in the first amended declaration that this sixth well was being repaired in some way by the lessor at the time said lease was executed; but the fact that a salt well is out of repair does not prevent it from being a salt well still, any more than a coal bank which is obstructed at some point by fallen slate is no longer a coal bank; and, looking at the face of the lease, we cannot say that the recital in the description of the property leased, including six salt wells, implied a covenant that there were six salt wells of any particular productive capacity on said premises, although the averments of the declaration show that there were six salt wells on said premises, one of which was being repaired at the time of the execution of the lease.

For these reasons, we think the plaintiff has shown no cause of action, and the demurrer should have been sustained to the

entire declaration; and for the same reasons ²²² we are of the opinion that the circuit court committed no error in excluding the plaintiff's evidence from the jury.

The judgment complained of must be affirmed, with costs, etc.

LANDLORD AND TENANT—WARRANTY OF FITNESS.—In the lease of a building there is no implied warranty that it is safe or properly adapted to the uses to which it is applied, nor that it shall continue fit for the purposes for which it is demised: *Davidson v. Fischer*, 11 Col. 583; 7 Am. St. Rep. 267, and note; *Murray v. Albertson*, 50 N. J. L. 167; 7 Am. St. Rep. 787, and note.

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR REPAIRS MADE BY TENANT.—A tenant cannot make repairs at the landlord's expense without a special agreement authorizing it: *Mumford v. Brown*, 6 Cow. 475; 16 Am. Dec. 440, and note.

LANDLORD AND TENANT.—PAROL EVIDENCE may be offered by a lessee showing that at the time a written lease was executed the lessor agreed to perform and insert a certain covenant, which was omitted in the lease: *Christ v. Dittenbach*, 1 Serg. & R. 464; 7 Am. Dec. 624; *Welz v. Rhodius*, 87 Ind. 1; 44 Am. Rep. 747, and note.

LANDLORD AND TENANT—CAVEAT EMPTOR.—Where the tenant is permitted to fully examine the condition of the tenement sought to be leased, and any defects existing therein are patent, the rule of caveat emptor applies: *Davidson v. Fischer*, 11 Col. 583; 7 Am. St. Rep. 267, and note. A tenant assumes the risks of the condition of the premises if he inspects them before accepting the lease and the landlord is not guilty of any concealment: *Blake v. Dick*, 15 Mont. 236; 48 Am. St. Rep. 671, and note. See, also, the extended note to *Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 478.

GREENBRIER INDUSTRIAL EXPOSITION v. SQUIRES.

[40 WEST VIRGINIA, 307.]

CORPORATION, ESTOPPEL TO DENY EXISTENCE OF.—One who signs a preliminary agreement for the formation of a corporation, but fails to acknowledge it, and who attends the organization meeting held by the stockholders, and, after the issuing of a certificate of stock to him, votes for directors, and pays part of the first assessment thereon, and recognizes the authority of the directors, only claiming that he had subscribed for a different amount of stock, is estopped from denying the corporate existence, and from urging technical defects in its organization. He, therefore, cannot resist an action to recover the balance of his subscription.

CORPORATION, CHANGE IN.—A SUBSCRIBER to the stock of a corporation cannot defeat an action to recover the amount of his subscription, on the ground that the corporation formed is not the one to which he subscribed, because the certificate of incorporation fixed the date of its expiration at a time different from that specified in the preliminary agreement, when he has, after the issuing of stock, voted thereon, and otherwise recognized the existence of the corporation.

CORPORATION, ACQUIESCENCE IN CHANGE IN.—A corporation who has received stock in the corporation, and voted thereon, and paid part of the first assessment, and who was present when

the certificate of incorporation was read at the organization meeting, is charged with knowledge of a variance between such certificate and the preliminary agreement for incorporation, and cannot relieve himself from the effect of his subsequent acquiescence by proving that he did not hear the reading. It was his duty to inform himself when the means of information were thus open to him.

Alexander F. Mathews, for the plaintiff in error.

John W. Harris, for the defendant in error.

308 BRANNON, J. The Greenbrier Industrial Exposition, as a corporation, obtained a judgment in the circuit court of Greenbrier county against L. W. Squires, based on a subscription by him to its capital stock, and Squires obtained this writ of error.

Squires depends on the theory that there never was a legal corporation as to him, and that the subscription which he made to its stock is not binding. The formation of this alleged corporation was under chapter 54 of the code. The preliminary agreement, constituting the first step and basis in the process of formation of the corporation, was signed by Squires, but not acknowledged by him. The certificate of incorporation issued colorably under it. By the agreement, the proposed corporation was to expire December 1, 1910, while the certificate of incorporation fixes the date of its expiration December 1, 1919. By reason of nonacknowledgment of agreement and variance between it and the certificate of incorporation, Squires would not be liable for his subscription made by said preliminary agreement had he done nothing more, as this court decided in *Industrial Exposition v. Rodes*, 37 W. Va. 738. That statutory requirements as to preliminary steps in the organization of a corporation to bind signers of the agreement must be complied with, I refer to 1 Lawson's Rights, Remedies, and Practice, sections 436, 437; *Childs v. Smith*, 55 Barb. 45. The case of *Real Estate Co. v. Tower*, 161 Mass. 10; 42 Am. St. Rep. 379, holds the right of one signing preliminary articles to withdraw before organization, and is a full discussion of how he may withdraw: See *Tavern Co. v. Burkhard*, 87 Mich. 182. This case, however, differs from *Industrial Exposition v. Rodes*, 37 W. Va. 738, in its facts. Rodes did not acknowledge the agreement, though he signed it, and took no part in the organization of the company, did nothing but sign the agreement. Squires 309 signed the agreement, and, though he did not acknowledge it, he attended the organization meeting held by stockholders on the 25th of November, 1890, after the issue of the certificate, and voted as a stockholder for the directors then elected, and when, after the directors had made a call for the payment of ten per cent on the stock, payment of the assess-

ment was asked of him, he paid twenty dollars, the ten per cent on his two shares of stock, and an account was opened on the books of the corporation, charging him with two shares of stock, and crediting him with the twenty dollars. In June, 1891, after further calls had been made upon stockholders, the assistant secretary addressed an official letter to Squires, informing him of the action of the directors, incurring cost in the erection of buildings and racecourse, and asking payment of Squires' assessments, to which he wrote a reply, dated July 24, 1891, stating that his understanding was, that he was only taking one hundred dollars of stock, and was only to pay fifty dollars, and that if that suited the directors, it was all right, and if not, he wished his money returned, and he would not pay the amount demanded. Thus he recognized the directory of the corporation, and that he had subscribed stock, and on a certain basis would pay as a stockholder, differing only as to amount of subscription, a matter outside of the question of his character as stockholder, and governed by the evidence bearing on it, the agreement. In *Industrial Exposition v. Rodes*, 37 W. Va. 738, it is stated incidentally—not as a point necessary to the decision in the case—that as to subscribers before the issue of the charter, those becoming so by executing the agreement preliminary, if they acquiesce in the mode of incorporation by subsequent acts by payment of installments, or otherwise treated as a corporation, they cannot set up that the corporation was not legally incorporated. I have taken pains by examination of authorities cited and some others, to ascertain whether this position is correct, and I find it so. I find it laid down in the very recent work (1 Thompson on Corporations, sec. 528), which, judging from the two volumes now out, will prove an invaluable work on that all-important subject. In *Rickhoff v. Machine Co.*, 68 Ind. 388, it was held that payment of part of ³¹⁰ stock upon assessment and promise to pay balance, "involved a clear admission of the full and complete organization of the corporation, and of the existence of every fact necessary to such organization." *Railroad Co. v. Bowser*, 48 Pa. St. 29, held that when, after subscription of stock under an act requiring a certain amount before incorporation, a later act lessened it, the change would not release the subscriber who voted at the organization and in the election of directors in right of his subscription. In *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532, it was held that one who subscribed in view of and for purposes of organization, and paid part of the stock, was estopped from denying his liability. In the supreme court of Missouri, in *Hotel Co. v. Hunt*, 57 Mo. 126, it is said to

be well settled that a defect in the certificate is not available to a stockholder, who, by his conduct, has waived the defect. The court also said: "The cases in regard to this point have all been examined, and they all agree that where the subscription has been acquiesced in, either by payment of part of the subscription, or by becoming a director, or by attending meetings of stockholders, or by any other act indicating an acquiescence in the validity of his subscription, his defense, based on mere technical objections, will be disregarded. But the present case is peculiar, in that it shows nothing but the bare act of subscribing. . . . It appears that the ten per cent required by the articles of association to be paid on subscription was never paid; that the defendant never took any part in the company's acts, except to subscribe." The Alabama court says: "A subscriber to stock may, like any other person, be estopped from disputing the de facto existence of a corporation, especially as against creditors, where he attends meetings of stockholders, or otherwise participates in the business of the company, thereby inducing others to act upon the faith of his admissions, to their prejudice": *Schloss v. Trade Co.*, 87 Ala. 414; 13 Am. St. Rep. 51. In *Bridge Co. v. Chapin*, 6 Cush. 50, it is admitted that if a subscriber, knowing the whole capital had not been subscribed, but attended meetings, and participated in the business of the company, he would be estopped to deny his subscription. In *Association v. Walker*, 83 Mich. 386, attending meeting and voting stock was held to be a waiver of objection to an increase of stock. Presence of a party at organization of a company as a corporation, his election as president and signature as such to a note is, in effect, an admission of the existence of the corporation, and that he was a stockholder: *Haynes v. Brown*, 36 N. H. 545. Payment of calls is an admission that subscription is binding: *Boggs v. Olcott*, 40 Ill. 304; *Musgrave v. Morrison*, 54 Md. 161. Such acts waive irregularity of subscription: *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; 86 Am. Dec. 128, and note.

It is contended that a corporation was formed but not the corporation contemplated. It is the same name, different only as to date of expiration from the agreement. We cannot say this makes it another corporation. It is the same in all other aspects. "Even where articles of association are altered, or an attempt is made to transfer a subscription to a new company, the subscriber will be liable if he consented to the change, either by word or act indicating acquiescence": *Hammond v. Straus*, 53 Md. 1, 16; 1 Morawetz on Private Corporations, sec. 63. "If any

question could arise as to the identity of the corporation organized as the one mentioned in the subscription paper, it must be held to have been waived by the defendant when he appeared at its meetings, and took part in the discussion of questions there raised, and voted his stock": Opinion in *Association v. Walker*, 83 Mich. 393. There is not a shadow of evidence that any other corporation or anything like the same name existed, and it seems to me that it is utterly impossible to say that Squires, in his acts of participation, in fact meant any other, or that the law would say they are not referable solely to the corporation contemplated by the agreement which he signed. It was the same. The mere variance above spoken of between agreement and certificate did not, for the purpose of the question now spoken of, make it another company; it did not change identity. The frame, the business, the nature of the corporation made by the certificate are the same as those of the one contemplated by the article, so that Squires' acquiescence or waiver would surely apply to the corporation made ³¹² by the certificate. Where, even, there is a material departure from the original plan, the cases agree that action such as that of the subscriber in this case will bind him: Note in *Machine Co. v. Davis*, 40 Minn. 110; 12 Am. St. Rep. 701; 26 Am. & Eng. Corp. Cas. 69. The case of *Manufacturing Co. v. Hockaday*, 89 Va. 557, while holding that a material change in the purposes of a corporation will release a stockholder, admits in the opinion that attendance on meetings, or paying subscriptions, is a waiver of the objection. The rule of release, meet it where you will, is always stated with this qualification. *Railroad Co. v. Wilson*, 22 Conn. 435, is strong to the same point. See, on this estoppel subject, *Glass Co. v. Alexander*, 2 N. H. 380; 9 Am. Dec. 102.

But it is argued that when Squires did the acts of acquiescence he did not know of the variance. The certificate of incorporation was read aloud at the organization. He says he did not hear it read. No one was charged with the duty to inform him of it. It was his own duty to look to that, and means were open. In *Railroad Co. v. Bowser*, 48 Pa. St. 29, it was argued, as here, that to bind the subscriber by acquiescence he must know of the change. An instruction to the jury that if he did not know of it, he was not bound, was held erroneous. The opinion said that after the act of the legislature reduced the capital, "the company was organized, and the defendant voted in right of his subscription at the organization and at the election of directors. Upon this state of facts, the court instructed the jury that, unless the defendant knew when he voted that the required subscription to

the capital stock had been reduced by law from one hundred and fifty thousand dollars to twenty-five thousand dollars, the change released him from his subscription; that the presumption of law would be that he knew of the change in the charter, but that whether he did or not the jury should determine. In this we think there was error. By voting, the defendant admitted himself still a corporator, and the general principle of law is, that a corporator must be held cognizant of his own charter. There was no evidence to rebut this legal presumption, even if it was capable of rebuttal. ³¹³ . . . The change in the charter could not relieve the defendant. After it was made, he had contributed to involve his cocorporators in the venture, encouraged the creation of debts, and it was no longer for him to deny his liability to pay his own subscription."

We affirm the judgment.

CORPORATIONS—EXISTENCE—ESTOPPEL TO DENY.--Where both the corporation and the subscriber, in entering into a contract of subscription for stock, assume the existence of the corporation, both are estopped from denying it in a suit to compel payment of the subscription: *Cravens v. Eagle etc. Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298, and note. Persons who have been instrumental in the formation of a corporation and in issuing alleged illegal stock, and who have contracted with the corporation with full knowledge of all its transactions, are not in a position to contest the regularity of its formation: *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149, and note. In an action on a subscription to corporate stock, it cannot be pleaded that there was no such corporation, the defendant being estopped by his contract to deny the existence of the corporation: *Anderson v. Newcastle etc. R. R. Co.*, 12 Ind. 376; 74 Am. Dec. 218, and note. A subscription for stock to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber from afterward denying the legal existence of the corporation upon the subscription: *Capps v. Hastings Prospecting Co.*, 40 Neb. 470; 42 Am. St. Rep. 677, and note. See, also, the extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 827, 872.

CORPORATIONS—CHANGE IN—EFFECT ON STOCK SUBSCRIPTIONS.--A change of name of the corporation will not relieve an admitted stockholder therein from liability to the creditors of the corporation for the amount remaining due on the stock subscribed by him: *Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156. Changes in the charter of a railroad company, which do not put it out of the power of the company to apply original stock subscriptions to the purpose for which they were originally subscribed, at law constitute no defense to an action against an original subscriber: *Pacific R. R. v. Hughes*, 22 Mo. 291; 64 Am. Dec. 265, and especially the note.

WILSON v. PHOENIX POWDER MANUFACTURING CO.

[40 WEST VIRGINIA, 412.]

NUISANCE—POWDER WORKS.—The manufacture and keeping of large quantities of gunpowder and other explosives in, or dangerously near to, public places, such as towns and highways, is a public nuisance, and indictable as such, whether negligently or carefully conducted.

NUISANCE.—THE OWNER OF POWDER MILLS and works is answerable for all damages done to person or property by their explosion, whether negligent or not, if they are so situate that such an explosion would probably involve injury to the person or property of third persons.

PRACTICE.—AN IMMATERIAL ALLEGATION OF NEGLIGENCE need not be proved.

EVIDENCE, FOREIGN RECORDS, AUTHENTICATION OF, WHERE THE JUDGE IS ALSO THE CLERK.—Though the statute requires the record of a foreign court to be certified by the clerk and authenticated by the judge thereof, it is admissible when certified by the judge to be a complete and correct copy, if he is also the clerk of the court.

LAWS OF OTHER STATES.—The courts of West Virginia will, under its code, take judicial notice of the laws of other states, and, in exercising this power, may consult the statutes thereof or any other book.

TITLE, WHEN NEED NOT BE PROVED.—One in possession of real estate may maintain an action to recover damages thereto from the explosion of powder works without proving his title. It will be presumed from such possession.

ESTOPPEL—PARTIES.—A judicial record is not admissible against a party to it in favor of a stranger thereto, when offered as an estoppel.

EVIDENCE.—THE PLEADINGS IN another case may be received in evidence to prove an admission made therein by the party against whom they are offered.

Simms & Enslow, for the plaintiff in error.

Marcum, Peyton, & Marcum, for the defendant in error.

⁴¹⁴ BRANNON, J. The Phoenix Powder Manufacturing Company was sued in an action of trespass on the case in the circuit court of Wayne county by John G. Wilson, to recover damages to Wilson's dwelling-house and other buildings resulting from an explosion of powder stored in buildings of the defendant company. The jury found a verdict for the plaintiff, subject to the defendant's demurrer to the plaintiff's evidence, on ⁴¹⁵ which demurrer the court gave judgment for the plaintiff, and the defendant resorted to the writ of error which we now decide.

There was no evidence to show negligence on the part of the defendant in the operation of its powder-mill or in the storage or handling of its powder, and thus the question arises whether the plaintiff can recover by showing only the presence of the mill in the location it occupied, the storage of powder there, its explo-

aion, and the consequent damage to the plaintiff's property, without proof of negligence.

Was the defendant maintaining a public nuisance? If it was, it was engaged in the commission of a public wrong; and, injury resulting therefrom to the plaintiff, the defendant must repair such injury.

Powder and nitroglycerine are commodities of essential, if not primary, importance from their wide use in war and in the construction of railroads, roads, buildings, and other varied uses, and their manufacture is a business entirely respectable and indispensable; but that consideration is not all controlling; that consideration is not alone to be regarded. The rights and safety of those not engaged in their manufacture must not be forgotten. They are agents of magical power and wrath. When the spark or touch of ignition meets them, their subtle force is awakened to instantaneous action—an action giving no warning and so potent that almost in the twinkling of an eye, before thought or self-preservation can come, it wastes man and his home and his savings with irrepressible energy. Often the explosion comes from causes not discernible, which reasonable foresight or prudence cannot see. Valuable as are these giants as auxiliaries to man in his great works, they must be limited to places and bounds of safety.

Here is a mill, making powder and other explosives, standing right on the bank of the Ohio river, upon which, day and night, boats bear thousands of precious lives and thousands of dollars of property, about two hundred yards from the great Chesapeake & Ohio Railroad and about three hundred yards from the Huntington & Big Sandy Railroad, both great highways of the public, with trains filled with passengers ⁴¹⁶ and property passing over them almost hourly, and about seventy-five yards from a country road, also a highway in constant use. Six explosions occurred at this mill within three years, showing that it was a constant menace to life and property for a wide range around it, within which many people lived and worked, as its explosions threw large pieces of iron and large timbers out into the river, and some clear across into the town of Burlington, about one half mile away on the Ohio bank of the river, and into fields in Ohio, a mile distant. The buildings of the plaintiff which were injured in the explosion involved in this suit stood in Burlington. These explosions have injured many houses in Ohio, by shaking and jarring, damaging chimneys, walls, plastering, etc., from the force of concussion. Some of the explosions were terrible in their power and shock. This powdermill, with its great quantity of explosives in its store-

house, was a constant danger impending over those highways and all lawfully using them, and the people living in the neighborhood within the danger limit—an ever present peril, day and night.

The manufacture and keeping of quantities of gunpowder, nitroglycerine and other explosives in or dangerously near to public places, such as towns or highways, is a public nuisance and indictable as such. It makes no difference whether carefully or negligently conducted and managed. Negligence is here no material element. If damage happened to a person from explosion, the injured party is entitled to compensation without proving negligence on the part of the defendant. He is injured by that which breaks the law—the law against public nuisance. He is in no fault, while the other man is, and he has received damage from that other man's wrongful act. He has a right to immunity from this injury, and the other man owed him the duty of securing him immunity. The state is wronged by the maintenance of a nuisance which may at any moment take the lives and destroy the property of its people passing and repassing over its highways, and reposing and working in their accustomed places, and the particular person hurt has special cause of complaint, because he is especially injured: *Talbott v. King*, 32 W. Va. 6.

⁴¹⁷ It is true the manufacturer owns his mill, and is engaged in lawful and honorable business; but he has violated that maxim, centuries old in the law, yet vital and indispensable in organized society, where everyone must use his property to earn bread, "*Sic utere tuo ut alienum non laedas*" (So use your own property that you injure not another). This lawful but dangerous business, being carried on where it is, is a public nuisance. No care can exempt it, situated where it is, from the charge of being a nuisance: *Wood on Nuisances*, sec. 69; *Wier's Appeal*, 74 Pa. St. 230; *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654; *Myers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744; *Lafin etc. Powder Co. v. Tearney*, 131 Ill. 322; 19 Am. St. Rep. 34, and note 39; *McAndrews v. Collerd*, 42 N. J. L. 189; 36 Am. Rep. 508.

In *McAndrews v. Collerd*, 42 N. J. L. 189, 36 Am. Rep. 508, the opinion says that "keeping powder, nitroglycerine, or other explosive substances, in large quantities, in the vicinity of a dwelling-house or other place of business, is a nuisance per se, and may be abated by action at law or injunction in equity, and, if actual injury results, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other

persons, and is not chargeable to his personal negligence." The reason is, the act is wrongful, fraught with danger all the time, and it is illogical to call on one who, free from fault, has been injured, to prove that the party who injured him conducted a business confessedly unlawful in a careless manner, and just wherein he was careless. His whole action is negligent from being wrongful, so to speak. The authorities above cited dispense with proof of negligence by plaintiff. Later New York cases overrule the case of *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296, in this regard.

Now, if this mill were located in a secluded place—one removed from highways—being in itself a lawful business, the case would be different; it would not be a public nuisance, and, to recover injury from an explosion, I apprehend the plaintiff must show negligence on the defendant's part. But it is contended that, as the declaration alleges negligence on the part of the defendant, it must be proven. That allegation was unnecessary, immaterial, and surplusage, and the law does not require anything but material allegations to be ⁴¹⁸ proven: *State v. Howes*, 26 W. Va. 110; *State v. Hall*, 26 W. Va. 236; 1 *Greenleaf on Evidence*, sec. 51.

Another matter in the case relied upon as error is the introduction in evidence of a copy of a bill to show title in the plaintiff to the premises injured. It was probated in Ohio, and it is said that it is insufficiently authenticated in the fact that, though certified as a full, true copy by the probate judge it wants the clerk's certificate, both being required by section 19, chapter 130, of the code. By the constitution of Ohio and its statute law, the probate judge is also clerk of the probate court, and keeper of its books and papers. This same person could make two certificates, but that would seem useless. The object of the statute in requiring two certificates is to double the probability of truthful certification; but this cannot be done where one man fills both places, the statute requiring the judge of the same court to certify that the clerk's certificate is in due form. It has been held that, where one person is clerk and judge both, it is sufficient: *Cox v. Jones*, 52 Ga. 438. We have the right under section 4, chapter 13, of the code, to take judicial notice of the law of another state, this being a change from the former law (1 *Robert's Practice*, 249; 1 *Greenleaf on Evidence*, sec. 5, note 1, sec. 489), and, in exercising this power, can consult the statutes of Ohio, or any other book, to learn that the probate judge is by law ex

officio clerk of the probate court: *State v. Goodrich*, 14 W. Va. 840; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16.

It is claimed that certain deeds were improperly admitted. They were offered to show title in the plaintiff. They purport to be original deeds, not authenticated copies, and, being acknowledged in such manner as would allow them to be recorded here, that is sufficient under section 21, chapter 130, of the code of 1891. But even were the said will and deeds not admissible, it would be immaterial, as the plaintiff, so far as concerns his title to the premises, could maintain his action, as he was in actual possession, which is one and the first element of title, as it is prima facie evidence of full legal title in him who has it: 1 Lomax's Digest, 574; 2 Minor's Institutes, 447; 2 Blackstone's Commentaries, 596, and note. One in actual possession may maintain trespass quare clausum fregit. Formerly, to maintain ⁴¹⁹ that action, actual possession was necessary: *Barton's Law of Practice*, 182; *Kretzer v. Wysong*, 5 Gratt. 9; *Cook v. Thornton*, 6 Rand. 8; *Truss v. Old*, 6 Rand. 556; 18 Am. Dec. 748. Therefore, a tenant being in possession, the landlord could not sue in trespass for lasting injury to the freehold, but must bring trespass on the case: 1 Tuck. 191. But now a constructive possession is sufficient to maintain trespass: *Snider v. Myers*, 3 W. Va. 195; *Storrs v. Feick*, 24 W. Va. 606.

I suppose the injury to the plaintiff's property was so direct and immediate from the explosion as to warrant an action of trespass under the strict principles of the common law; but that is irrelevant, as, the action here being trespass on the case, we need not consider the nice and finespun distinction as to direct and consequential injury, on which rested the choice between the two forms of action, resulting formerly in so many nonsuits, discussed in *Jordan v. Wyatt*, 4 Gratt. 151, 47 Am. Dec. 720, and elsewhere, as the enactment found in section 8, chapter 103, of the code, that "in any case in which an action of trespass will lie there may be maintained an action of trespass on the case," does away with it in this case.

Another error alleged in the petition for the writ of error is that the court allowed to go in evidence the answer of the Phoenix Manufacturing Company filed in a suit of the Huntington & Kenova Land Development Company. The object of tendering this answer as evidence was, I suppose, to have the benefit of the statement in it as an admission that the defendant did buy land, and upon it erect and operate a powder manufactory. Was it ad-

missible? It was a pleading in a case to which Wilson was a stranger. A judicial record is not admissible against or binding upon parties to it, in favor of strangers to it, its effect being confined to parties and their privies, that is, when offered to have the effect of estoppel, under the principle of *res judicata*; but that was not the purpose of the introduction here, it being offered only as an item of evidence is an admission by the defendant, open to explanation or rebuttal. There is a volume of law to show that pleadings in another cause may be used for evidentiary or collateral purposes where only one party to the case on trial was a party to the former one. An answer in chancery may be used as evidence of an admission of a fact or facts: *Hunter v. Jones*, 6 Rand. 541; *Tabb v. Cabell*, 17 Gratt. 160; 1 *Greenleaf on Evidence*, sec. 572 a; 1 *Wharton on Evidence*, sec. 836, 838. Moreover, without the admission contained in the answer, there was plenty of evidence to show that the defendants built and operated the mill, and stored powder there, especially on a demurrer to evidence. There was ample evidence to sustain the verdict, especially considered upon a demurrer to the evidence.

We cannot set aside the verdict for excessiveness of damages. Therefore we affirm the judgment.

NUISANCE.—A POWDER MAGAZINE situated so near the dwelling-house of another as to be liable to inflict serious injury to his person or property in case of explosion is a private nuisance, making the owner liable whether the powder was carefully kept or not: *Lafin etc. Powder Co. v. Tearney*, 131 Ill. 322; 19 Am. St. Rep. 34, and note. The erection of a powder magazine and keeping stored therein large quantities of gunpowder is per se a nuisance: *Cheatnam v. Shearon*, 1 Swan, 213; 55 Am. Dec. 734.

EVIDENCE—JUDICIAL NOTICE OF LAWS OF OTHER STATES.—Courts do not take judicial notice of the statutes of another state: *Summer v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106, and note; *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520, and note.

EVIDENCE.—A SWORN PLEADING of a party to one action is admissible in evidence against him in another action as an admission subject to rebuttal and explanation: *Gibson v. Harriott*, 53 Ark. 85; 29 Am. St. Rep. 17. An answer filed for defendant over the signature of his attorney is admissible as evidence in another action, of admissions of the allegations therein set out: *Ayres v. Hartford etc. Ins. Co.*, 17 Iowa, 176; 85 Am. Dec. 553.

REAL PROPERTY—POSSESSION AS NOTICE OF TITLE.—Possession of real estate gives constructive notice of the title under which the occupant claims: *Johnson v. Glancy*, 4 Blackf. 94; 23 Am. Dec. 45, and note. See, also, the note to *Bowman v. Anderson*, 31 Am. St. Rep. 476, and especially the extended note to *Plume v. Seward*, 60 Am. Dec. 601.

FLANNEGAN v. CHESAPEAKE & OHIO RAILWAY CO.

[40 W. ST VIRGINIA, 436.]

FELLOW-SERVANTS ARE those who are so far working together as to be practically co-operating, and who have an opportunity to control, or influence the conduct of, and who have no superiority over, one another.

FELLOW-SERVANTS, WHO ARE NOT.—A brakeman of a railway train, and a telegraph operator in charge of a signal station, with full authority to control the running of trains, and to whom all brakemen owe the duty of obeying his orders, are not fellow-servants. The former may, therefore, recover of the common employer for injuries sustained through the negligence of the latter in giving a signal for a train to proceed, when the track is occupied by another train.

RAILWAYS — VICE-PRINCIPALS. — A telegraph operator, whose duty it is to control the running of a train over a track, and, to that end, to know whether or not it is obstructed, is performing the duty of the master to his employes, the performance of which cannot be delegated to another, so as to relieve the master from liability. In other words, such operator is a vice-principal.

MASTER AND SERVANT—DUTIES WHICH MASTER CANNOT DELEGATE SO AS TO RELIEVE HIMSELF FROM LIABILITY.—A railway corporation owes to its employes the duty of providing a safe place in which to work. This includes the keeping of a clear track over which to run the trains on which they serve, and the corporation cannot relieve itself from liability to its employes by placing the entire charge of this branch of business in the hands of a subordinate. Such a subordinate is a vice-principal, and an employe injured through his negligence may recover of the common employer.

FELLOW-SERVANTS—EVIDENCE TO PROVE THE PERFORMANCE OF DUTY BY.—In an action by a servant to recover for injury claimed to have resulted from the negligence of a vice-principal, but which may have resulted from the negligence of a fellow-servant, the plaintiff, after establishing the negligence of such vice-principal, is not bound to assume the burden of proving the absence of contributory negligence on the part of such fellow-servant. The court cannot infer negligence on the part of such fellow-servant in the absence of any, or a doubtful state of, evidence relating thereto.

NEGLIGENCE, BURDEN OF PROOF RESPECTING.—If a plaintiff suing for damages resulting from negligence makes out a prima facie case, he is not bound to assume the burden of disproving contributory negligence, either on his part or that of a fellow-servant.

PRACTICE.—ON A DEMURRER TO THE EVIDENCE, where there is doubt which of two inferences should be adduced, the court will adopt the one most favorable to the plaintiff.

PRESUMPTION FROM FAILURE TO PRODUCE EVIDENCE.—If a railway corporation sued for damages to an employe, claimed to have resulted from negligence, has it in its power to produce evidence of employes present at the time of the accident, and, instead of so doing, it demurs to the evidence offered by the plaintiff, it will be presumed that the testimony of the employes, had it been produced, would have been favorable to the plaintiff.

Simms & Enslow, for the plaintiff in error.

T. G. Mann and W. R. Thompson, for the defendant in error.

⁴³⁶ DENT, J. This is a writ of error from the judgment of the circuit court of Fayette county rendered on the sixth day of March, 1894, for the sum of five thousand and twelve dollars and seventy-two cents, in favor of R. E. Flannegan against the ⁴³⁷ Chesapeake & Ohio Railroad Company, on a demurrer to evidence.

The facts are as follows: On the seventeenth day of March, 1892, while the plaintiff was in the employ of the defendant as a brakeman on a freight train, his train became uncoupled in Stretcher's Neck tunnel, and it became his duty to couple it; and, while engaged in the discharge thereof, a passenger train ran into the rear end of the train, and caused the plaintiff's right leg to be cut off near the ankle. The conductor sent the rear brakeman back to flag any approaching train, but whether he discharged his duty properly does not appear in evidence. The engineer says he did not see the flagman, but heard some one say there was a man in the tunnel. Who said this, it does not appear. But it does appear that he was on the wrong side of the engine, owing to the curvature of the road, to see the flagman, and also that he was blinded by the smoke so that he could not see a foot ahead of the engine. The fireman's evidence was not taken, and it must have been he who saw the man in the tunnel. The rear end of the freight train was about three hundred and fifty feet from the west end of the tunnel when struck, which occurred but a few minutes—an uncertain time—after it became uncoupled.

The trains were run through this tunnel by means of signals know as the "blook system," there being a telegraph station at either end of the tunnel in charge of an operator, whose duty it was, by signals, to notify trains when to stop, and when and at what rate to proceed. The operator at the west end gave the passenger train the wrong signal—being that for a clear track—and allowed it to proceed at full speed, when she should have stopped it. Defendant demurred to the evidence, but the court overruled it, and entered judgment for the plaintiff. It is now here insisted that the court erred in its judgment, for the reasons: 1. That the operator was a fellow-servant with the plaintiff; 2. That the accident was caused by the failure to flag the passenger train, on the part of the rear brakeman of the freight.

In passing on the first objection, the court is asked to review and overrule the case of Haney v. Railway Co., 38 W. Va. ⁴³⁸ 570, wherein this question has already been determined. The contention is, that both the flagman and signal operator are called

upon to perform precisely similar duties, the signal stations being simply an additional precaution provided to prevent accidents. The definition of "fellow-servants," as defined and settled by recent decisions, is, those "who are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and have no superiority, the one over another" (*Madden v. Railway Co.*, 28 W. Va. 619, 57 Am. Rep. 695), while it is held that those who act in a superior position, and have the right to direct and control the conduct of others, are not fellow-servants of such others, especially in discharge of superior duties: *Riley v. Railway Co.*, 27 W. Va. 146; *Core v. Railroad Co.*, 38 W. Va. 456.

The rear brakeman or flagman on a train is the fellow-servant of the front brakeman, for each has his respective, separate, yet dependent duties to perform in the running of the train; and they may influence, and even control, each other's conduct, yet they are neither superior to, nor can they control, each other. Yet the flagman occupies a far different relation toward the train men of all other trains, for, in giving them warning of the obstruction of the track by the train to which he belongs, he performs a duty delegated to him by the master; and for his failure to discharge it the master is liable, for it is one of the master's personal nonassignable duties to keep the track free from obstructions, for the safety of his employes. So a flagman, in discharging the same duty, acts as a fellow-servant to some, and as a superior or master to others, of his coemployes. Two persons who are called upon to perform the same duty, in effect, may occupy a relatively different position to the same employe in its discharge. For instance, the flagman protects his coemployes by warning the approaching train, while the master, the dispatcher, and the operator render them the same protection by not allowing the train to use the track until it is clear. One stops the train. The other holds it back. The one is a part of the train, while the other belongs to an entirely different department, which has the supervision and ⁴³⁹ management of all trains, and yet is no part of any train, but is entirely stationary. The one acts for self-protection. The other, being in no personal danger, acts for the safety of others, and the dispatch of his master's business.

In this case, the defendant, seeking to discharge its personal duty and provide a safe track, and at the same time facilitate the rapid movement of trains, established the signal station, and placed the operator in charge, with full authority, by means of a code of signal orders equally as effective as any other kind could

possibly be, to control the running of all trains over this block; and all trainmen, of every train, were under absolute rule to watch for and obey her orders before they dare enter upon the block. If she had been attentive to her duties, she must have known the block was occupied and obstructed, and her knowledge was the knowledge of the master; yet, in the face of that fact, she negligently gives a peremptory signal for the train to proceed. In what way could she possibly be the fellow-servant of the trainmen, who are entirely at her command and who can neither influence or control her independent actions? She is as much the master of her section block as the master is of the whole road. In *Lewis v. Seifert*, 116 Pa. St. 647, 2 Am. St. Rep. 631, it is held: "The master owes to every employé the duty of providing a reasonably safe place in which to work. This is a direct, personal, and absolute obligation; and, while the master may delegate these duties to an agent, such agent stands in the place of the principal, and the latter is responsible for the acts of the agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent, or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate": *Mullan v. Philadelphia etc. S. S. Co.*, 78 Pa. St. 25; 21 Am. Rep. 2; *New York etc. R. R. Co. v. Bell*, 112 Pa. St. 400. "It would be a monstrous doctrine to hold that a railway company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty; and while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the ⁴⁴⁰ place of, and represent, the principal. In other words, they are vice-principals": *Lewis v. Seifert*, 116 Pa. St. 647; 2 Am. St. Rep. 631. In the case of *Railway Co. v. Salmon*, 14 Kan. 524, it is said: "Higher officers, agents, or servants, cannot, with any degree of propriety, be termed fellow-servants with the other employés, who do not possess any such extensive powers, and who have no choice but to obey such superior officers or servants. Such higher officers, agents, or servants, must be deemed in all cases, when they act within the scope of their authority, to act for their principal, in the place of their principal, and in fact to be the principal": *Darrigan v. Railroad Co.*, 52 Conn. 285; 52 Am. Rep. 590. A volume might be written on this subject, and numerous authorities cited for and against the rule of vice-principal, as propounded in the case of *Haney v. Railway Co.*, 38 W. Va. 570; but such rule has become too firmly established in this state to

be departed from now, and must be carried out to its legitimate results, until abrogated or altered by legislation. It undoubtedly bears severely on corporations, but its object is the safety and preservation of life and limb.

The doctrine, as recognized and enforced in this state, is that it is the personal and nonassignable duty of the master, 1. To exercise reasonable care in providing and keeping in repair suitable machinery, and all necessary appliances, including a safe place to labor; 2. To exercise a like care to provide and retain suitable servants for each department of service; 3. To establish, conform to, and enforce compliance, with proper rules and regulations. These are the superior duties, for the proper performance of which the master is responsible, whether he intrusts them to a department, or any employé of any grade, and the neglect of which, by the agent or agency to which they are intrusted, renders the master liable to any one injured by reason of such neglect, against whom and to whom contributory negligence cannot be shown or imputed from his own act or the act of a fellow-servant, whether it be of commission or omission: *Daniel v. Railway Co.*, 36 W. Va. 397; 32 Am. St. Rep. 870; *Cooper v. Railway Co.*, 24 W. Va. 37; and other cases heretofore cited; also, *Schroeder v. Railway Co.*, 108 Mo. 323; ⁴⁴¹ *Foster v. Railway Co.*, 115 Mo. 165. The decisions of many jurisdictions are not in linewith our decisions on this subject: 7 Am. & Eng. Ency. of Law, 821, tit. "Fellow-servants." The rule of stare decisis applies with impregnable force in this instance, and from which there is no way of escape, even if the court were so inclined, unless by an utter and reprehensible disregard of all precedent.

Defendant insists, even if this be true, that the plaintiff is not entitled to recover, for the reason that his fellow-servant, the flagman, failed to do his duty and that, therefore, contributory negligence is imputable to the plaintiff. The question at once presents itself as to the burden of proving neglect or non-neglect of duty on the part of the flagman. In the case of *Comer v. Mining Co.*, 34 W. Va. 534, Judge Brannon propounds the law, as settled by repeated decisions of this court as follows, to wit: "After the plaintiff has met this requirement by showing negligence of the defendant causing him injury, and not until then, the plaintiff may rest until the defendant answer it. The defendant may meet a case satisfactorily proven on the part of the plaintiff by showing contributory negligence on the part of the plaintiff as the proximate cause of the injury, but the burden of showing contributory negligence rests on the defendant." If the plaintiff's evidence shows contributory negligence, this is

proof sufficient to defeat a recovery: *Riley v. Railway Co.*, 27 W. Va. 146; *Sheff v. Huntington*, 16 W. Va. 316; *Hesser v. Grafton*, 83 W. Va. 548. Wherefore, we are required to determine whether the evidence justifies the inference of contributory negligence. If it is a matter of doubt, it must be resolved in favor of the demurree. The conductor of the freight testifies that he directed the rear brakeman to flag. The engineer of the passenger train says he saw no flagman, but some one informed him there was a man in the end of the tunnel. Owing to the curvature of the track, and the dense smoke, the engineer was not in position to see the flagman; and having been notified that the block was clear, by the signal given, he was not on the lookout, and had on ⁴⁴³ a full head of steam, and was running rapidly. The evidence of the fireman, who, if not busy in the performance of other duties, could have seen the flagman, is not taken, and neither is the evidence of the flagman. The time elapsed between the uncoupling of the train and the collision is very uncertain. The defendant could have made these questions certain, either for or against itself, by the evidence of the fireman and flagman; and the presumption arises that the evidence, if introduced, would have been adverse to the defendant, or it would not have been withheld: *Union Trust Co. v. McClellan*, 40 W. Va. 405. On the demurrer to the evidence, the negligence of the defendant, having been fully established, and the question of contributory negligence being left in an uncertain and doubtful condition, the plaintiff must prevail, as there is no obligation on him to prove that neither himself nor any of his coservants were guilty of any fault or omission which might have been the proximate cause of the injury. The court cannot infer such default from the absence of any, or a doubtful state of evidence relating thereto: *Comer v. Mining Co.*, 34 W. Va. 534. Where there is a grave doubt which of two inferences should be deduced, the court will adopt the one most favorable to the plaintiff, as the demurree: *Franklin v. Geho*, 30 W. Va. 27; *Schwarzbach v. Union*, 25 W. Va. 642; 52 Am. Rep. 227; *Miller v. Insurance Co.*, 8 W. Va. 515; *Ware v. Stephenson*, 10 Leigh, 164.

The circuit court having correctly determined the demurrer to evidence in favor of the plaintiff, the judgment is affirmed.

MASTER AND SERVANT—FELLOW-SERVANTS—WHO ARE. Persons engaged in the same common work, employed by the same agent of the common master, and performing duties pertaining to the same general business, are fellow-servants: *Norfolk etc. R. R. Co. v. Hoover*, 70 Md. 253; 47 Am. St. Rep. 892, and note.

RAILROADS — FELLOW-SERVANTS — TRAIN DISPATCHER AND TRAINMEN.— A train dispatcher who has control of the movements of trains and engines, and to whose orders conductors and engineers are subject, is not a fellow-servant with those engaged in operating and moving trains, but is the representative of the company, for whose negligence, causing injury to an employé acting under his orders, the company will be liable: *Smith v. Wabash etc. Ry. Co.*, 92 Mo. 359; 1 Am. St. Rep. 729, and note; *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416; 40 Am. St. Rep. 616, and note. See, also, the extended note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455, 456, and the notes to *Abend v. Terra Haute etc. R. R. Co.*, 53 Am. Rep. 621, and *Krogg v. Atlanta etc. R. R.*, 4 Am. St. Rep. 84.

NEGLIGENCE.—THE BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE of the plaintiff rests upon the defendant: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 28, and note at page 40, where the cases are collected. In *Bamberger v. Citizens' etc. Ry. Co.*, 95 Tenn. 18, 49 Am. St. Rep. 909, however, it was held that it was not error to instruct the jury that the plaintiff must prove want of contributory negligence, where the circumstances are not such as raise any presumption of due care on his part.

CROFT v. HANOVER FIRE INSURANCE COMPANY.

[40 WEST VIRGINIA, 508.]

INSURANCE, ORAL CONTRACT FOR.—As the statute of frauds and perjuries does not apply to insurance, an agreement to insure need not be in writing.

INSURANCE, REMEDY, WHEN THE CONTRACT IS NOT WRITTEN.—When a contract has been made, but no policy of insurance to evidence it has been issued, the remedy of the insured, after a loss, may be by bill in equity; and the court may at once decree the payment of the amount which would have been recovered under the policy, had it been issued.

INSURANCE, ORAL.—TO SUSTAIN AN ACTION on a contract of insurance, where no policy has issued, the elements must have been agreed upon, and nothing left open and undetermined, and all conditions precedent complied with.

INSURANCE, DURATION OF, WHEN SUFFICIENTLY AGREED UPON.—Though the assured insists that he contracted for insurance for a year, and the agents of the insurer that it was for three years, yet if the agents had blank policies, signed by the officers of the insurer, with authority to fill them out and deliver them, and they made a memorandum on their books, and the failure to actually issue the policy was due only to neglect or forgetfulness on their part, there is an existing agreement to insure, which will support an action, if the property is destroyed within one year from the perils insured against.

INSURANCE, FAILURE TO DESIGNATE INSURER.—If persons contract for insurance with the agents of several insurance companies, without specifying in which the insurance is desired, and a month later the agents designated a particular corporation as the insurer, they possessing power to make such designation, this completes the contract, and makes the insurer so designated answerable for a subsequent loss.

INSURER.—PAYMENT OF PREMIUM is not necessary to an oral contract of insurance, if credit was given to the assured.

INSURANCE—INCORRECT DESIGNATION OF ASSURED. The fact that the agents' memorandum of insurance designated one person, when the insurance was applied for, and intended to be issued to another, does not invalidate an oral contract for insurance.

INSURANCE—VARIANCE.—A bill to enforce an oral contract of insurance cannot be defeated by proof that the date of the alleged insurance is incorrectly stated in such bill. The date is not a matter of substance.

Hutchinson, Hutchinson & Camden, for the appellants.

W. G. Peterkin and Van Winkle & Ambler, for the appellees.

512 BRANNON, J. This was a suit in equity in the circuit court of Wood county by Walter L. Croft against the Hanover Fire Insurance Company and the Citizens' Fire Insurance Company for the specific performance of an agreement to issue a policy of insurance upon a dwelling-house, which was consumed by fire. The court decreed that the insurance companies paid the insurance stipulated for, on the companies' appeal.

No policy was actually issued, but the suit is based on an oral contract to insure and to issue a policy accordingly. As the "statute of frauds and perjuries," so called (Code, c. 98) does not apply to insurance, an agreement to insure need not be in writing: Wood on Insurance, sec. 4; May on Insurance, sec. 14; Insurance Co. v. Colt, 20 Wall. 560. I do not think clause 7 of chapter 98 of the code applies to the case, even if the policy agreed upon was for three years: Kimmins v. Oldham, 27 W. Va. 258.

When a contract for insurance has been made, but no policy to evidence it has been issued, the remedy of the insured after loss may be by bill in equity, on the principle of specific performance; and the court does not simply decree the specific performance of the agreement by the actual execution of a policy of insurance, and then compel the insured to bring an action on that policy, but, to avoid multiplicity of actions and delay, having the parties before it properly for specific performance, will at once decree the payment of the amount which would be recoverable under the policy if issued, agreeably to that principle of equity practiced that as all the necessary parties are before the court for one purpose, it will give full and complete relief, and not send them to another court: Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362; 31 Am. Rep. 732; May on Insurance, sec. 565; Wood on Insurance, secs. 11, 12; Insurance Co. v. Colt, 20 Wall. 560. Or he may sue at law, by same authorities.

But the defendant companies say there was no contract **513** to sustain a suit, because the contract was vague, uncertain, and incomplete. Herein lies the turning point of the case. As

to proof, there is nothing peculiar in contracts of insurance. As in other cases, the contract must be definite and certain, and the parties must have agreed upon all essential terms. The contract must be such as to bind both parties—the one to insure, the other to pay the premium. All elements must be agreed upon, and if anything is left open or undetermined, so that the minds of the parties have not met, no contract exists, and there is no liability for a loss; as, where the rate of premium is left undetermined, or the time when the policy shall attach, or the apportionment of the risk has not been agreed upon, or the insured retains control over the premium note or any papers the delivery of which is a condition precedent, or if anything remains to be done by the insured as a condition precedent, as the payment of premium, or if the duration of the risk is not agreed upon, or any condition precedent has not been complied with. The *aggregatio mentium* (union of minds) must be fully established, and nothing must remain to be done but deliver the policy. The details of the contract must be fixed, and, if the agreement or understanding of the parties in reference thereto is not mutual—that is, if one party understands the matter one way, the other another—the minds of the parties have not met, and there is no contract in law or equity. Of course, the burden of proof to show such a contract as is enforceable is on the plaintiff: Wood on Insurance, sec. 6.

The chief point of question in the contract, as it seems to me, is as to the length of time the policy was to run. It has been stated above that this is an essential element in a valid contract. The parties must agreed upon a time for the duration of the policy. The plaintiff says that he applied for a policy on his dwelling-house for one year, and understood that the agreement with the agents was for one year. One of the agents says he understood it to be three years. The agent says he made no memorandum in writing on this occasion. According to the evidence on both sides, in that interim an agreement was made for the insurance of the dwelling-house in such sum as the agents ⁵¹⁴ should fix, at a certain rate, and the policy was to be made out and sent by mail to the insured, and he was then to pay the premium, or it was to be charged to his father, who had other insurance with these agents, as the agents preferred. The agents agreed and promised to send the policy. They had policies in blank, signed by the officers, and they had authority to fill out and deliver them without application to the chief officers of the companies.

About one month after this, a brother of the plaintiff, by authority of his brother, met the one of the agents who had negoti-

sted for the policy, and asked the agent for it, and was told that it had not been made out, as he had not satisfied himself as to the amount for which the policy should be written. The plaintiff's brother told the agent he wished it fixed up, and the agent himself says that he told the brother that he would fix it then as far as he could, as he was on his way to the train to go on a trip, but would attend to it; and he then wrote in a private memorandum-book this memorandum: "W. M. Croft, \$600.00, on one story fr. shingle roof dwell., near Davisville, 1½—3 yrs. N. Y. Underwriters." The brother told him to send the policy, and he would send the money to pay the premium, to which the agent assented. The evidence shows the agent agreed to credit; did not demand prepayment. It is not claimed otherwise.

About a month after this interview between this agent and the plaintiff's brother, the house was destroyed by fire, and this brother, the next day, called on the agents, and asked for the policy. The agent said he had written it, but had mislaid it, and searched and could not find it, and said he would look for it, and to call later, and then the brother informed him of the fire. In the afternoon, the brother called again for the policy, but the agent had not found it. Later this agent concluded he had never written it up. After this the plaintiff tendered the agent the premium money, but he declined it, saying that he had informed the company of the fire, and the adjuster would soon come, and, "under the circumstances," he would not take the money.

515 We can say from the evidence on both sides that an agreement to insure was made, and nothing remained to be done but to issue the policy, and that the agent promised to do this. All the elements were settled, except as to time to be covered by the policy, let us say. The property was named. The plaintiff gave its value. The amount of the indemnity was left by the plaintiff absolutely to the decision of the agent. He would have right to fix that anyhow. It was with him to say just how much he would insure it for. He did fix it, as the memorandum shows. The rate of premium was fixed. The discretion to select the company was left to the agent. The agent, as a witness, says it was only through his neglect or forgetfulness that the policy was not issued. He says the policy should have been issued. But the insured asked and understood that the insurance was to be one year, while the agent understood it to be three years. What effect can this have? The defense would use it to show there was no finished agreement, under that principle of law, stated above, that all elements must be agreed, and time is an essential

element, and that when one party understands an essential element of the contract in one way and the other in another way, the minds of the parties have not met on that essential element. But what practical harm can this circumstance do to the companies? The fire occurred within one year. The plaintiff says to the companies: "You are liable to me. You agreed to insure me for one year, and the fire occurred within one year." The companies plead in reply: "We are not liable because we agreed to insure you for three years." The plea is not good. It confesses the fact of insurance. It does not deny that the fire was in one year, and the fact that the term was three years is not material, the three years covering one year. The rate agreed was the usual one for three years. Croft's evidence, however, is that the term was one year. It is a case of conflicting evidence as to this. If he is believed, their minds met on one year. We should not, where two witnesses thus disagree, reverse the decree, there being no other evidence as to that.

It is contended for the defense that no company was named ⁵¹⁶ as the insuring company at the time the agreement was made, and that never until a month later, when in the memorandum above mentioned, the agent wrote the New York Underwriters, as the insurers, was there any particular insurer mentioned. Here the evidence of the plaintiff and the agent conflicts, the former saying that the New York Underwriters were named as the insuring parties. The defendant companies did business under that name. Let us say that no insuring party was named at the time of the agreement. The firm of K. S. Boreman & Son were insurance agents, doing business for the defendant companies, and also other companies, and both plaintiff and the one of said firm acting in this matter (to whom I have often referred above, and may below, as agent) say that it was left to the agent to assign the risk; that is, give the insurance to what company they pleased. Croft having confidence in the experience of the agents with the various companies, committed this discretion to them. This is often done. It is lawful and binding on the company selected by the agent, when they have policies signed in blank, to issue to whom they choose. It does not render the agreement incomplete as for want of contracting party: Wood on Insurance, sec. 25, and note; May on Insurance, sec. 59, end. The agents clearly have power to make a contract binding these companies by name as insurers at the time of the contract. Then when the party insuring leaves it with the agents to select any of

the companies represented by them, why is it not binding? If the party insured does not object, how can the company object? These two companies had an agreement that in all policies taken in the name of the New York Underwriters they should share premiums and liabilities in certain proportion. Until the agent does select the company, there is not contract; but when he does, then there is. Let the date of the memorandum naming the Underwriters as the insurers be at the date of the agreement or afterward, it was before the fire. It became, as to this point, a contract before the loss. The agent wrote to the companies after the fire that he had assigned the risk to them. *Sheldon v. Insurance Co.*, 65 Wis. 436, cited, is not in point. An ⁵¹⁷ agent agreed to insure in some company represented by him, but not designated, on certain terms. The defendant decided to insure on different terms, but, before acceptance, the company declined to do so. Held, there was no contract. The judge, admitting that when it is left to an agent to select the company, it is binding when he designates the company, said it is not a contract until he designates. The memorandum of designation there showed a rejection by the company, and the court held it a departure from the order of the company in designating a less premium than it had proposed to accept. The case of *Association v. Boniel*, 20 Fla. 815, is not in point. A subagent agreed to insure in a company not designated, and there is no showing that he was to select it, and he never did designate one, and he had no authority.

There is an indirect allusion in brief of counsel to the non-payment of the premium, but the point is not distinctly made. It would be untenable. The proof is full that the agreement was that when the policy should be sent, Croft would bring or send the money, or it could be charged to his father, and the agents assented. Now, insurance can be sold on credit as well as anything else. The agent can give credit: *Eagan v. Insurance Co.*, 10 W. Va. 583, 588; *Wood on Insurance*, sec. 28; *May on Insurance*, sec. 360 D; *Insurance Co. v. Colt*, 20 Wall. 560; *Long v. Insurance Co.*, 137 Pa. St. 335; 21 Am. St. Rep. 883, note. Prepayment is not necessary to the conclusion of an oral contract: *Wood on Insurance*, secs. 22 a, 43 b. But, in addition, if credit had not been given, there was no obligation to pay until the policy was ready to be delivered, and the companies were to do that, and did not, though asked to do so: *Wood on Insurance*, secs. 29, 30; *May on Insurance*, secs. 22 a, 43 c.

The agent made out the memorandum in the name of W. M. Croft, not in that of plaintiff, Walter L. Croft, by mistake. The

plaintiff owned the house and applied for the insurance, and made the agreement. From the fact that his father, W. M. Croft, had insurance from these agents, and the latter thought that the father owned the house, the mistake was made by the agent. The plaintiff says he told him the house was his. No pretense or claim of falsehood ⁵¹⁸ or concealment is made against the plaintiff. The agent swears that it would have made no difference, as he would have as readily insured in the son's name. This mistake is mentioned in the brief, but merely mentioned. It can have no effect. Even a policy in a wrong name may be reformed and rectified after loss. This is a suit on an oral, executory agreement, and we are in a court of equity: *May on Insurance*, sec. 566 a; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 295; *May on Insurance*, secs. 479, 482. This court decided in *Dietz v. Providence etc. Ins. Co.*, 33 W. Va. 526, 25 Am. St. Rep. 908, that where, by mistake, the agent wrote the name of the husband as the insured instead of the wife, it would not defeat recovery by the true owner: See, also, opinion in *Travis v. Insurance Co.*, 28 W. Va. 583. But this memorandum is not the contract. There is evidence to sustain the court in holding the agreement was with the plaintiff. The suit is on the oral contract. The memorandum is only important as showing a designation of the insuring companies; it is not the contract. Plaintiff in person applied for the policy and told the agent the house was his. The agent accepted the risk of the plaintiff in person, and why should we or the agent say the contract was with the father? The agent, as a witness, does not claim he was misled; attributes no bad faith whatever to the plaintiff. He inferred, because the plaintiff was a young man of thirty, and the father had a mill property close by, and was a man whose name was on the insurance-book as to other insurance, that the father owned the house. It was merely his inference. The real contract was in fact and in law with the plaintiff. *Prima facie*, if the plaintiff did not mislead, it would be his contract. The agent says it was merely his inference. I repeat, the memorandum is not the contract. If it were, the mistake could be corrected.

Variance. This is relied on in a brief of counsel. As regards the matter last spoken of—the name—there can be no variance between allegation and proof. The bill alleges the oral contract as made with the plaintiff, and, as I have shown, the proof is of a contract made with the plaintiff. The memorandum is not the contract sued on; and, if it were, ⁵¹⁹ the bill states the

mistake in it, and gives reasons of mistake, why it, if the gravamen of the suit should be treated as one made with plaintiff. Either party may have even a written contract specifically enforced with such corrections as parol evidence may show to be necessary, to correct a mistake: *Creigh v. Boggs*, 19 W. Va. 240.

Variance as to date of contract. There is no variance between bill and proof in this respect. The bill says that "about the middle of July, 1891, the plaintiff applied to the agent for the insurance," etc., "and that at that time, to wit, July, 1891," a certain agreement was made. The proof shows, I think, that this was on the 11th of August. Is it possible that we must, in a suit of equity, overthrow the decree for this? There is no variance. The substance and real point of the allegation is, that a contract of insurance was made. The date is not material. Even if the bill said it was on a fixed day in July, it would not be fatal, the agreement not being a writing. Even in formal law actions, allegations of "time, place, quantity, and value, when not descriptive of the identity of the subject of action, will be found immaterial, and need not be proved strictly as alleged. Thus, in trespass, the material fact is the assault, the time and place not being material": 1 *Greenleaf on Evidence*, sec. 61. A distinction exists between allegations of matters of "substance," and matters of "essential description." The former may be substantially proven; the latter must be proven with a degree of strictness extending in some cases even to literal precision: 1 *Greenleaf on Evidence*, sec. 56. But here the bill does not tie itself to a fixed date, but is "about the middle of July." Now, if it were a note or instrument described by date, it would then be, in the words of *Greenleaf*, "matter of essential description," the earmark of identity, and strict proof would be required, and such cases as *Scott v. Baker*, 3 W. Va. 285, would apply. This date is not matter of substance, but the substance is the contract and its essential elements. If there were a variance in them, it would be different. Therefore, cases like *Railroad Co. v. Skeels*, 3 W. Va. 556, and *James v. Adams*, 8 W. Va. 576, do not apply.

Substantial and even-handed justice has been done in the ⁵²⁰ case by the decree, and, when that is so, there ought not to be a reversal, though on some point it may be open to question: 4 *Minnor's Institutes*, 870; *Barton's Chancery Practice*, 1139.

The agents agreed with the plaintiff, for a given consideration, to insure a particular house owned by plaintiff, in a sum which the agent was to, and did, fix and for a period of time covering

the date of the loss by fire. Nothing remained to be done but issue the policy, which the agent promised to do. These things he himself proved. Both parties understood that the plaintiff was insured. Every element was final to base that policy on. The agents were authorized to issue it. His own memorandum told him every single element from which to issue it, except the name of the insured; and, had he issued it in the wrong name, the mistake could be corrected, and a suit maintained upon it. The only thing wanting is the policy to perfect the insurance. Whose fault that it was not issued? Where is the plaintiff in fault or default? To decide the case against the plaintiff, his house is lost, without the indemnity he fairly contracted for; to decide against the defendants is only to make them do what they fairly contracted to do. The defense set up at first blush inspires some questions; but, on consideration, it becomes a figment which withers away.

Courts must not let insurance companies evade their policies through mere technicalities. They must be treated fairly, and only held up to their fair engagements. They are very valuable institutions, deserving patronage and encouragement; but when their contracts of indemnity prove worthless, for unsubstantial reasons, to those who are in distress and poverty from the waste of fire, against which their prudence sought to provide, it derogates from the efficacy of the policies and the confidence of the public in fire insurance.

For these reasons, we are clearly of opinion to affirm the decree.

INSURANCE—VALIDITY OF ORAL AGREEMENT FOR.—A contract of insurance need not be in writing; it may be oral only: *Viele v. Germania Ins. Co.*, 28 Iowa, 9; 96 Am. Dec. 83; *Sanborn v. Fireman's Ins. Co.*, 16 Gray 448; 77 Am. Dec. 419, and note; *Northwestern Iron Co. v. Aetna Ins. Co.*, 23 Wis. 160; 99 Am. Dec. 145, and note; *Ellis v. Albany etc. Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 405, and note; contra, see *Bell v. Western etc. Ins. Co.*, 5 Rob. 423; 39 Am. Dec. 542. See, also, the note to *Long v. North British etc. Ins. Co.*, 21 Am. St. Rep. 883.

INSURANCE — ORAL CONTRACT — ENFORCEMENT IN EQUITY.—An oral agreement for insurance will be enforced in equity: *Woody v. Old Dominion Ins. Co.*, 81 Gratt. 862; 81 Am. Rep. 732.

INSURANCE—ORAL—EFFECT OF NONPAYMENT OF PREMIUM.—Where a written application for insurance is made to and filed with the agent of an insurance company, who orally agrees to insure from the date of the application, provided the company is not already upon the risk, there is a complete and valid contract binding upon the company from the date of the conversation, even though the premium be not paid, if the usage of the business to extend the time of paying premiums over to the company by the broker until the end of the month is shown: Note to *Long v. North British etc. Ins. Co.*, 21 Am. St. Rep. 883.

INSURANCE.—MISTAKE IN WRITING THE NAME OF THE INSURED by the agent of an insurance company was held in *Deits v. Providence etc. Ins. Co.*, 33 W. Va. 526; 25 Am. St. Rep. 908, immaterial and not a bar to recovery on the contract of insurance.

WARD v. WARD.

[40 WEST VIRGINIA, 611.]

COTENANCY—LIABILITY FOR EXCLUSIVE OCCUPANCY.—A joint tenant, or a tenant in common, is not answerable by the common law for exclusively occupying the common property, or more than his share thereof, unless he agreed to pay rent, or has ousted his cotenants. This rule does not prevail in West Virginia, the courts of Virginia having construed the statutes of the state as making a cotenant liable for occupying more than his share, as well as for receiving more than his proportion of the rents, except when the property is susceptible of a several occupation by the different co-owners, in which event a cotenant in exclusive possession of a part, without hindering the others from the use of their shares, is not answerable to them for profits realized from the portion in his exclusive occupancy.

A COPARCENER OCCUPYING MORE THAN HER SHARE of the common property is not liable to account for the profits realized, where she does not oust or exclude the other co-owners, though there is a statute imposing liability to account on joint tenants, tenants in common, and their personal representatives for profits realized from occupying the common property.

COTENANCY—REPAIRS.—At the common law, one cotenant could compel the others to unite in the expense of repairing a house or mill, by the writ of *de reparatione facienda*, if they, after request, refused to join in such repairs, but no recovery could be had for repairs already made.

COTENANCY—IMPROVEMENTS.—One cotenant cannot compel another to make improvements on the common property, nor maintain an action against him personally to compel contribution to the expense of improvements made thereon without his consent, express or implied, nor fix it as a lien on his interest in the estate, except that by the writ of *de reparatione facienda* all the tenants could be compelled to unite in the expenses of the necessary repairs of a house or mill owned by them.

COTENANCY—IMPROVEMENTS.—A cotenant called on in equity to account for rents or profits may deduct therefrom expenses for repairs, on the principle that, he who seeks equity must submit to equity.

PARTITION—IMPROVEMENTS.—Where partition is made, a part improved, if not prejudicial to others, should be allotted to the one who made the improvements, estimating its value without the improvements; but, if this cannot be done, the one to whom the improved part is allotted need not pay for the improvements.

PARTITION — IMPROVEMENTS.—WHERE PROPERTY CANNOT BE DIVIDED, but must be partitioned by sale, and improvements made by one of the cotenants have enhanced its value, he cannot be awarded the costs thereof, but should be given the actual enhancement of value therefrom existing at the time of the sale, though the improvements were not made at the request of the cotenants.

CHANCERY PRACTICE—EXCEPTIONS TO COMMISSIONER'S REPORT.—Where a commissioner is appointed to make inquiry and report facts, his report, if not excepted to within ten days, must be taken, as against all adult parties, to be correct, and will not be examined except for errors appearing on its face.

CHANCERY PRACTICE.—EXCEPTION TO THE REPORT OF A COMMISSIONER may be made more than ten days after the filing thereof. On such exception the party is not entitled to take evidence, but can only contend that the commissioner reached an erroneous conclusion on the evidence taken by him.

CHANCERY PRACTICE—FINDINGS BEYOND THE ISSUES.—The report of facts by a commissioner, when not supported by the pleadings, presents a case of error appearing on the face of the report, and exceptions thereto may therefore be sustained.

COTENANCY—IMPROVEMENTS.—The fact that when improvements were made on the common property, it was in the possession of the holder of an estate for life, does not deprive the cotenant making them of his right to be allowed in a suit for partition by sale the amount which such improvements enhanced the value of the property, when sold.

W. R. D. Dent, for the appellant.

B. F. Martin and Frank W. Woods, for the appellees.

613 BRANNON, J. Maria Ward died seized of a hotel property known as the "Ward House," in the town of Grafton, leaving a husband and six children. Her husband, George W. Ward, occupied the property as tenant by the curtesy from February, 1878, when his wife died, until December, 1880, when he died. Four of his children lived in the hotel with him, the plaintiff, L. E. Ward, John B. Ward, Mrs. Broyles, and Archibald Ward. Before the father's death, and for eleven years afterward, the plaintiff, L. E. Ward, occupied a stable on the property as a livery stable, and after his death Mrs. Broyles and husband occupied the hotel. Mrs. Broyles, by purchase from coparceners at different times after her father's death, became owner, including her own share, of five-sixths of the property.

L. E. Ward brought this suit in the circuit court of Taylor county, alleging that in 1879 he and several others of the parcellers, seeing that the property was badly in need of repair, almost entirely rebuilt and greatly enlarged the hotel, at great expense, he furnishing a large amount of means, labor, and material, of the amount of fifteen hundred and thirty-eight dollars and twenty-six cents, and that Archibald F. Ward and Lloyd M. Broyles, for his wife, furnished material and labor, for which amount expended by him he claimed compensation. He further alleged that for several years Broyles and his wife had the possession and use of the hotel property, except the stable, without payment of rent, but had paid taxes, and put some repairs on

the property from time to time as needed, and that he, the plaintiff, had occupied the stable without payment of rent. He prayed that an account of the rent and improvements be taken; the amount due him and others be decreed; that the property be rented or sold to satisfy those charges, and also that the property, not being susceptible of partition, might be sold, ⁶¹⁴ and the proceeds divided. The other parties resisted this demand of the plaintiff for improvements, saying that such improvements were made by their father while in possession as tenant by the curtesy, and any charge by the plaintiff was against him, not against his coparceners, as they never assented to such improvements, and neither they nor their property were liable therefor. The case was referred to a commissioner, and he reported a large sum as due the plaintiff from Mrs. Broyles, one of the parceners, for rent and improvements. The court disallowed all claim by the plaintiff for improvements or rent, and, declaring the property insusceptible of partition, directed its sale. The plaintiff appealed.

First, let us consider the subject of rent. Are those of the heirs who occupied the property after the end of the father's estate by the curtesy liable to pay rent or rather compensation for use and occupation? At common law, neither a joint tenant, tenant in common, nor coparcener, occupying the common property, and thus taking more than his share of the rents and profits, can be made to account to his fellows, unless he has been appointed bailiff or receiver by his fellows. Each one has right to enter and use the land, and this fact cannot be impaired by the fact that others absent themselves or do not claim their right to a common enjoyment. Unless the one in possession denies the right of the others to enter and enjoy the estate, or agrees to pay rent, nothing can be claimed of him. It is presumed that the others consent to his use. He cannot call on the others to help him farm or otherwise use the property, and, in case of loss from failure of crops or other cause, he cannot call on the others to contribute to the loss. If the others do not wish to occupy the premises with their co-owners, the remedy of partition is at hand, or, if the property be indivisible, the court will sell it, and divide its proceeds: Lomax's Digest, 481, 501; 2 Minor's Institutes, 429, 437; Freeman on Cotenancy and Partition, sec. 269; note to *Early v. Friend*, 78 Am. Dec. 665. This is the view stated in Freeman on Cotenancy and Partition, sec. 258; *Gayle v. Johnston*, 80 Ala. 395.

By section 14, chapter 100, of the code, it is provided that

AM. ST. REP., VOL. LII.—58

an action of account may be maintained "by one joint tenant, or ⁶¹⁵ tenant in common, or his personal representative, against the other for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common." This statute originated in England, and there and in a majority of the American states it has received the construction which I would think the proper one, that merely by exclusive occupation and use one tenant in common or joint tenant does not become liable to account to others, but only where he receives rents or proceeds of the estate from strangers: Freeman on Cotenancy and Partition, sec. 274; note to Early v. Friend, 78 Am. Dec. 665; Chambers v. Chambers, 3 Hawks, 232; 14 Am. Dec. 665, and note. But in Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649, which was decided at a date making it binding authority here, it is held that one tenant in common may sue his cotenant, who has occupied the whole property, for an account of rents and profits. He is accountable whether he receives rents and profits from strangers, or receives them by occupying the premises himself, with interest from each year's close. Rust v. Rust, 17 W. Va. 901, holds just the same. In Dodson v. Hays, 29 W. Va. 577, syllabus point 2, this doctrine was somewhat qualified in the holding that where the property is such as to admit of use by several, and less than his just share is used by one tenant in common in a manner not hindering or excluding the others from the use of their shares, he does not receive more than his share, within the meaning of section 14, chapter 100, of the code, and is not accountable for the profits of that portion owned by him to his cotenants.

But it will be observed that this statute in terms applies to joint tenants and tenants in common, and does not mention parceners. Does the statute apply by analogy to them? Its letter does not. Joint tenancy, tenancy in common, and coparcenary are the three notable joint estates, and to them alike the common-law rule applied that one cotenant using alone the common property was not liable to account therefor, and the legislature, in changing the rule, leaves out coparceners and expressly names joint tenants, and tenants in common. Why do this, unless it intended to exclude coparceners from the statute? Could there be a stronger instance of the application ⁶¹⁶ of the principle of construction that "the mention of the one is the exclusion of the other"? The lawmakers did not intend that the sister or brother remaining under the roof of the old home, or making bread from the home farm after the departure

of parents, should every day be running in debt to the others. While it might be reasonable as between joint tenants or tenants in common, often strangers, it would not be so between brothers and sisters. There was reason for omitting parceners from the statute. It is humane and reasonable to assume that brothers and sisters do not object, but consent, that brothers and sisters continuing on the premises are still at home, and not expected to pay rent. Such we know to be the uniform course between members of a family. The same presumption does not hold between two who own as joint tenants or tenants in common. Thus, I think neither the letter nor reason nor the equity of the statute applies to parceners. Professor Minor, admitting that parceners are not within the letter of the statute, says that "it is believed" that the common-law rule of nonliability has been changed by construction of the statute, partly because courts of equity before the statute of Anne in England had obliged parceners to render an account, and partly from the irresistible reasonableness of the thing, and partly because of the force of the analogy between joint tenants, tenants in common, and coparceners: 2 Minor's Institutes, 437 (506). I have examined the authorities there referred to, and find that this opinion rests on *Drury v. Drury*, decided in the year 6 of the reign of Charles I., which does seem to sustain the position, as it makes one of two heirs account to the other heirs; but the report in 1 Ch. 48, 49, is so meager that we cannot tell how far the element of ouster or exclusion may have entered into the case: *Dean v. Wade*, 1 Ch. 48, decided ten years later, simply adopted *Drury v. Drury*, expressly as a precedent. No facts are given. *Equity Cases Abridged*, chapter 2, title "Account" (A), page 5, note, so far from sustaining Professor Minor, is against his position, as it limits the equity jurisdiction to joint tenants and tenants in common, and that under the statute of Anne not mentioning coparceners. It is but a note citing no case. Though *Kent* is cited by Professor Minor, *Kent* does ⁶¹⁷ not insert it in his text. It is an annotator's note, based on the old English case and the note in *Equity Cases Abridged* just mentioned, and the Kentucky case of *O'Brannon v. Roberts*, 2 Dana, 54, below referred to. *Lomax* refers to the same authority. Now, as to the Kentucky case cited by Professor Minor (*O'Brannon v. Roberts*, 2 Dana, 54) it supports Professor Minor's inclination to an opinion. But examine the case. The opinion plainly shows that Judge Nicholas hesitated to hold that one parcener may be held to account in equity for profits and rents of land exclusively occupied

by him, saying that the statutes of 3 & 4 Anne, the source of ours, applied only to joint tenants and tenants in common, but he felt bound by a former Kentucky case (*Graham v. Graham*, 6 T. B. Mon. 562; 17 Am. Dec. 166). When that case is examined, it has nothing whatever to do with the point, for it was a case where one child claimed exclusively in severalty as purchaser of their father by a forged title bond. It was a case of ouster, where one heir shut out another by adverse claim. The syllabus itself states that he held in severalty. I must refer to *Chinn v. Murray*, 4 Gratt. 348, cited by Minor. It is peculiar. A judicial partition was made in 1820, which lay unconfirmed till 1836, and on an appeal as late as 1848, it was reversed. The parties took possession and improved the parcels under the partition as their own. Improvements were allowed as far as they added to the present value, and rents and profits were charged, or rather set off. This case cannot be said to hold the clear proposition that a coparcener, merely from occupation of the premises, receives more than his share, under the said code section, by construction. It is a case of charge to offset improvements, which I elsewhere say can be done. The parties had to be allowed improvements, because made under the mistaken belief that they owned the parcels in severalty under a partition so long acquiesced in, and, claiming improvements, they must be charged for use and occupation. Where it is proper to allow improvements, rents and profits should be charged. Where it is proper to charge rents and profits, improvements should be allowed. The decree in the case says that, "under the circumstances of the case," justice required an allowance for improvements, and ⁶¹⁸ then said that rents and profits be charged. The opinions do not touch on the point. They do not consider whether the said statute naming joint and in common tenants includes within its equity coparceners. The matter was not discussed, not even mentioned. The Virginia cases sustaining an account are cases of joint tenants and tenants in common. So the two West Virginia cases cited above. If there is a case in either state pointedly holding that a mere sole use by a coparcener subjects him to account, I have not seen it, except *Fry v. Payne*, 82 Va. 759, holding, by a mere remark, a parcener liable to account for sole use; but there was no consideration of the point whether the statute applied to parceners, but it was assumed it did. The distinction between parceners and joint tenants or tenants in common was not thought of.

So, I do not think these parceners could by law demand an ac-

count of use and occupation. But, in addition, all the parceners, save one, including the plaintiff, by uniting in the form of a letter signed by all as an agreement declared that they did not wish the hotel to go into the hands of strangers, and wished Broyles, then in possession, not to leave it, but to keep it and use it, and insure and paint and repair it, and, after all the improvements contemplated by it had been made, if he thought the heirs were entitled to anything he could pay; but if he thought they were not, then pay nothing, leaving it to him, and they would be satisfied. This was April 17, 1884. It spoke no intent to charge back rent, but by plain implication disclaimed it, and disclaimed an intention to charge in future. The suit would not change this. Mrs. Broyles still had right till partition or sale, so she did not exclude an actual effort at entry and enjoyment by others. Let the question of liability for use and occupation be settled as it may on general principles of law. This agreement in this case repels a charge.

Next, as to improvements claimed by L. E. Ward. Can he be allowed for them? One joint tenant or tenant in common at common law could compel others to unite in the expenses of a necessary reparation of a house or mill owned by them, though the rule is limited to three parts of the common property, ⁶¹⁹ and does not apply to fences inclosing wood or arable land. This right was enforced by a writ de reparatione facienda. It did not apply to past repairs, and could only be resorted to after request to unite in the repairs and refusal: 1 Lomax's Digest (504), 648; 2 Minor's Institutes, 430; 4 Kent's Commentaries, 370. It was confined to a mill or houses, because it is for the public good to maintain houses and mills, which are for the habitation and use of men—as Lord Coke said in Coke on Littleton, 54 b, 200 b. If there be two joint tenants of wood or arable land, the one has no remedy against the other to make inclosure or reparation for safeguard of the wood or corn: Bowles case, 11 Coke, 82. I have no doubt this old common-law writ, though disused, might yet be resorted to. It applies to future, not past, repairs: Freeman on Cotenancy and Partition, sec. 261; Calvert v. Aldrich, 99 Mass. 76; 96 Am. Dec. 693. I think it can be safely laid down, with the exception stated, no joint tenant, tenant in common, or parcener can compel his cotenant to make improvements or maintain an action against him personally to compel him to contribute to the expense of improvements made upon the estate, without his consent, express or implied, or fix it as a lien on his interest in the estate. One cannot improve his fellow out of his

estate. He has voluntarily put improvements upon the land of another, knowing his right, and he cannot impose a debt on him or his estate without his consent: Freeman on Cotenancy and Partition, secs. 261, 262; Aldrich v. Husband, 131 Mass. 480; Husband v. Aldrich, 135 Mass. 317; Nelson v. Clay, 7 J. J. Marsh. 138; 23 Am. Dec. 387; Hancock v. Day, 1 McMull. Eq. 69; 36 Am. Dec. 293; Scott v. Guernsey, 48 N. Y. 106; Calvert v. Aldrich, 99 Mass. 74; 96 Am. Dec. 693; Munford v. Brown, 6 Cow. 475; 16 Am. Dec. 440. It is not the case of one making improvements in good faith believing the land to be his. The common law denied such a one relief, and it is only allowed by statute: Code, c. 91. It seems that, where a tenant in common or joint tenant is called on for rents and profits in equity, he may deduct ordinary repairs, on the principle that he who asks help from a court of equity must do equity: Hannan v. Osborn, 4 Paige, 343; Ruffners v. Lewis, 7 Leigh, 720, 743; 30 Am. Dec. 513; 2 Minor's Institutes, 420; 1 Story's Equity Jurisprudence, sec. 655; Graham v. Pierce, 19 Gratt. 28, syllabus 6; 100 Am. Dec. 658; Freeman on Cotenancy and Partition, sec. 279. Where partition is made, the part improved should, if not prejudicial to others, be allotted to the one who ⁶²⁰ made improvements, estimating its value without improvements: 2 Minor's Institutes, 420; Patrick v. Marshall, 2 Bibb, 41; 4 Am. Dec. 670; Nelson v. Clay, 7 J. J. Marsh. 138; 23 Am. Dec. 387. But if this cannot be done he to whom the improvement falls does not have to pay for it: Nelson v. Clay, 7 J. J. Marsh. 138; 23 Am. Dec. 387. Where improvements are made with consent of the cotenants, they are personally bound, and the demand is a lien on their shares: Houston v. McCluney, 8 W. Va. 135; Freeman on Cotenancy and Partition, sec. 262.

It seems to be claimed in the brief of counsel that the letter to L. M. Broyles, written by some of the heirs, justifies a charge by L. E. Ward for improvements. After requesting him not to leave the house, but to stay, it recited what he ought to pay, viz., keep and use the property, have it insured, keep taxes paid, keep the house in good repair; and then said, "Go to work and have the house painted and repaired as in your opinion you think it should be; and, after all this improvement has been made, if you think, after calculating the expenses of the improvements and the taxes, etc., which you may have paid heretofore, that the heirs are entitled to anything, then you can arrange and pay them their proportion; and if you think that nothing is coming to the heirs after paying for painting, etc., then we are satisfied." This did not refer to improvements made by L. E. Ward before the

letter, but to future improvements. The word "paid" refers to taxes. Although it be law that one coparcener cannot, without consent, make permanent improvements, and charge his coparcener or his share with their cost, where the estate is partible in kind, as a tract of land, how is it in the case of a house or land which is impartible in kind for any reason, so that it has to be sold in order to effect a partition, as was the case in the present instance? Is there no difference here? Circumstances alter cases. Is it right for a court of justice to sell the land greatly increased in value by the expenditure of one brother, and put the money into the pocket of another, with his eyes shut to the fact that the property brought more, a great deal, by reason of the new house built by one of the brothers? Ought it not to be ascertained how much the value was enhanced by the improvement, and pay the amount of the enhancement to the one whose means produced it, and ⁶²¹ divide the balance? This is different from the case where there is division in kind. In the latter case, to charge the brother who did not consent to the improvement is to force upon him a debt he did not assent to, and to mortgage his estate with a debt which he cannot pay, and which will take away his patrimony. One ought not to be made a debtor without his consent; but, where the whole is to be converted into money and distributed, another principle is admissible; doing harm to no one and justice to all. The others get just what they would have received without the improvements, and the one making them is reimbursed. I have observed that in Illinois this doctrine has been frequently applied: *Louvalle v. Menard*, 1 Gilm. 39; 41 Am. Dec. 161, and note; *Howey v. Goings*, 13 Ill. 95; 54 Am. Dec. 427; *Dean v. O'Meara*, 47 Ill. 120. And on further search I find this exception approved in *Moore v. Thorp*, 16 R. I. 655. I think *Elrod v. Keller*, 89 Ind. 382, would also allow it in such a case as we have in hand. *Alleman v. Hawley* (117 Ind. 533) does. It does not follow that the original cost of improvements be given, but the actual enhancement of value at time of sale by reason of improvements is ascertained: See opinion in last cited case, and in *Moore v. Williamson*, 10 Rich. Eq. 328; 73 Am. Dec. 93. The opinion in the last case very properly says that if the cost of improvements be allowed, "it would subject the owner to the want of judgment or economy of the improver, and render him liable to be built out of his land by the improvidence of his tenant." I would add that the improvement may have depreciated from some time before the sale.

It is objected that the bill does not charge a request on the

part of the cotenants for the improvements. It would be necessary to charge them otherwise than as indicated above, but it is not necessary to so charge them; that is, as a simple increase of value.

It follows from what has been said that, while there could be no claim for use and occupation against Broyles and his wife, yet the decision of the court below is wrong in wholly disallowing all claim for improvement made by the plaintiff out of the proceeds of sale, in the manner above stated, which ⁶²² was directed to be made because the property was found insusceptible of partition.

A reference was made to a commissioner, and his report charged rents and profits to Mrs. Broyles for the hotel, and to the plaintiff for the stable, and charged Mrs. Broyles, as the owner of five-sixths of the property, with five-sixths of the money spent by the plaintiff in improvements. The commissioner made a part of his report a deposition of the plaintiff, and, as the report imports, there was no other oral evidence before him. Taking that deposition alone, it supports the report as to the charge for improvements, as it shows consent on the part of the cotenants. No exception was made within ten days, and the plaintiff contends that the result reached and returned by the commissioner must be taken as correct, and cannot be impaired by after exceptions and evidence afterward taken, and that the court could not, upon depositions afterward taken, overturn and reject the result reached by the commissioner, but must confirm or recommit: *Ward v. Ward*, 21 W. Va. 262. The plaintiff's deposition must be considered a part of the report—a part of its face: *Lynch v. Henry*, 25 W. Va. 424; *Kester v. Lyon*, 40 W. Va. 161. It is plain that if we decide the exception only by the face of the report, including that deposition, we must overrule it, because the deposition sustains the report in the point of view of fact. But after the report, and we will say after the exception, the defense took depositions. They denied the statement of the plaintiff's deposition, that the other heirs agreed that the plaintiff make the improvements. The court read them on the hearing. Could they be read to impair the finding of the report in favor of the plaintiff as to the improvements? This may seem at first an immaterial question, since as above stated the plaintiff ought to be allowed out of the sale an amount equal to the amount of increase of value at the time of sale imparted to the property by the improvements; but a second thought makes it material in this, that if there was an agreement between the parties that the improve-

ments be made, that would entitle the plaintiff to perhaps a larger recovery, that is, the original cost of improvements ⁶²³ with interest from date when made, while if there was no request, he would get out of the sale the mere increase of value. Can these depositions be read then? If there had been no exception, they could not, as, without exceptions, a report is taken, as to adult parties, to be correct, and will not be examined by the court except for errors on its face: *Kester v. Lyon*, 40 W. Va. 161. But where there is an exception, but not within ten days, how is it? Where the party says that he does not intend to be regarded as admitting the correctness of the report, but excepts to it, and appeals to evidence subsequently presented in the case, can he overthrow the report with that evidence? Is he unalterably bound by the report, if not erroneous on its face? If he had excepted within ten days, he could have taken other evidence, and the commissioner could retain the report to await it, and upon it make remarks, or even make a further or amended report. I think this is so because section 7, chapter 129, of the code says that if exceptions be taken within ten days, the commissioner shall with his report "return the exceptions, and such remarks thereon as he may deem pertinent and the evidence relating thereto." Judge Green expressed the same opinion in *Lynch v. Henry*, 25 W. Va. 423. I have some question as to the last matter, but think it tenable, and that the rule may be convenient in practice. The code, after providing for exceptions before the commissioner within ten days, goes on to add: "But any party may except to such report at the first term of the court to which it is returned, or by leave of the court after such term." What does this mean? It may be asked of what use such exception, if evidence taken after the return of the report cannot be read? The answer can be given, that the party may think the commissioner has reached the wrong conclusion on the evidence, and, desiring to have it reviewed, desires to except to get rid of the admission of its correctness which would operate against him from silence, and designs to ask the court to review the evidence, if it has been made part of the report, and, if it has not been, then to ask the court to order the evidence to be certified to be read with his exception, which he may do if he has been prevented from excepting within the ⁶²⁴ ten days: *Arnold v. Slaughter*, 36 W. Va. 590, syllabus point 4.

If we say that after a report has been made a party may go on and take depositions, and have them read, we introduce confusion in practice, install a bad practice, and put a premium upon

negligence and delay. A case is referred to a commissioner. He gives notice, and proceeds to execute the order of reference. The parties ought to attend before him. They can be much better heard upon the facts before a commissioner than in court. It is the most important proceeding in the case, save, perhaps, the final hearing; in many cases even more important than that. If the action of the commissioner is unsatisfactory, the party can, within ten days after he has finally announced his conclusion by a completed report, except, and, if he does not want more evidence, ask the commissioner to certify the evidence to the court for its review; and if he is surprised at the inferences drawn by the commissioner upon that evidence, and thinks he can strengthen his case by additional evidence, he can except within ten days, and take more evidence, and, under proper circumstances, the commissioner will delay returning his report to enable the party to do so, as the statute giving him right to take such evidence ought to be liberally construed to promote a fair full hearing; and then the commissioner can report on such evidence, or make an amended report, or send up his original report, the exceptions, and all the evidence, old and new. After all the toil before a commissioner, after he has given his decision, and after the full opportunity for a hearing before him, a negligent litigant ought not to be allowed to reopen the case, often to the inconvenience and surprise of the other party. If so, where the utility of this tedious hearing before that important auxiliary of the court, the commissioner? It would be an almost meaningless performance. We do not think the code means such a reopening by giving right to except at the first term after the report. We think such after-taken depositions cannot be read on the hearing to impair the report, as was done in this case. We think the only office they can perform is to support a motion for a recommittal of the report, or to suggest ⁶²⁵ to the court, where it appears contrary to justice to confirm the report, the propriety of such rehearing before the commissioner; but on such evidence the court cannot overturn the report, or remodel or restate the account, which may work great injury and surprise to the other party, but must recommit the report, if dissatisfied with it: Ward v. Ward, 21 W. Va. 262.

I have said this much upon this matter of commissioners' reports because of the importance in every day's practice of proper understanding as to proceedings before commissioners, and the frequent controversies arising upon them. Under these views, it would have been error to overturn the report, based on the theory,

that the improvements were made with the consent and agreement of the coheirs, but for the fact that the bill and amended bill have no allegation that the coheirs requested such improvements to be made or consented thereto. As this was not charged, the finding of the report is error apparent on its face, and vindicates the action of the court against the argument that only by using the after-taken depositions it rejected the finding of the report. Does it thence follow that the total disallowance of anything to the plaintiff is justified by this omission in the bills? By no means. The bills charged the fact of the improvements, and that the hotel property itself was not susceptible of partition, and must be sold, and the same decree which disallowed all compensation for improvements subjected the property to sale in order to divide its proceeds, and upon those facts, the plaintiff was entitled to something on the principle of increased value above stated. Nor of the court to have confirmed the report and decreed its full finding, because it allowed, not an amount for increased value, but the account of expenditure by the plaintiff in improvements, and because it charged use and occupation. There ought to have been a recommittal to ascertain the amount of increased value, viewing the case on those facts. The court could not make a new statement. If the plaintiff amended his bill by the allegation wanting, he could have claimed the account filed by him, with interest, if he could succeed in sustaining the theory or contention that his coparceners ^{case} agreed to the making of improvements by him, but without such allegation he could not. He can still amend his bill to that effect, if he wishes to do so.

It is contended that in no view can the plaintiff claim anything at all for the improvements, since they were made in 1879, while the father yet lived, and his estate by the curtesy existed, and the heirs had only an estate in reversion, not in possession, and the improvements were made for and by the father. All the children, save two daughters, continued to reside in the home as a family with their father, after the mother's death, and the existence of this curtesy would not prevent any reversioner, by agreement with the others, from making improvements beneficial to the inheritance, and charging the property with them. Nor would it debar one from claiming such increase of value in the reversion or inheritance as his improvements imparted. Of course, were it shown that the plaintiff contracted with the father to make them, if the father became his debtor, his sole debtor, for them, and he looked to the father for pay, he could claim nothing from the heirs.

I do not consider that the evidence at present shows such a case as enables us to say this.

So much of the decree complained of as disallows the claim of the plaintiff or Lavina Broyles or L. M. Broyles for repairs, improvements, or rents is reversed, and the cause remanded for further proceedings in respect thereto, according to principles above stated, so far as applicable, and further according to principles governing courts of equity in such case.

Of the Liability of One Cotenant to Another for Rents and Profits Received from and for Expenditures Made upon Their Common Property.*

By the Common Law, a cotenant, though in possession of the entire property of the cotenancy, whether he used it himself, and thereby received advantages and profits, or let it to his tenants, who paid him rents for the use and occupation thereof, was not answerable to the other co-owners, either for the advantages enjoyed or the rents actually received. To make him so answerable, it was necessary to establish an agreement, express or implied, between him and his fellow-tenants, by virtue of which he either undertook to compensate them for his exclusive use of the property, or to collect the rents, and to pay them their share or some other portion thereof: *Cutler v. Currier*, 54 Me. 81; *Freeman on Cotenancy and Partition*, sec. 269; *Henderson v. Eason*, 17 Ad. & E., N. S., 716; *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288; *Nelson v. Clay*, 7 J. J. Marsh, 188; 23 Am. Dec. 887; *Webster v. Calef*, 47 N. H. 289; *Wheeler v. Horne, Willes*, 208. The early common law upon the subject was thus stated: "If one joyntenant or tenant in common of land maketh his companion his baylife of his part, he shall have action of account against him, as hath been said. But although one tenant in common or joyntenant without being made baylife taketh the whole profits, no action of account lieth against him; for in an action of account he must charge him as guardian, baylife, or receiver, as hath been said before, which he cannot do in this case, unless his companion constitute him bailifa. And, therefore, all those bookes which affirm that an action of account lieth by one tenant in common, or jointenant, against another, must be intended when one maketh the other his baylife, for otherwise never his baylife to render an account, is a good plea": *Coke on Littleton*, 200b.

Liability Created by the Statute of Anne.—To provide some appropriate remedy by one cotenant against the other, the English statute 4 & 5 Anne, chapter 16, was enacted, the twenty-seventh section of which declared: "Actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and by one joint tenant, and tenant

* REFERENCE TO MONOGRAPHIC NOTES.

Liability of cotenants to account for rents and profits, and for use and occupation: Note to *Early v. Friend*, 78 Am. Dec. 665-668.

Rights of cotenants to contribution for repairs and improvements: Note to *Robinson v. McDonald*, 62 Am. Dec. 482-487.

The lien of one cotenant on the moiety of another: Note to *Plack v. Gosnell*, 85 Am. St. Rep. 416-422.

In common, his executors and administrators, against the other as bailiff, for receiving more than comes to his just share or proportion; and against the executor and administrator of such joint tenant or tenant in common; and the auditors appointed by the court, where such action shall be pending, shall be and are hereby empowered to administer an oath, and examine the parties touching the matters in question, and, for their pains and trouble in auditing and taking such account, have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be." Under this statute, wherever the relation of cotenancy exists, there is a liability to account. This liability is, however, generally dependent upon some demand for such account, and a demand, to be effective, cannot be repeated day after day or month after month, but only at reasonable periods. Therefore, where the custom of the country is to reckon the rents at annual or other stated periods or times, such times must be adopted as the reasonable ones at which a cotenant receiving rent may be required to account: *Barnum v. Landon*, 25 Conn. 150. The liability to account does not arise upon a mere suggestion that the defendant has received rents and profits, but it must further appear that he has received more than his share or proportion: *Early v. Friend*, 16 Gratt. 52; 78 Am. Dec. 649; *Hayden v. Merrill*, 44 Vt. 336; 8 Am. Rep. 372; *Stuption v. Richardson*, 13 Mees. & W. 21; *Irvine v. Hanlin*, 10 Serg. & R. 221; *Sargent v. Parsons*, 12 Mass. 149; *Wheeler v. Horne*, Willes, 210; *Eason v. Henderson*, 12 Ad. & El. N. S., 996.

In some of the United States, the statute of Anne has been regarded as part of the common law of the country, and in others statutory provisions of very similar import have been enacted. The courts of this country have not, however, been able to agree respecting the construction of the statute of Anne and others having a similar phraseology. This statute, in effect, created a liability against a cotenant "for receiving more than comes to his just share or proportion." The cases in which the action to account have been sought to be sustained under this statute divide themselves into two classes. In the first are comprised all cases in which the cotenant sought to be held liable has received from a third person the rents or profits of the common property. The second class includes the cases in which the cotenant complained of has not received anything from third persons, but has directly appropriated to himself the use and enjoyment of all of the common estate, or of more than his share thereof.

For Rents Received.—In the cases on the first class, namely, those in which the cotenant has received from a third person the rents and profits of the common property, there is no doubt of his liability to account to his cotenants if he has received more than his share thereof: *Crow v. Mark*, 52 Ill. 332; *Gayle v. Johnson*, 80 Ala. 395; *Hazard v. Albro*, 17 R. I. 181; *Holmes v. Best*, 58 Vt. 547; *Huff v. McDonald*, 22 Ga. 161; 68 Am. Dec. 487; *Israel v. Israel*, 80 Md. 120; 96 Am. Dec. 571; *Izard v. Bodine*, 11 N. J. Eq. 408; 69 Am. Dec. 595; *Pope v. Hawkins*, 16 Ala. 324; *Puckett v. Smith*, 5 Strob. 26; 53 Am. Dec. 686; *Schlissel v. Dixon*, 129 Ind. 139.

For Use or Occupancy, no Rents Being Received.—A cotenant, though in the exclusive occupancy of the common property, or some

part thereof, may receive nothing from third persons on its account, and yet its use may be of great advantage to him, or may, in connection with his skill and labor, result in great profits. Then the question arises whether, under the terms of the statute of Anne and of other statutes of similar import, he has received more than his just share or proportion, and has become answerable to his cotenants for the excess. These statutes do not, in terms, at least, purport to interfere with the rights of cotenants in the use and enjoyment of the common property, whether real or personal. Unless these statutes can be regarded as working a greater change in the common law than appears upon their face, each cotenant must be still regarded as having the right to enter and enjoy every part of the common estate. This right cannot be impaired by the fact that another of the cotenants absents himself, or does not choose to claim his right to an equal or common enjoyment; and it would be inequitable to compel a cotenant in possession to account for profits realized out of his skill, labor, or business enterprise, when he has no right to call upon his fellow-tenant to contribute anything toward the production of those profits, nor to bear his proportion when, through bad years, failure of crops, or other unaccountable misfortune, the use made of the estate has resulted in a loss, instead of a profit, to the one in possession. Hence crops raised by one of the cotenants on any part of the common lands are not, in the absence of an agreement to that effect, held in cotenancy. They belong exclusively to the one whose industry has produced them: *Creed v. People*, 81 Ill. 505; *Freeman on Cotenancy and Partition*, sec. 258; *Kennon v. Wright*, 70 Ala. 434; *Le Barron v. Babcock*, 122 N. Y. 153; 19 Am. St. Rep. 488. A cotenant in exclusive use or occupancy of the common property cannot be regarded as asserting any right to which he is not entitled, even though such use and occupancy may result in the realization of vast profits. Hence a slight preponderance of authority affirms that, where the common law still prevails, and where it has been no farther modified than by statutory provisions of import similar to those to be found in the statute of Anne, one cotenant is not answerable to another merely for using more than his proportion of the common property, although realizing profits from such use: *Asklin v. Jefferson*, 65 Tex. 137; *Belknap v. Belknap*, 77 Iowa, 71; *Brown v. Wellington*, 106 Mass. 318; 8 Am. Rep. 330; *Carver v. Fennimore*, 116 Ind. 236; *Orane v. Waggoner*, 27 Ind. 52; 89 Am. Dec. 493; *Davis v. Hutton*, 127 Ind. 485; *Everts v. Beach*, 31 Mich. 136; 18 Am. Rep. 169; *Fiedler v. Childs*, 73 Ala. 567; *Gayle v. Johnston*, 80 Ala. 395; *Goodenow v. Ewer*, 16 Cal. 471; 76 Am. Dec. 540; *Hamby v. Wall*, 48 Ark. 135; 8 Am. St. Rep. 218; *Henderson v. Eason*, 17, Ad. & E. N. S., 701, 718; *Howard v. Throckmorton*, 59 Cal. 79; *Humphries v. Davis*, 100 Ind. 369; *Israel v. Israel*, 30 Md. 120; 98 Am. Dec. 571; *Izard v. Bodine*, 11 N. J. Eq. 403; 69 Am. Dec. 595; *Kean v. Connelly*, 25 Minn. 222; 33 Am. Rep. 458; *Hause v. Hause*, 29 Minn. 252; *McLaughlin v. McLaughlin*, 80 Md. 115; *McMahon v. Burchell*, 2 Phill. 134; *Moses v. Ross*, 41 Me. 360; 68 Am. Dec. 250; *Le Barron v. Babcock*, 122 N. Y. 153; 19 Am. St. Rep. 488; *Neil v. Schackelford*, 45 Tex. 119; *Osborn v. Osborn*, 62 Tex. 495; *Peck v. Carpenter*, 7 Gray, 283; 66 Am. Dec. 477; *Pico v. Columbet*, 12 Cal. 414; 78 Am.

Dec. 550; *Ragan v. McCoy*, 29 Mo. 367; *Reynolds v. Wilmeth*, 45 Iowa, 693; *Sailer v. Sailer*, 41 N. J. Eq. 598; *Sargent v. Parsons*, 12 Mass. 152; *West v. West*, 90 Ala. 458; *Leake v. Hayes*, 13 Wash. 213; 52 Am. St. Rep. 84; *Scantlen v. Aldison*, 32 Kan. 876; *Kline v. Jacobs*, 68 Pa. St. 57; *Enterprise etc. Co. v. National etc. Co.*, 172 Pa. St. 421; 51 Am. St. Rep. 746.

The Reason of the Rule maintained by the authorities just cited is, not only that the tenant in possession has not received rents or profits, but further that he has not infringed upon any right of his fellow-tenants, nor done anything to prevent their sharing as fully as himself in the benefits of the cotenancy, and that they cannot, by remaining idle and indifferent themselves, speculate, without risk, on the chances of his obtaining profits as the result of his labor, enterprise, or skill in the use of the common property. In the cases where these reasons do not exist, the rule itself will generally not be applied. Therefore, where the tenant in possession has prevented his fellow-tenants from sharing in the use of the property, he is liable to them for using and occupying more than his share. He may prevent their sharing in such use with him either by entering into an agreement with them, express or implied, to pay rent, in which case he becomes their tenant as to their moiety, or, by excluding them from the possession of their share, and perhaps by various other acts through which he may be enabled to obtain or keep for himself the possession and use of more than his share, when, but for such acts, the others would have been in the enjoyment of equal privileges with him.

Agreement to Pay Rent.—There is no doubt that cotenants may occupy, as between each other, the relation of landlord and tenant: *Davies v. Skinner*, 58 Wis. 638; 46 Am. Rep. 665; *Freeman on Cotenancy and Partition*, sec. 164; *Kites v. Church*, 142 Mass. 586; in which event the one yielding exclusive possession to the other has the right to enforce payment of the sum stipulated to be paid for rent, or, if the sum is not fixed by the agreement, then to recover upon a quantum meruit. When one cotenant has leased his moiety to another, they are entitled to the respective rights and remedies of landlord and tenant, and the former may sue for and recover rent, and has the right to distrain for the amount due him: *Cowper v. Fletcher*, 6 Best & S. 470; *Luther v. Arnold*, 8 Rich. 24; 62 Am. Dec. 422; *Story v. Johnson*, 2 Younge & C. Ex. 586; and may, by an action of unlawful detainer, compel his restoration to the possession of all his moiety on the expiration of the lease: *Freeman on Cotenancy and Partition*, sec. 295; while the latter may recover of the former for any invasion of his right under the lease to be in exclusive possession of the property: *Baird v. Baird*, 1 Dev. & B. Eq. 524; 31 Am. Dec. 399; *Brittin v. Handy*, 20 Ark. 404; 73 Am. Dec. 497; *Freeman on Cotenancy and Partition*, secs. 164, 268; *Gunter v. Lafan*, 7 Cal. 588; *O'Hear v. De Goesbriand*, 33 Vt. 593; 80 Am. Dec. 663.

The relation of landlord and tenant, with its consequent obligation to pay rent, may result from an implied, as well as from an express, agreement, as where it is clear that one cotenant has been put or left in exclusive possession under such circumstances that the others believe, and have a right to believe, that he expects to compensate them for any use or occupancy beyond his share. "An agreement to pay for use and occupation may be implied as well where

the parties are tenants in common as in any other case. The only difference being that the relation of landlord and tenant will not be so readily inferred from occupation in the case of a cotenant as in the case of a stranger. If the conduct of the cotenants toward each other in relation to the occupancy of the premises has been such that an agreement to use each a particular part of the premises can reasonably be implied, then either, on being disturbed in his possession, is entitled to the same remedies as though no relation of cotenancy existed": *Boley v. Barutio*, 120 Ill. 192.

Whether, after the expiration of the term of a lease from one cotenant to another, the lessee remaining in exclusive possession is presumed to do so as a tenant holding over, and therefore to be liable for rent, is a question upon which the decisions are not harmonious. Of course, the lessee does not, by accepting a lease, make himself forever the tenant of the lessor, nor obligate himself to yield to the latter the exclusive possession of the property on the expiration of the lease; for, after such expiration, he has the right to assume to the property the character and situation which he held toward it before the lease was made; and he may doubtless end the relation of landlord and tenant by express notice, or by any course of conduct which will charge his fellow-tenants with notice that the lease is regarded as at an end. On the other hand, if he remains silent, and there is nothing to indicate to his landlord that the lessee deems his estate as such terminated, and his rights to be only those of a tenant in common, the presumption should be indulged that he remains in possession as lessee, and therefore under obligation to pay the same rent designated in his lease: *Chapin v. Foss*, 75 Ill. 280; *Harry v. Harry*, 127 Ind. 91; *O'Connor v. Delaney*, 53 Minn. 247; 39 Am. St. Rep. 601. A respectable minority dissents from this view, and maintains that, after the termination of his lease, the leasing cotenant should be presumed, though he continues in exclusive possession, to be holding in his capacity as cotenant, rather than in that of lessee: *McKay v. Mumford*, 10 Wend. 352; *Rockwell v. Luck*, 38 Wis. 70.

During an Exclusion or Adverse Holding.—If a cotenant in exclusive possession holds adversely to the other owners, or refuses to permit them to share in the possession, or commits any other act which they may deem an ouster, he becomes answerable to them for the value of the use and occupation of their share of the property. In such a case, it is not material whether he makes profits or not. In excluding the others from possession, he has denied them a right, and must compensate them for any damages sustained by them, whether his wrong has been profitable to himself or not: *Orane v. Waggoner*, 27 Ind. 52; 89 Am. Dec. 493; *Austin v. Barrett*, 44 Iowa, 488; *Sears v. Sellew*, 28 Iowa, 596; *Dodge v. Davis*, 85 Iowa, 77; *Israel v. Israel*, 30 Md. 120; 93 Am. Dec. 571; *Zapp v. Miller*, 180 N. Y. 51; *Osborn v. Osborn*, 62 Tex. 495.

We come now to the consideration of a more difficult class of cases; those in which there has neither been an agreement to pay rent nor an ouster or exclusion of the cotenants, but in which one of them has, nevertheless, through some act of the other been deprived of his just share in the use or profits of the common property. It may be of such a character that it cannot be advantageously oc-

cupied by but one person, and is susceptible of being rented to others to realize profits, and one of the cotenants may have exclusive possession, and may refuse to join in any lease. In New Jersey, it has been held that when the premises are not susceptible of occupancy by more than one of the cotenants, then the one in possession, especially if he refuses to join with the others in an advantageous lease, and thereby deprives them of the profits, is liable to them: *Edsall v. Merrill*, 37 N. J. Eq. 116; *Izard v. Bodine*, 11 N. J. Eq. 403; 69 Am. Dec. 505. The courts of this state, however, have not altogether accepted the construction of the statute of Anne maintained by a majority of the other courts, and perhaps their decisions in the cases last cited may have been due to this fact, and may therefore not so modify the rule that one cotenant is not liable to another except for receiving more than his just share, as to create a liability for acts depriving his cotenants of profits, but not amounting to their ouster. If one cotenant procures a conveyance from another, and holds exclusive possession thereunder and the conveyance is afterward canceled for fraud in its procurement, the tenant so holding is liable for use and occupation. This liability may be supported, however, on the ground that the wrongful acts in question were equivalent to an actual exclusion or ouster: *Zapp v. Miller*, 109 N. Y. 51.

That a cotenant guilty of the ouster of his fellow-tenant is answerable for the value of the use and occupation of the latter's moiety we have conceded. We cannot here undertake to give in detail the tests for determining what acts may, at the election of a tenant out of possession, be treated as an ouster. Cases may be found declaring that the sole possession by one cotenant of property incapable of division or of separate occupation is an ouster of the other: *Annelly v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725. But such a piece of property may be occupied by one of the cotenants, because the others do not wish to share therein, nor to take the risk necessary to its profitable use, and surely, under these circumstances, the one in possession is guilty of no exclusion of his fellow-owner and of no wrong for which the latter ought to be compensated. An ouster, whether committed against a tenant in common or against an owner in severalty, is a wrongful dispossession or exclusion of a party from real property who is entitled to be in possession thereof, and must necessarily be accompanied with an intent to effect such exclusion: *Freeman on Cotenancy and Partition*, sec. 228.

Cases Maintaining Liability for use and Occupation.—As already suggested, the courts have not agreed in the construction of the statute of Anne. Even in England, it was at first determined that an actual reception of rents and profits from a third person was not essential to the liability of a tenant in common to account, and that he, if in exclusive possession of more than his share, must account for profits received, though resulting from his own use of the property: *Eason v. Henderson*, 12 Ad. & El. 986; overruled in *Henderson v. Eason*, 17 Ad. & El., N. S., 701. Before the construction of the statute had been thus settled in England, various American judicial tribunals had been called upon to construe and apply it, and some of them, chiefly in the southern states, had reached the conclusion

first announced in the mother country, and others, though not called upon to decide the question until after it had been settled in England, refused to follow the decision there made on the grounds that "it is too recent to be absolutely binding as an authority for construing our statute, so long in force before the decision was made": *Hayden v. Merrill*, 44 Vt. 336; 8 Am. Rep. 372. In many of the states in which the statute of Anne, or statutes of similar import, are in force, a cotenant in exclusive possession and realizing profits in excess of his share may be required to account to his fellow-tenant, though there has been no receipt of rents and profits from a third person, no ouster or exclusion, and no agreement to pay rent: *Huff v. McDonald*, 22 Ga. 131; 68 Am. Dec. 487; *Gage v. Gage*, 66 N. H. 282; *McPherson v. McPherson*, 11 Ired. 391; 53 Am. Dec. 416; *West v. Weyer*, 46 Ohio St. 66; 15 Am. St. Rep. 552; *Thompson v. Bostick*, 1 McMull. Eq. 75; *Annely v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725; *Thomson v. Peake*, 38 S. C. 440; *Hayden v. Merrill*, 44 Vt. 336; 8 Am. Rep. 372; *Ruffners v. Lewis*, 7 Leigh, 720; 30 Am. Dec. 513; *Early v. Friend*, 16 Gratt. 21; 78 Am. Dec. 649; *Graham v. Pierce*, 19 Gratt. 28; 100 Am. Dec. 658; *Ward v. Ward*, 40 W. Va. 611; ante, p. 911; *McGahan v. National Bank*, 156 U. S. 218. In other states, statutes have been enacted making the liability in such cases unquestionable, as where they provide that every cotenant is required to account who shall take and use the profits and benefits of the common estate, or any greater proportion than his or her interest; *Woolley v. Schrader*, 116 Ill. 29; *Boley v. Barutlo*, 120 Ill. 192; *McParland v. Larkin*, 155 Ill. 84; *Almy v. Daniels*, 15 R. I. 318. In Tennessee, a tenant in common of real property who merely occupies the whole thereof without obstructing the rights of the other tenants cannot be held liable for an occupation rent: *Schneider v. Taylor*, 16 Lea, 304. It appears, however, in this state that if it is clearly shown that a cotenant was in exclusive possession of the property, and realized profits, he is liable to account therefor, though they were not received as rents, but from the use made by him of the property in cultivating, improving, and managing it as if it were his own: *Tyner v. Fenner*, 4 Lea, 469.

No opinion, other than that in the principal case, has, so far as we can ascertain, considered whether the statute of Anne and similar enactments apply to coparceners. It is true they are not mentioned in the statute; but the wrongs which it was intended to redress apply to them as well as to other co-owners, and we should be much surprised at a decision holding that a coparcener receiving the entire rents of the common property was under no obligation to account therefor; and yet the liability to account for rents received, where the one party has not collected them as bailiff or agent of the other, is dependent on the statute. We think the ruling in the principal case due to the fact that the compelling a co-owner to account when he has neither received rents or profits from a third person, nor been guilty of any ouster or exclusion of his co-owner, involves manifest injustice, and is contrary to the weight of the authorities, and the court did not wish to apply to coparceners an erroneous construction of law which its predecessors had applied to other co-owners.

The requiring a cotenant in possession of property to account for profits realised, though he has not excluded his fellow-tenants, cre-

ates a sort of partnership in the profits, but none in the losses. At least, the tenant out of possession is not liable to make good losses suffered nor is he chargeable with expenditures made nor for services rendered; and there is much difficulty in ascertaining to what extent he may profit by the labor, skill, and expenditure of the tenant in possession without making any return or allowance therefor. If the proceeding to account takes place in a court of equity, it must doubtless be conducted upon equitable principles, and these principles we judge to be equally applicable, though the court having jurisdiction of the action or proceeding is not a court of equity. The first difficulty arises when the property, at the time the exclusive possession is commenced, was not in a condition to produce profits, and whether then in such a condition or not, its capacity for profits has been greatly enhanced by the expenditures or skill of the occupying tenant. In an early South Carolina case, the chancellor reached the conclusion "that defendants ought to be charged with the rent of land, estimated as it was when they took possession, and are not to be charged with the rent of the newly cleared land, or credited with improvements." "If there was no account at common law as between joint tenants and tenants in common, it seems clear that one cotenant could not charge the other for improvements put by him upon the land. One man has no right to improve the land of another at the owner's expense. But is the tenant out of possession is not to be charged for a share of the improvements, it would be plainly inequitable that he should be allowed to claim the enhanced rent produced by means of such improvements. If the tenant in possession should build a mansion on the land, or a mill, or manufactory, it would be enough that the cotenant should take his share of the land, increased in value by these improvements, without charging the tenant at whose expense they were constructed with rent for the time they were used by him. To apply to the present case. If the premises were improved by the clearing and fencing of new land or by erecting the cotton screw, the defendant's had no right to charge for that. They had no right to make improvements at their cotenants' expense without their consent. But they are not to be charged with the rent of the land cleared by them, because the premises were rendered capable of producing that rent by means of their improvement": *Thompson v. Bostick*, McMull. Eq. 75, 78. In a later case in the same state, it was determined that when there had been no wrongful act or exclusion on the part of the tenant in possession, he could not be held answerable for any profits in excess of those actually realized, though he might, by good husbandry, have created greater profits or have caused a larger portion of the estate to be rented or cultivated: *Jones v. Massey*, 14 S. C. 292. In another case in the same state, in which it appeared that partition must be made by a sale, and in which the tenant in possession, who had made valuable improvements, was allowed out of the proceeds of the sale "not the proportionate part of all costs and improvements put upon the common property, but the amount which such improvements shall, upon inquiry, be ascertained to have enhanced the value" of such property, it was held that, in accounting for rents, he should account not for the value of the property irrespective of the improvements, but for its value enhanced by such im-

provements: *Annely v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725. In Virginia, it is held that the cotenant in possession is not accountable for the issues and profits actually made by the application of his labor, skill, and capital to the property, but only for its fair yearly value in the condition in which it was at the time it came into his possession; and it was said that to adopt any other rule was to make the compensation depend upon the accident of his being a "good or bad manager, a prudent and cautious person, or a wild and reckless speculator": *Early v. Friend*, 16 Gratt. 21, 53; 73 Am. Dec. 649. The same principle was applied in the later case of *White v. Stewart*, 76 Va. 567, a case in which it appeared that the profits of the property had been very greatly enhanced from the "skill, capital, and energy of the occupying tenants." There may be cases, however, in which, from their peculiar circumstances, the courts of this state will not adopt the rule of charging the occupying tenant with a fair rental value of the property, but will take an account of his actual receipts and disbursements, with a view to charging him only with the net profits. This latter rule was applied to persons carrying on a mine, and the court said: "The best mode of settling such an account, and one which is perfectly just, supposing the tenant to have been capable and faithful, is to charge him with all his receipts, and credit him with all his expenses on account of the operation of the mine": *Graham v. Pierce*, 19 Gratt. 28, 39; 100 Am. Dec. 658. In Massachusetts, in an action of assumpsit by one cotenant against another to recover the former's share of the profits realized from carrying on a garden farm, it was held that the defendant should be allowed for his services, board, and the use of animals and utensils in realizing the money received by him, and also for taxes paid upon the common property: *Dewing v. Dewing*, 165 Mass. 280. As a general rule, it may be conceded that if a tenant in common enters upon the common estate, which then yields no profit, and so improves it as to make it productive, he is entitled to all the profits produced by the means of such improvements, and without making any allowance against him for the increase in value occasioned thereby. This principle must be equally applicable when, though at the time of taking exclusive possession, the estate is capable of yielding some profit, but its capacity in that respect is enhanced by improvements subsequently made by the occupying tenant: *Worthington v. Hills*, 70 Md. 172; *Nelson v. Clay*, 7 J. J. Marsh, 138; 23 Am. Dec. 387; *Ford v. Knapp*, 102 N. Y. 135; 55 Am. Rep. 782; *Leake v. Hayes*, 13 Wash. 213; 52 Am. St. Rep. 34.

Even in those states in which a cotenant may be required to account for property used by him exclusively, it is not every exclusive use of a parcel thereof that creates liability. If it is susceptible of occupation in severalty by the various owners, each may use for his exclusive benefit any part not disproportionate to his interest without incurring any liability to the others, their remedy being to use for themselves other parts of equal productive value. In other words, a cotenant using a part not in excess of his share, and in no manner "hinderling or excluding the others from the use of their shares, does not receive more than his share," within the meaning of the statute of Anne and of similar enactments: *Ward v. Ward*, 9 W. Va. 615; ante, p. 911; *Dodson v. Hays*, 29 W. Va. 577.

Mines.—There are classes of property, the use of which, if sufficiently long continued, will result in the appropriation and user of all the beneficial enjoyment of which such property can be capable, and will amount to a practical destruction thereof. This is notably the case with mining property, and no rule can be formulated which, in its application to such property, may not, in some instances, result in extreme hardship. Thus it does not seem just, where one cotenant has assumed the risk and expense in developing and operating a mine, to require him to share in the profits of the adventure with others who do not assume any risk whatever, nor, on the other hand, does it seem equitable to permit one of the cotenants to remove valuable ores from a mine, and thus to effect a pro tanto destruction of the property, without any responsibility to his co-owners. The property is obviously of no value except for the purposes of sale, unless it can be used, and the only use which its owners ever contemplated for it, and of which it is susceptible, consists of the removal from it of some part of its elements of value. Through such removal its value must be diminished, and, if sufficiently long continued, must be exhausted. The cotenants who desire to use the mine must either be deprived of all use thereof, or, if allowed to use it, must assume all the risk and expense, and incur the liability to account to the others in case the use proves profitable, or the non-assenting cotenants must either join in the mining operation or submit to a use by another which will consume or destroy a part of the property. As a mine already opened must have been intended to be used, and in its use to be finally mined out, and as the cotenants must have acquired their interest in contemplation of, and subject to, this use, and as each cotenant is generally entitled to such use of the common property as is consistent with its character and circumstances, the better rule seems to be that if some of the cotenants choose not to enter upon and work the mine, they may neither enjoin the others from so doing, nor compel them to account after having so done: *McCord v. Oakland etc. Co.*, 64 Cal. 134; 49 Am. Rep. 686.

Offsets.—In considering the matters for which a cotenant must account to his fellow-tenant, we have not devoted any attention to demands in the nature of counterclaims which the defendant may bring forward to reduce the amount of the charges against him. "It is not enough for the plaintiff to show that the defendant has taken more than his proportion of a single article raised on the estate, but it must be made to appear that he has received more than his aliquot part of the proceeds of all the profits of the common property, after deducting all reasonable charges. There must be a balance due, at the commencement of the plaintiff's action, in the hands of the defendant, as a result of a final settlement of the account between the parties relating to the estate owned in common: *Shepard v. Richards*, 2 Gray, 424; 61 Am. Dec. 473; *McPherson v. McPherson*, 11 Ired. 391; 53 Am. Dec. 416; after deducting all expenses and countercharges: *Edsall v. Merrill*, 37 N. J. Eq. 114. Among the reasonable charges for which the defendant will be allowed as an offset are included all sums paid for taxes or assessments, or for keeping the premises in ordinary repair: *Hannan v. Osborn*, 4 Paige, 343; *Dech's Appeal*, 57 Pa. St. 472; also necessary

disbursements made "for the recovery, defense, or protection of the joint property, but not the law expenses of adverse suits between the tenants in common themselves": *Lewis etc. Appeal*, 67 Pa. St. 169. If the cotenant who calls for the accounting is indebted to the other for a sum advanced in purchasing the estate, the latter is entitled to have the sums for which he is liable applied, first to the payment of interest which had accumulated when such liability accrued, and next to the payment of the principal sum: *Volentine v. Johnson*, 1 Hill Eq. 50.

Repairs, Liability for.—For expenditures made upon the common property we doubt whether there is any instance in which one cotenant can be held personally answerable to another in the absence of an agreement, either made in direct terms or implied from the conduct of the parties and the attendant circumstances. At the common law, it is clear that the only remedy, where premises owned in common fell into decay, and repairs upon them became necessary, was one to compel such repairs to be made under the direction of the court. The mode in which the court compelled the parties to contribute their respective shares does not distinctly appear in any authority with which we are familiar. That by the common law the remedy was by the writ de reparatione facienda, and by it only, is admitted: *Bowles' case*, 10 Coke, 82 b; *Leigh v. Dickinson*, 12 Q.B. 194; *Carver v. Miller*, 4 Mass. 561; *Loring v. Bacon*, 4 Mass. 578. We are not aware of any instance in which this writ has been employed in the United States, and its use in the mother country was rare. From the existence of this remedy an equity on the part of every cotenant to contribute to repairs has been inferred, and hence it has been claimed that if any of them fails to discharge his duty, and thereby makes the whole discharge of the duty to repair rest upon another cotenant, a promise will be implied in favor of the latter to contribute to the necessary outlay, and therefore that an action of assumpsit may be maintained upon this implied promise, or that some other proceeding may be sustained whereby just contribution may be compelled: *Fowler v. Fowler*, 50 Conn. 256; *Alexander v. Ellison*, 79 Ky. 148. But it should be remembered that even at the common law no cotenant was under any general duty to repair, but only under obligation to make such repairs as the courts having jurisdiction should deem to be necessary, and then only to make them under the direction of that court. While there are many cases in which a court of equity or a court of law administering some remedy which it has power to administer upon equitable principles, may take into consideration the fact that one of the parties has made necessary repairs, and may make an allowance therefor, and deduct the amount thereof from a sum which is coming from the other party, we do not believe that any action or suit is maintainable by one cotenant against another, either to recover damages arising from the failure of the defendant to join in necessary repairs, or to obtain a personal judgment against him for moneys paid in making repairs, however necessary they may have been, in the absence of any agreement to join therein: *Converse v. Ferre*, 11 Mass. 326; *Calwert v. Aldrich*, 90 Mass. 76; 96 Am. Dec. 693; *Wiggin v. Wiggin*, 43 N. H. 568; 80 Am. Dec. 192; *Kidder v. Bixford*, 16 Vt. 172; 42 Am.

Dec. 504. Contra, apparently, *Moss v. Rose*, 27 Or. 535; 50 Am. St. Rep. 743. But there may be circumstances which warrant the inference of an implied agreement, as where the property was being used for the common benefit, and the repairs upon a sudden contingency became necessary, and some of the part owners were not where they could be consulted, and the failure to make the repairs at once would have subjected the property to great injury, and its owners to loss and a certain statutory penalty: *Haven v. Mehlgarten*, 19 Ill. 95. The writ to which we have referred did not confer the remedy in all cases, but only in those in which a mill or house had fallen into decay. If there is any case in which a direct action may be maintained against a cotenant to recover his share of the expense of repairs upon the common property, and in which he has not expressly or impliedly agreed to contribute, it is clear that it can only be where, before the making of the repairs, he has been requested to join therein, and has unjustifiably refused: *Louvalle v. Menard*, 6 Ill. 39; 41 Am. Dec. 161; *Coffin v. Heath*, 6 Met. 76; *Mumford v. Brown*, 6 Cow. 476; 16 Am. Dec. 446; *Stevens v. Thompson*, 17 N. H. 103; *Kidder v. Rixford*, 16 Vt. 169; 42 Am. Dec. 504.

Improvements, Personal Liability for.—If, as the authorities indicate, there can be no personal judgment against a cotenant for repairs made upon the common property, and not previously expressly or impliedly authorized by him, or for which he has not subsequently agreed to make compensation, it must be that there can be no such judgment for improvements made or labor bestowed thereon without his consent. Otherwise, the mere ownership of a moiety of real property might subject its owners to grievous burdens, which they were unable to meet, and their personal liability might continue, in some cases, after the property had been lost to them, or wholly appropriated in payment of the claims created against it. No cotenant is under any obligation to his fellow-tenants to improve or to cultivate the common property, or to bestow upon it any care or attention whatever, unless it be to discharge liens which have been created against it by the act of the cotenants or of their predecessors in interest, or to satisfy taxes and assessments levied thereon by the sovereign power, or by some subordinate body or authority to which it has delegated the power to levy taxes or impose assessments; and this note does not undertake to treat of the liability of a cotenant or of his moiety of the property when paramount liens and charges have been discharged by one of the co-owners for the benefit of all. For improvements made or services rendered by a cotenant he cannot maintain any action which will result in a personal judgment against any of his fellow tenants, unless he can prove an express promise to pay him, or such a state of circumstances that a promise should be implied; and it will not be implied either from the making of improvements or from their utility or necessity: *Drennan v. Walker*, 21 Ark. 539, 557; *Bazemore v. Davis*, 55 Ga. 504; *Alleman v. Hawley*, 117 Ind. 532; *Austin v. Barrett*, 44 Iowa, 488; *Graham v. Graham*, 6 T. B. Mon. 562; 17 Am. Dec. 166; *Hamilton v. Conine*, 28 Md. 635; 92 Am. Dec. 724; *Ranstead v. Ranstead*, 74 Md. 384; *Pierce v. Pierce*, 89 Mich. 233; *Wells v. Greenwood*, 29 Minn. 87; *Welland v. Williams*, 21 Nev. 237; *Wells v. Thompson*, 17 N. H. 103; *Crest v. Jack*, 3 Watts, 238;

Dec. 353; Moore v. Thorpe, 16 R. I. 655; Thurston v. Dickinson, 2 Rich. Eq. 317; 46 Am. Dec. 56; Moore v. Williamson, 10 Rich. Eq. 823; 73 Am. Dec. 93; Neil v. Shackelford, 45 Tex. 119; Kidder v. Rixford, 16 Vt. 169; 42 Am. Dec. 504; Redfield v. Gleason, 61 Vt. 220; 15 Am. St. Rep. 889. On the other hand, there is no doubt that one cotenant may authorize another to cultivate or improve the common property at their joint expense, or after such improvement has been made, agree to contribute his share of the expenses, and that any express promise made by either cotenant to the other is enforceable to the same extent and in like manner as if the parties were not cotenants: Baird v. Jackson, 98 Ill. 78; Prentice v. Janssen, 79 N. Y. 478; Houston v. McCluney, 8 W. Va. 135; Reed v. Jones, 8 Wis. 421; and a cotenant may also recover for his services in the care and management of the common property, where there appears to have been an understanding between him and his fellow tenants that he should be paid therefor: Sears v. Munson, 23 Iowa, 380. An express promise to pay for improvements is not indispensable to the liability of one cotenant to another for his share of the expenses thereof. The circumstances of the case, the conduct of the parties, the use to which they are putting their property, the disposition they are seeking to make of it, the purpose they are mutually striving to accomplish by it, may all show that when the improvements were made, all the parties in interest must have understood that the expense of making them was a joint burden to be borne by all. If so, a promise on the part of each to pay for his share must be implied, and this implied promise, like any other, may support an action, if there is a breach thereof: Reed v. Jones, 8 Wis. 421. But no promise will be implied from the mere fact that improvements have been made, nor from the fact that the cotenants, other than the one making them, did not protest against them, or take measures to prevent them, if possible. "This is the rule at law. There are, however, cases in which an owner of land standing by and permitting another to expend his money in improving it, has, in equity, been deemed a delinquent, and been compelled to surrender his right on receiving compensation, or else to pay for the improvement. But in these cases there is always some ingredient which would make it a fraud in the owner of the land to insist on his legal right. There is something like encouragement to the other's going on; or the one party acts ignorantly and without the means of better information, and the other remains silent, when it is in his power to prevent him from expending his money under a delusion. To permit such a one to take advantage of the mistake would be revolting to every sentiment of justice. But, on the other hand, I know no case where equity has, on the mere ground of silence, relieved one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in expending money on the land of another without obtaining or asking his consent. His ignorance, if it exists, is willful, and he acts at his peril": Crest v. Jack, 3 Watts, 238; 27 Am. Dec. 353.

There being no remedy by an action at law on behalf of one cotenant in the absence of an agreement, express or implied, for improvements made by the former on the common property, the next

question is, whether or not there is any other relief available. Such relief may be sought: 1. By claiming the right to retain exclusive possession of the property until payment is made, or until the value of its use and occupation shall indemnify the claimant for his expenditures; 2. By presenting a demand for the improvements made as an offset in an action or proceeding wherein a recovery is sought for rents and profits; or 3. By seeking such partition of the property as will either give the party making the improvements the part of such property upon which they stand, or will award him a larger amount of property than he would be entitled to, if they were not taken into consideration, or require actual payment to be made to him out of the proceeds of the property, or in some other manner.

Retaining Possession until Reimbursed for Improvements. — As a cotenant is not under any obligation to join with his fellow tenants in improving the common property, and they have no cause of action if they see proper to improve it on their own account, and without first securing some agreement from him to pay his share of the expenses thereof, it seems clear that they have no right to insist upon remaining in the exclusive possession of the property until payment is made to them, or until, from such possession, they shall be fully indemnified for their expenditures: *Young v. Gammel*, 4 G. Greene, 207; *Crest v. Jack*, 3 Watts, 238; 27 Am. Dec. 353. In several of the states, statutes have been enacted, declaring, in substance, that if any person believing himself to be the owner, either in law or in equity, under color of title, has peaceably improved, or shall peaceably improve, property, which shall, upon judicial investigation, be decided to belong to another, the value of the improvements made shall be paid by the successful party to such occupant before the court rendering judgment in such proceeding shall cause possession to be delivered to the successful party. A statute of this character has been held applicable to cotenants, and the cotenant plaintiff has been denied the right to recover his moiety, except upon condition of paying for his share of the improvements, although the person making them had constructive notice of the plaintiff's title: *Shepard v. Jernigan*, 51 Ark. 275; 14 Am. St. Rep. 50.

Improvements, Setting Them Off Against Demand for Rents, etc. — The next mode of securing compensation for improvements is to present them as an offset against the plaintiff in a suit or proceeding wherein he seeks to recover for rents and profits or for the use and occupation of the common property. Their consideration is relevant in such a proceeding, whether they are presented as an offset or not, because, as a general rule, the plaintiff will not be permitted to recover for the use and occupation of the property its value in its improved condition as against one who has made the improvements, and who has not been reimbursed therefor: *Carver v. Fennimore*, 116 Ind. 236; *Hannah v. Carver*, 121 Ind. 278; *Johnson v. Pelot*, 24 S. C. 254; 58 Am. Rep. 253. In many of the states, the defendant in a suit to recover possession of real property is entitled to offset against any claim made against him, for rents and profits or for the value of the use and occupation, permanent improvements made by him, and, in some instances, other improvements which,

though not of a permanent character, were essential to the ordinary use of the property. Chiefly under the influence of statutes of this kind, it has been held that a cotenant has, as against a claim for rents or for the value of the use and occupation, the right to offset expenditures incurred in the making of improvements suitable to the character and condition of the property: *Jones v. Johnson*, 28 Ark. 211; *Ormond v. Martin*, 37 Ala. 598; *Horton v. Sledge*, 29 Ala. 498; *Scantlin v. Allison*, 32 Kan. 378; *Pickering v. Pickering*, 63 N. H. 468; *Sutton v. Sutton*, 26 S. C. 33; *McGee v. Hall*, 23 S. C. 562; *Broyles v. Waddel*, 11 Helsk. 82; *Stewart v. Stewart*, 90 Wis. 516; 48 Am. St. Rep. 949. See, contra, *Marshall v. Crehore*, 13 Met. 462; *Walter v. Greenwood*, 29 Minn. 87.

Improvements, Setting Off in Partition to the Party Making Them.—In partition, the first and most obvious mode of dealing equitably between a cotenant who has made improvements on the common property and one who has not, is, where such a course can be adopted without prejudice to the equities of either, to set aside, to be held in severalty by the cotenant making the improvements, that part of the property on which they are situated, and estimating it as if it had not had the benefit of the improvements. This mode of proceeding has the sanction of statutes in many of the states, but, independently of such sanction, is proper, and should be adopted: *Wilkinson v. Stuart*, 74 Ala. 198; *Donnor v. Quartermas*, 90 Ala. 164; 24 Am. St. Rep. 778; *Ferris v. Montgomery etc. Co.*, 94 Ala. 557; 33 Am. St. Rep. 146; *Denman v. Walker*, 21 Ark. 557; *Seale v. Soto*, 35 Cal. 104; *Louvalle v. Menard*, 1 Gilm. 39; 41 Am. Dec. 161; *Mahoney v. Mahoney*, 65 Ill. 408; *Elrod v. Keller*, 89 Ind. 382; *Nelson v. Clay*, 7 J. J. Marsh. 138; 23 Am. Dec. 337; *Town v. Needham*, 3 Paige, 545; 24 Am. Dec. 246; *Pope v. Whitehead*, 68 N. C. 199; *Annely v. De Saussure*, 17 S. C. 380; *Reeves v. Reeves*, 11 Helsk. 669; *Robinson v. McDonald*, 11 Tex. 385; 62 Am. Dec. 480; *Osborn v. Osborn*, 62 Tex. 495; *Lewis v. Sellick*, 69 Tex. 379; *Ward v. Ward*, 40 W. Va. 611; ante, p. 911. The only state, so far as we are aware, denying that a cotenant is, in a suit for partition, necessarily without relief for improvements placed on the common property voluntarily and without any previous understanding or agreement with his fellow tenants, is Massachusetts. In that state, it is insisted that such improvements are a part of the realty, and must be treated as such in a proceeding for partition, and included in estimating the value of the property in like manner as if all the cotenants had paid their share thereof, and therefore that they cannot be set aside to the cotenant making them, except upon condition of charging him with their full value, or rather, with the full value of the land set apart to him, including its enhancement from such improvements: *Aldrich v. Husband*, 131 Mass. 480; *Husband v. Aldrich*, 135 Mass. 317.

Improvements, Paying for Out of Proceeds of Sales in Partition.—If the lands of the cotenancy are not susceptible of partition without prejudice to their owners otherwise than by a sale, and improvements have been made by one of the cotenants, which must enhance their value, and result in their sale for a greater price than if such improvements had not been made, then the question arises whether compensation may be decreed to be made out of the pro-

ceeds of the sale. If it were possible, by any method of inquiry open to the court, to determine the amount of such enhancement, it would undoubtedly accord with equitable principles to decree it to the person to whose unrecompensed labors and expenditures it was due. The cases where such amount can be precisely, or even approximately, determined must be rare, and to attempt to make an allowance out of the proceeds of the sale for improvements made by one cotenant must very frequently result in compelling his fellow tenants to pay for that which they never authorized, and which has not in fact sensibly enhanced the fund realized from the sale; and we think the courts, unless it be in exceptional or very clear cases, are justified in not attempting to reimburse out of the proceeds of the sale the cotenant voluntarily improving the property, and hence, in many instances, courts have very properly declined to interfere in his behalf: *Elrod v. Keller*, 89 Ind. 382. The very decisive preponderance of authorities, however, supports the rule maintained in the principal case, that on a sale of property in partition, upon which improvements have been made by one of the cotenants, he may be allowed out of the proceeds of the sale, not the cost of such improvements, but such sum as, in the opinion of the court, they have added to the saleable value of the property: *Dean v. O'Meara*, 47 Ill. 120; *Sarbach v. Newell*, 30 Kan. 102; *Ford v. Knapp*, 102 N. Y. 135; 55 Am. Rep. 782; *Moore v. Thorpe*, 16 R. I. 655; *Johnson v. Pelot*, 24 S. C. 254; 58 Am. Rep. 253; *Buck v. Martin*, 21 S. C. 592; 53 Am. Rep. 702; *Ward v. Ward*, 40 W. Va. 611; ante, p. 911; especially where the improvements have been made in good faith in the belief on the part of the person making them that he was the sole owner of the property: *Killmer v. Wuchner*, 79 Iowa, 722; 18 Am. St. Rep. 392; *Moore v. Thorpe*, 16 R. I. 655. We had understood the early cases in Indiana to be in conflict with the rule just stated. The later decisions, however, are in harmony with it. Thus in *Carver v. Coffman*, 100 Ind. 547, the right of a cotenant who had made improvements while in possession to have them taken into consideration and compensated for in a suit for partition was affirmed in general terms. In *Alleman v. Hawley*, 117 Ind. 532, it appeared that certain real property unimproved was worth seven hundred dollars, but as improved four thousand dollars, and that all of these improvements had been made by one of the parties to the action, and it was determined that the persons not joining in the improvements should be awarded their moiety of the real estate at its unimproved value, and that the party making the improvements should be awarded the remaining part of the real estate according to its unimproved value, and also all of the sum which had been added thereto by means of his improvements.

Improvements, Decreeing Compensation for.—A proceeding for partition usually takes place in a court of equity, or in a court which, at least, is, in that proceeding, governed by the principles controlling in courts of equity. One of these principles is, that he who seeks equity must do equity, and every party to such a suit or proceeding, whether he appears upon the record as a defendant or as a complainant, may properly be regarded as an actor and as seeking equity, and therefore as subjecting himself to the rule that he must

do equity before he will be declared entitled to what he seeks. In partition, either of the parties may, therefore, compel an accounting from the other, and in this accounting repairs or improvements and rents and profits may always be taken into consideration, and each of the parties be required to submit to what the court may deem to be equitable in relation thereto. Of course, if either of the parties has made expensive and unnecessary improvements, or has entered upon a course of improvements apparently for the purpose of prejudicing the right of another to partition, the court may leave the former without redress as to expenditures which he has made. On the other hand, if improvements and repairs have been made which are necessary for the ordinary enjoyment of the property, and their making has been in good faith and without any apparent design to prejudice any of the co-owners in their right to partition or otherwise, an allowance will be made therefor. This allowance is very frequently directed to be deducted from an amount found due for rents or for use and occupation, but there are many instances in which this alone would not do complete equity between the parties, and in which it appears that the improvements made have enhanced the value of the whole property, and especially of that part upon which they are located. We have already shown that one of the methods of doing equity is to set aside to the improving cotenant that part of the property, the value of which has been enhanced by his improvements, and that another is, when a sale of the property is decreed, to allow him from the proceeds of the sale such a sum as his improvements have been found to enhance the value of the property. There may be instances in which neither of these methods of proceeding can be resorted to, and then the question arises, what other remedy, if any, may be administered in behalf of the cotenant making repairs or improvements on the common property. We think there is no doubt that no personal judgment can in any action be entered against the cotenant who has not contributed his just share, enforceable against his other property. There are cases asserting in general terms that the right of a cotenant making improvements cannot be compensated even in suits for partition, except by deducting the amount thereof from the rents or profits: *Horton v. Sledge*, 29 Ala. 498; *Ormond v. Martin*, 37 Ala. 606; *Jones v. Johnson*, 28 Ark. 211; *Williams v. Coombs*, 88 Me. 183. And it has also been said that if the improved part is set off to a cotenant who did not make the improvements, no action can be sustained against him for the value thereof: *Nelson v. Clay*, 7 J. J. Marsh. 142; 23 Am. Dec. 387. An examination of all the authorities bearing upon the subject indicates, however, that a court will, in all cases where compensation for improvements or repairs is deemed equitable, discover some mode of making compensation, though perhaps in none of the cases has the precise method been necessarily determined, probably because, when embarrassed by its consideration, the court has resorted to a sale of the property, and to decreeing compensation to be made out of the proceeds of the sale. We think, however, when this course is not proper, the court may regard the person making the improvements or repairs as entitled, because thereof, to a larger share in the property than if they had not been made, or that it may, perhaps, ascertain the amount thereof, and treat it as owelty chargeable

against the shares of the cotenants who have not contributed to the improvements: Kurtz v. Hibner, 55 Ill. 544; 8 Am. Rep. 685; Baird v. Jackson, 98 Ill. 78; Sarbach v. Newell, 30 Kan. 102; Reespass v. Breckinridge, 2 A. K. Marsh. 584; Allen v. Hall, 50 Me. 253; Reed v. Reed, 68 Me. 568; Hall v. Piddock, 21 N. J. Eq. 311; Young v. Heffner, 36 Ohio St. 232; Johnson v. Pelot, 24 S. C. 254; 58 Am. Rep. 253; Robinson v. McDonald, 11 Tex. 390; 62 Am. Dec. 486; Bond v. Hill, 37 Tex. 626; Thompson v. Jones, 77 Tex. 626; Broyles v. Waddel, 11 Helsk. 32.

Where courts of probate are authorized to make partition of property, but have no other power except to divide it in equal moieties, and to set aside the shares of the respective parties through the drawing of lots, the claim on the part of one of them that he has made valuable improvements, of which he ought to have the benefit by the assignment to him of that portion of the estate on which they are situate, entitles him to enjoin the proceedings by a probate partition, and to compel the parties to proceed in equity, where all his rights can be adjusted and recognized: Wilkinson v. Stuart, 74 Ala. 198.

INDEX TO THE NOTES.

Accounting between cotenants, compelling of in suit for partition, 937-940.

between cotenants, principles governing, 931, 932.

between cotenants, right of is created by the statute of Anne, 924.

between cotenants, what necessary to sustain suit for, 925.

ADMINISTRATORS AND EXECUTORS, actions against upon contracts made by decedents, 120.

actions against upon contracts made by themselves, 120, 124.

acknowledgment of outlawed debts by, 123.

agreements made by do not bind the estate, 121.

are not liable officially upon acceptances made by them, 121.

are not liable officially upon contracts made by them, 121.

are not liable officially upon covenants for quiet enjoyment made by them, 121.

attorneys at law, compensation of cannot be fixed by agreement with, 122.

attorneys at law, duty to compensate rests primarily upon, 122.

attorneys at law may be employed to advise and assist, 122.

contracts of as to business of the estate cannot control the courts, 122.

contracts of, cases holding that actions cannot be sustained against estates upon, 124.

contracts of decedents, liability upon, 126.

contracts of do not create liability against the estate or heirs, 119, 120.

contracts of, personal liability of upon, 120, 121.

contracts of with attorneys attempting to fix the amount of their compensation, 122.

contracts of which may be specifically enforced, 119.

conversion, liability for, 130.

covenant for quiet enjoyment, estate, whether answerable for, 134.

covenant for quiet enjoyment, whether may make estate answerable for breach of, 133.

covenants made by them do not bind the estate, 121.

declarations of, whether admissible against the estate, 123.

embezzlement of, estate is not answerable for, 130.

estoppel against cannot affect the estate, 129.

eviction by of a tenant of the decedent, 133.

expenses of administration, are personally answerable for, 122.

judgment against, effect of, 823.

lease, liability upon covenants of, 127.

legislation changing title of in real and personal property, 119.

liability of for services performed by for the estate, 122.

(143)

ADMINISTRATORS AND EXECUTORS, liability of upon contracts of decedent for defaults occurring after his death, 126, 127.

loans made to, do not create any liability against the estate, 120, 121.

misrepresentations of, liability of estates for, 130.

money had and received, action against for, 124.

negligence of in the care and management of property, 131, 132.

negligence of, the estate is not liable for, 132, 133.

negotiable instruments made by them do not bind the estate, 121.

penal statutes, action against for violation of, 133.

personal property, interest of executors in at the common law, 118.

personal property, misappropriation of, liability of person receiving with knowledge of, 118.

personal property, power of to dispose of, 118.

personal property, trust upon which it is held by, 118.

persons performing services at instance of, remedies of, 123, 129.

property received by, liability of estate for, 126.

real estate, no title vested in at the common law, 119.

relation of to estate and heirs is different from that at common law, 118.

remedies of persons performing services for the estate, 123, 129.

specific performance of contracts, when will be decreed, 119.

statute of limitations, acknowledgments by, whether prevent running of, 123.

statute of limitations, waiver of by, 123.

subrogation to rights of, 128.

title, personal property vested in at the common law, 118.

tortious acts of, 129, 131.

torts, have no authority to commit, 129.

torts of, liability of estate for, 126.

transfers by are in contravention of their trust, 119.

unauthorized acts of cannot impose a liability upon the estate, 129, 130.

wrongful detention of property, liability of estate for, 131.

wrongs of, estates cannot profit by, 130.

ADVERSE POSSESSION, requisites of, 806.

where several tracts are included in one conveyance, 806.

ALIENS, mineral lands may not be located by, 219.**APPEAL**, amount in controversy as conferring jurisdiction, 264.

consent, judgment or decree cannot be reviewed by, 768.

ATTACHMENT, dissolution by amendment of the declaration, 597.**ATTORNEYS AT LAW**, administrators and executors, whether may by contract fix the compensation due to, 123.**BOARD OF HEALTH**, notice need not be given by before making orders affecting third persons, 752.**BOUNDARIES**, trees thereon, right of landowner to cut off roots and branches, 300, 301.**CARRIERS**, baggage, liability for, 297

delivery of goods to one personating the consignee, 333.

delivery of goods to persons not authorized to receive them, 332.

express companies are insurers of the safe delivery of property, 334.

express companies, presumptions against, 333, 334.

- CARRIERS**, fraud, imposition, or mistake does not excuse delivery of goods to person not entitled thereto, 333.
 impostors, delivery of goods to, 333-336.
- CHARITIES**, exemption of from taxation, to what applies, 766.
- CONSTITUTIONAL LAW**, class legislation, when cannot be upheld, 716.
 statutes discriminating between persons similarly situated, 349.
 Sunday laws directed against barbers, 714-717.
- CONTRACTS**, statutes depriving persons of power to make, 349, 350.
- COPARCENERS**, action by one against another to recover for use and occupation, 930.
 whether included in the statute of Anne, 930.
- CORPORATIONS**, burden of proving the existence of, 226.
 changes in which will relieve subscribers to stock of, 889.
 de facto, when exist, 227.
 existence, estoppel to deny, 227, 889.
 preference by insolvent, 633.
 preference by of one creditor over another, 414.
 stockholders, enforcing liability of in another state, 841.
 trust fund, property of when regarded as a, 441.
 unpaid subscriptions are assets of enforceable by a receiver, 841.
 unpaid subscriptions, transfers of stock to avoid payment of, 860.
- COTENANTS**, accounting between, action for is authorized by the statute of Anne and similar statutes, 924.
 accounting between, action for, what necessary to sustain, 925.
 adverse holding, tenant maintaining is liable for value of use and occupation, 928.
 agreement of one to pay rent to the other, when implied, 927-929.
 agreements to pay for services rendered, 936.
 conversion by one cotenant, what is, 435.
 coparceners, liability of one to another for use and occupation of the common property, 930.
 coparceners, whether included in the statute of Anne, 930.
 crops raised by one cotenant belong to him exclusively, 926.
 holding over after expiration of a lease from one to another, 928.
 improvements, compensation for in suits for partition, 939.
 improvements made by tenant in possession, rent is not to be charged for, 931.
 improvements, paying for out of the proceeds of a sale in partition, 938, 939.
 improvements, personal liability for, 935.
 improvements, possession, retaining until after they are paid for, 937.
 improvements, promise to pay for, when may be implied, 936.
 improvements, restraining probate partition on account of, 940.
 improvements, setting off in partition to person making them, 938.
 improvements, setting off to person by whom they were made, 41.
 improvements, setting them off against demand for rents and profits, 937.
 lease by one to another, holding over after, 928.
 leasing by one cotenant to another, 927.
 mining property, whether profits must be accounted for, 933.
 offsets to which occupying tenant is entitled in accounting for rents and profits, 933.

- COTENANTS**, ouster of one by another entitles the former to recover the value of the use and occupation, 928.
- ouster of one by another, what is, 929.
 - outstanding title, purchase of by one of the cotenants, 495.
 - personal liability for repairs and improvements, 934, 935.
 - remedies between when one has leased to the other, 927.
 - rent, agreement by one cotenant to pay to another, 927.
 - rent, implied agreement to pay, 927.
 - rent of land cleared by the tenant in possession, 931.
 - rent received must be accounted for, 925.
 - rents and profits, accounting for can be compelled only at reasonable, stated periods, 925.
 - rents and profits arising from improvements made by the occupying tenant, 931.
 - rents and profits, expenditures should be deducted in taking an account of, 932.
 - rents and profits, liability at common law to account for, 924.
 - rents and profits, liability of one in possession for, 41.
 - rents and profits, liability to account for was created by the statute of Anne, 924, 925.
 - rents and profits, mode of settling accounts for, 931, 932.
 - rents and profits, tenant is not answerable for what he actually receives, but only for fair rental value, 932.
 - rents and profits, tenant is not liable for not realizing by good husbandry, 931.
 - repairs, action to recover moneys already expended for, 934.
 - repairs, agreement to contribute to expenses of, when will be implied, 935.
 - repairs, liability of one cotenant to another for, 934.
 - repairs, mode of compelling contribution to, 934.
 - services, neither cotenant can maintain an action for not founded on agreement, 935.
 - unlawful detainer, action of by one cotenant against another, 927.
 - use and occupation by a cotenant who prevents or excludes others from sharing therein, 927.
 - use and occupation, cases maintaining liability for, 930.
 - use and occupation, coparceners, liability for, 930.
 - use and occupation, liability for on the part of a tenant who refuses to join in a lease, 929.
 - use and occupation, liability of one cotenant to account to another for, cases denying, 925, 926.
 - use and occupation, liability when premises are not susceptible of joint occupation, 929.
 - use and occupation of any part less than his share does not render an occupying tenant liable, 932.
 - use and occupation, statutes imposing liability for, 930.
 - use and occupation, tenant holding adversely is liable for, 928.
- CRIMINAL LAW**, accessory before the fact, guilt of the principal must be established, 665.
- accessory before the fact may be indicted as principal, 664.
 - forgery, what is, 191.
 - knowledge of age of consenting female, want of is no defense, 490.
 - rape, consent of female under age of consent, 499.

- OROPS** raised on land held in cotenancy belong exclusively to the tenant producing them, 928.
- DEATH**, presumption of from absence unheard of, 816.
- DEFINITION** of due process of law, 349.
 of guilt, 743.
 of lotteries, 216.
- ELECTIONS**, statutory provisions concerning, when mandatory and when directory, 258.
- EQUITY**, laches sufficient to bar relief in, 239.
- EVIDENCE**, cross-examination of the defendant in criminal prosecutions, 665.
 dying declarations are not admissible in civil cases, 508.
- EXECUTION** against property of public corporation, 835.
- EXECUTORS**. See **ADMINISTRATORS AND EXECUTORS**.
- FIRE**, municipal ordinances designed to prevent, validity of, 752.
- FIXTURES**, tests of, 585.
- HUSBAND AND WIFE**, trust resulting in favor of wife, 871.
- INJUNCTION** against discharged employ es gathering in front of their employer's place of business, 628.
- INSURANCE**, accident, total loss of business time by, what is, 739.
 admissions of insured are not evidence against beneficiaries, 85.
 against accident, whether includes death from illuminating gas, 563.
 agents, false writing out by of answers given by applicants, 213.
 arbitration, whether resort to may be compelled, 546.
 assignment of, to persons having no insurable interest, 656, 666.
 assignment of, without consent of the insurer, 566.
 change of beneficiary, how may be made, 84.
 construction of policies of, 213.
 difference between membership and stock corporations, 544.
 difference between mutual benefit associations and insurance corporations, 544.
 dominant features of contracts of, 543.
 endowment associations, noncompliance with laws as a defense to assessments, 548.
 gas, death from unintentional inhaling of, 358-364.
 life, asphyxiation, death from, 364.
 life, death from external, violent, and accidental means, whether includes death from inhaling illuminating gas, 364.
 life, gas, death from inhaling, when a breach of condition in policies of, 358, 363.
 life, poison, accidental taking of, 363.
 life, poison, does not include bites of venomous insects, reptiles, and animals, 363.
 life, poison, meaning of this word when used in policies of, 362.
 life, poison, taken by mistake, 364.
 life, poison, taking of, when is an accident, 363.
 life, suicide, presumption is against death by, 618.
 life, taking of poison, what is within the meaning of policies of, 364.
 membership, actions, whether may be maintained before exhausting the remedies within the association, 546.

INSURANCE, membership and mutual, principles governing, 543.

membership, appeals to governing bodies of the association, by-laws requiring, 547.

membership, arbitration, whether resort to may be compelled, 546.

membership, assessments, estoppel against resisting, 551.

membership, by-laws making decisions of officers and arbitrators final, 546.

membership, by-laws requiring submission of claims to arbitrators, 547.

membership, beneficiaries, estoppel to deny change of, 551.

membership, certificate, whether is a contract of insurance, 544.

membership, conditions not communicated to member cannot be enforced, 549.

membership, contract of, by what law to be construed, 545.

membership, contract of, enforcement of rights under is not dependent upon the action of the officers of the association, 545.

membership, contract of is not a wagering contract, 545.

membership, contract of is subject to charter and by-laws of the association, 545.

membership, contract of, loss, proof of, whether necessary, 545.

membership, contract of, when complete, 545.

membership, courts, resort to, whether may be denied by agreement, 546.

membership, dividends, whether may be paid to members, 545.

membership, estoppel against denying privileges of, 549.

membership, estoppel against persons procuring, 550, 551.

membership, estoppel to deny truth of statement in proofs of death, 551.

membership, estoppel to insist upon a forfeiture, 549, 550.

membership, false answers written by agents, 551, 552.

membership, fraud and deception in procuring contract of, 550.

membership, incorporation is not essential to an association, 548.

membership, relations between and its members, 543.

membership, remedies within the association, when must be exhausted, 547.

membership, rulings of the association in construing its laws, when will be followed, 547.

membership, statutes respecting insurance corporations are not applicable to, 546.

membership, waiver of conditions, 550.

membership, waiver of, misrepresentation as a defense, 549.

mutual, general features of, 552.

mutual, mode of effecting, 550.

mutual benefit associations, actions against in case of death, 577.

mutual benefit associations, assessments, default in not paying cannot exist until after notice thereof, 573, 574.

mutual benefit associations, assessments, extension of time for payment, 575.

mutual benefit associations, assessments, illegal, no rights lost by not paying, 573.

mutual benefit associations, assessments, notice of and its sufficiency, 574.

- INSURANCE**, mutual benefit associations, assessments, notice of must be given, 573.
- mutual benefit associations, assessments, notice of sent by mail, 574.
- mutual benefit associations, assessments, suspended members, whether subject to, 573.
- mutual benefit associations, assignment of policy issued by to a person having no insurable interest, 565.
- mutual benefit associations, beneficiaries, assignments by, 565, 566.
- mutual benefit associations, beneficiaries, association cannot affect the rights of, 562.
- mutual benefit associations, beneficiaries, change of, consent of beneficiary, when essential to, 563.
- mutual benefit associations, beneficiaries, change of, equity may aid imperfect, 562, 563.
- mutual benefit associations, beneficiaries, change of, made by will, 563, 564.
- mutual benefit associations, beneficiaries, change of, prevented by fraud, 571.
- mutual benefit associations, beneficiaries, change of, relief in equity to aid defective, 564.
- mutual benefit associations, beneficiaries, change of, when permitted and how to be effected, 561, 562.
- mutual benefit associations, beneficiaries, certificate may be surrendered with consent of, 577.
- mutual benefit associations, beneficiaries, creditors may be, 560, 572.
- mutual benefit associations, beneficiaries, death of before that of the persons insured, 570.
- mutual benefit associations, beneficiaries, designation of persons who are forbidden to be, 560.
- mutual benefit associations, beneficiaries, divorced wife is not entitled to rights of, 571.
- mutual benefit associations, beneficiaries, executors and administrators, interest of, 572.
- mutual benefit associations, beneficiaries, failure to designate, persons in whom vest, 568.
- mutual benefit associations, beneficiaries, heirs, when are, 571.
- mutual benefit associations, beneficiaries, legal representatives, who are, 561.
- mutual benefit associations, beneficiaries, mothers as, 571.
- mutual benefit associations, beneficiaries, nature of interest of, 564, 565.
- mutual benefit associations, beneficiaries, relatives who are included within rights of, 572.
- mutual benefit associations, beneficiaries, sisters as, 572.
- mutual benefit associations, beneficiaries, some of whom are ineligible, 566.
- mutual benefit associations, beneficiaries, take per capita, 570.
- mutual benefit associations, beneficiaries, vested interest, when have any, 565.
- mutual benefit associations, beneficiaries, who may be, 559, 560, 562.

- INSURANCE, mutual benefit associations, by-laws are subordinate to the constitution, 556.**
- mutual benefit associations, by-laws, certificates issued subject to power of to alter or amend, 557.**
- mutual benefit associations, by-laws, change in, 556.**
- mutual benefit associations, by-laws, limitation upon power to alter, 556.**
- mutual benefit associations, by-laws, retroactive operation of is not favored, 556, 557.**
- mutual benefit associations, by-laws, who may adopt, 556, 557.**
- mutual benefit associations, certificates of membership are governed by the laws applicable to insurance, 555.**
- mutual benefit associations, certificates of membership, by-laws and rules of order are a part of, 555.**
- mutual benefit associations, certificates of membership, construction of, 555.**
- mutual benefit associations, constitution and by-laws of, conflict between, 558.**
- mutual benefit associations, constitution and by-laws of, when constitute part of the contract for insurance, 558.**
- mutual benefit associations, constitution and by-laws of, when unreasonable and void, 557, 558.**
- mutual benefit associations, constitution of, conflict between different clauses in, 556.**
- mutual benefit associations, constitution of, power to change, 558.**
- mutual benefit associations, creditors, assignment to, 565, 566.**
- mutual benefit associations, damages recoverable in case of death, 578.**
- mutual benefit associations, death of applicant before his application has been approved, 554.**
- mutual benefit associations, death, proofs of, how to be made, 564.**
- mutual benefit associations, expulsion of members, 576, 577.**
- mutual benefit associations, false answers by the assured, 553.**
- mutual benefit associations, false answers written by agents, 553.**
- mutual benefit associations, forfeiture by accepting subsequent payments, 576.**
- mutual benefit associations, forfeiture, estoppel to insist upon, 576.**
- mutual benefit associations, forfeiture for nonpayment of dues or assessments, 573.**
- mutual benefit associations, forfeiture is not favored, 574, 575.**
- mutual benefit associations, forfeiture, whether self-executing, 574.**
- mutual benefit associations, fraud in application for membership, 553.**
- mutual benefit associations, heirs, when take proceeds on failure of designated beneficiary, 568.**
- mutual benefit associations, initiation in, when necessary to valid insurance, 552, 553.**
- mutual benefit associations, insurance in, when becomes complete, 554.**
- mutual benefit associations, insured member has no interest in the fund, 557, 558.**
- mutual benefit associations, laws of and of the state, members must take notice of, 555.**

INSURANCE, mutual benefit associations, membership in, when and how terminated, 575.

mutual benefit associations, minors cannot become members of, 553.

mutual benefit associations, officers and agents, powers of, 559.

mutual benefit associations, officers, waiver of forfeiture by, 559.

mutual benefit associations, posthumous child, when will share in the benefit of insurance, 555.

mutual benefit associations, reinstatement, difference between and reinsurance, 577.

mutual benefit associations, reinstatement, remedies of members seeking, 577.

mutual benefit associations, reinstatement, right of members to, 577.

mutual benefit associations, statements in applications for insurance in, 553.

mutual benefit associations, suicide, by-laws refusing payment when death is caused by, 577.

mutual benefit associations, waivers of breaches of conditions, 554.

mutual benefit association, what is a, 552.

mutual benefit association, which is not an insurance corporation, 544.

mutual benefit associations, wills disposing of benefit certificates, 570 oral, may be enforced, 910.

oral, payment of premium is not indispensable to, 910.

remedies within the association, whether must be exhausted before resorting to suit, 546.

tests to determine whether an association is an insurance or a voluntary association, 543.

unincorporated societies, membership, insurance by, 543, 549.

INTERPLEADER, bill of, under what circumstances may be maintained, 790.

INVENTIONS, made by an employé while in charge of his employer's business, right of the latter to use, 821, 822.

master and servant, respective claims to, 820.

master has no exclusive right to inventions of his servant, 820.

master, when entitled to patent for invention made by his servant, 821.

master's right to use articles patented by his servant, 821.

servant employed to perfect machinery is not precluded from taking a patent therefor, 821.

servant making is entitled to patent as against his employer, 820.

servant, patent secured by, master, when entitled to assignment of, 820.

JUDGMENT, against person in one capacity does not bind him in another. 621.

attorney at law, attack upon because of unauthorized appearance by, 763.

collateral attack upon, 239.

conclusiveness of, 281.

foreign, impeaching because unjust, 280.

in ejectment, does not create any new title, 647.

laches in prosecuting, proceeding for relief from, 796.

misnomer of the defendant in, 607.

relief from because of mistake or excusable neglect, whether the decision granting must be rendered within the time designated in the statute for granting relief, 795.

JUDGMENT, relief from, motion for made within time, whether delay of court will preclude relief, 795-799.

statute of limitations, running of, whether suspended by, 648.
time within which relief may be granted on account of mistake or excusable neglect, 795-799.

JUDICIAL SALES, caveat emptor, rule of, when applicable to, 178.

confirmation, chancery courts will grant relief after, 178.

confirmation, effect of, 177.

confirmation, relief from for defects of title, 177.

confirmation, relief from for misrepresentations, 177, 178.

confirmation, relief from, when will not be granted, 177.

confirmation, whether establishes the terms of the sale, 177.

purchaser at, proceedings against for loss on a resale, 177-179.

purchaser at, whether may urge that the terms of the sale were different from those stated in the return and order of confirmation, 177-179.

JURISDICTION, presumption in favor of, 24.

LANDLORD AND TENANT, caveat emptor is the rule between, 884.

covenant to repair, remedies for breach of, 495.

LEASE by one cotenant to another, 927.

by one cotenant to another, holding over after termination of, 928.

LETTERS PATENT issued to an employé, employer's rights in, 820-823.

LOTTERIES, definition of, 216.

LUNATICS, deeds of, 87.

MARRIED WOMEN, personal injuries to themselves, when may maintain an action for, 503.

MASTER AND SERVANT, fellow-servants, train dispatchers and trainmen, whether are, 902.

inventions made by the latter while in the employment of the former, their respective rights therein, 820-823.

negligent act of servant for which master is not answerable, 525.

patent issued to servant, master's right to use patented article, 821.

MECHANIC'S LIEN, description of property in claim of, 78.

MINERAL LANDS, aliens cannot purchase in the United States, 219.

patent for cannot be collaterally attacked, 220.

MINES, right of one co-owner to compel another to account for profits realized from, 933.

MORTGAGE, on public lands made by pre-emption or homestead claimants, 249-254.

MUNICIPAL CORPORATIONS, license taxes, right of to exact, 305.

license taxes, which may be imposed by, 245.

streets, duty to keep in safe condition, 50.

MUTUAL BENEFIT ASSOCIATIONS. See **INSURANCE**.

NEGLIGENCE, in starting fires, liability for, 443.

NEGOTIABLE INSTRUMENTS, indorser of before delivery, 60.

NUISANCE, powder magazine near dwelling-house, 895.

OUSTER, of one cotenant by another, 929.

of one cotenant by another entitles the former to maintain an action for the value of the use and occupation, 928.

PARENT AND CHILD, death of child, action by parent for, 621.

PARTITION, improvements, compensation for, compelling the making of, 938, 939.

improvements, setting off to cotenant making them, 937.

in probate may be enjoined when one cotenant has a claim for improvements, 941.

purchaser at sale in, compelling to comply with his bid, 176.

PRINCIPAL AND AGENT, custom as affecting the authority of agent, 537.

PUBLIC LANDS, contracts to convey, when violate the federal laws, 250.

homestead, right of, when may be alienated, 253.

homestead, right of, when may be mortgaged, 252.

mortgage by homestead claimants, 252.

mortgage, defeating by relinquishing right of entry, 252.

mortgage, made after proving up upon, 251.

mortgage made before entry, effect of, 251.

mortgage of is subject to the power of the land-office to cancel entry, 250.

mortgage of, to secure pre-existing debt, 253.

mortgage of, when does not impair the right of a pre-emption or homestead claimant, 249.

mortgage of, whether to be deemed a forbidden conveyance, 250, 253.

mortgage on, estoppel from denying validity of, 251.

mortgage on homestead, when void, 253.

mortgage on pre-emption claims, 249.

pre-emption claims, mortgage of, 249.

pre-emption laws have been repealed, 249.

vested right of homesteader, when becomes perfect, 252.

when become private property, 252.

QUO WARRANTO, is a civil remedy, 312.

is a writ of right in public matters, 312.

laches as a defense to proceedings in, 314.

lapse of time as a bar to proceedings in, 313.

leave of the court, when necessary to prosecutions in, 312, 313.

lies to enforce both public and private rights, 312.

pleadings in, 312.

private persons, right of to prosecute proceedings by, 313.

statute of limitations does not run against, 313.

who may institute proceedings by, 313.

RAILWAY CORPORATIONS, coupons, right of to reject when not accompanied by the original ticket, 448, 582.

diligence required of when they permit the public to use tracks of as highways, 49.

duty of to persons who by acquiescence are permitted to use tracks of as highways, 46, 47.

license to use track as a highway, when implied, 48.

passengers, who are, 449.

public use of tracks as crossing, acquiescence in by the railway, 48, 49.

recklessness in turning cars loose on track which is known to be used by the general public as a highway, 47, 48.

rules and regulations of, duty of passengers to acquaint themselves with, 449.

RAILWAY CORPORATIONS, rules, injuries received by persons while violating, 449.

streets of city, care required in operating railways on, 48.

tracks, acquiescence in use of by the public, 46.

trespassers, persons using track by acquiescence of corporation are not, 47.

RECEIVERS, appointment of to prevent property from being used for criminal purposes, 416.

RES JUDICATA, motions, decisions upon when are, 597.

SALES OF CHATTELS, memorandum of, when sufficient, 531.

separation of, when essential to vest title, 521.

SETTLEMENT, voluntary, when may be set aside, 534.

SOCIETIES, benevolent, distinction between and insurance corporations, 545, 546.

benevolent, what are not, 545.

STATUTE OF LIMITATIONS, collateral securities are not released by, 515.

effect of, 515.

effect of judgment in ejectment upon, 648.

in proceedings to forfeit charters of corporations, 315.

quo warranto, proceedings by, whether subject to, 312-315.

remaindermen, when barred by, 343.

waiver of by executors and administrators, 123.

STATUTES, construction of, rules for, 613.

SUNDAY LAWS, barber shops, statutes requiring closing of on Sunday, 714-717.

constitutionality of acts closing barber shops, 373.

TAXATION, charities, exemption of from, 776.

TREES, on boundary line, right of landowner to cut off roots and branches, 300, 301.

TRUST FUND, creditor's bill to reach income of, 758.

UNLAWFUL DETAINER, action of by one cotenant against another, 827.

WATERS, percolating, landowner's right to, 205.

WILLS, subscribing witness signing wrong name to, 110.

INDEX.

ACCEPTANCE.

See Sales, 5.

ACCESSORIES, ETC.

1. **INDIOTMENT—ACCESSORIES.**—An indictment, first charging the guilt of the principal and then setting out the facts which constitute the defendant an accessory, is sufficient and not prejudicial to the defendant, although the common-law distinctions between accessories before the fact and principals are abolished by statute. (State v. Gleim, 655.)

2. **ACCESSORIES—EVIDENCE.**—On the trial of a person indicted as an accessory before the fact, the record of the prior conviction of the principal is admissible against the defendant, as prima facie evidence of the guilt of the principal of the crime charged. (State v. Gleim, 655.)

ACCIDENT.

See Insurance, 31-33.

ACCRETION.

See Waters, 3.

ACKNOWLEDGMENT.

See Mortgages, 2, 3.

ACTIONS.

STATUTORY RIGHTS, ENFORCEMENT OF.—When a statute creates a liability without providing the procedure for its enforcement, it can be enforced by any court having jurisdiction of the subject matter and the parties. (North Pac. Lumber Co. v. Lang, 780.)

ADVERSE POSSESSION.

1. **PRESCRIPTIVE TITLE CANNOT BE ACQUIRED EXCEPT BY OCCUPANCY UNDER A CLAIM OF OWNERSHIP.**—In the absence of occupancy, the claim of ownership accompanied by the payment of taxes and the sale of small parts of the property does not create title by prescription. (Willamette Real Estate Co. v. Hendrix, 800.)

2. **DEEDS—COLOR OF TITLE.**—A grantee of land has claim and color of title where his deed, on its face, purports to convey the title. It is not necessary, to show color of title, that the title, when traced back to its source, should prove to be an apparently legal and valid title. (Nelson v. Davidson, 838.)

3. **ADVERSE POSSESSION.**—Evidence that a person has for twenty-five years listed land for taxation, and paid the taxes thereon,

(955)

being part of the time in actual possession, continually and uninterruptedly exercising the usual acts of ownership, and refusing to extend like privileges to others, is competent and sufficient to establish adverse possession. (*Rogers v. Miller*, 20.)

4. ADVERSE POSSESSION—LIMITATION OF ACTIONS—ESTATE IN REMAINDER, WHEN BARRED.—If the grantee of an estate in remainder, claiming under a deed which purports to convey such estate to him, and which is sufficient to constitute color of title, holds possession for seven years, adverse to the tenant in remainder, and pays the taxes for that period, the estate in remainder is barred by the statute of limitations, notwithstanding the existence of an outstanding life estate, where the remainderman was under no disability during that time. (*Nelson v. Davidson*, 338.)

5. ADVERSE POSSESSION OF ONE OF SEVERAL LOTS.—Though property is described in a conveyance as consisting of lots and blocks, adverse possession of it cannot be predicated upon the occupancy of some lot therein by a purchaser from the grantee in such deed. Each lot or tract is distinct, and an entry and occupancy of one under a claim of title is not a constructive occupancy of the others. (*Willamette Real Estate Co. v. Hendrix*, 800.)

See Cloud on Title.

AGENCY.

1. PRINCIPAL AND AGENT.—THE AUTHORITY OF AN AGENT MUST BE DETERMINED BY the nature of his business and the apparent scope of his employment therein. It cannot be narrowed by private and undisclosed instructions, unless there is something in the nature of the business or the circumstances of the case to indicate that the agent is acting under special instructions or limited powers. (*Brown v. Franklin etc. Ins. Co.*, 534.)

2. EVIDENCE.—DECLARATIONS AND ADMISSIONS OF AN AGENT made after a transaction is fully completed are not admissible against his principal. (*Giberson v. Patterson Mills Co.*, 823.)

3. EVIDENCE—PRINCIPAL AND AGENT.—DECLARATIONS of a superintendent of a mill to the effect that a hanger therein had been condemned, and should be removed, if made away from the mill some days after a servant in the mill has been injured by the breaking of such hanger, are not admissible in evidence in favor of such servant and against his master. (*Giberson v. Patterson Mills Co.*, 823.)

See Forgery, 3; Insurance, 42-46.

ALIENS.

See Mines, 1, 2.

ALIMONY.

See Marriage and Divorce, 5-8; Trusts, 4, 5.

AMENDMENT.

See Courts, 1-5; Judgments, 15-18; Pleading, 7.

ANIMALS.

See Railroads, 18-25.

ANNULMENT.

See Marriage and Divorce, 1-5.

APPEAL.

1. **COURTS—JURISDICTION OF SUPREME COURT.**—Under a statute providing that no appeal to the supreme court shall lie, with certain exceptions, to review the final judgment of any inferior court, unless it exceeds two thousand five hundred dollars, exclusive of costs, the jurisdiction of that court does not attach, on the ground of the amount involved, where neither of several judgments, as in a proceeding to enforce a mechanic's lien, amounts to two thousand five hundred dollars, although their aggregate amount may exceed that sum. (*Spangler v. Green*, 259.)

2. **COURTS—JURISDICTION—SUPREME COURT.**—Jurisdiction of a cause upon one ground attaches for all. Hence, if a case requires the construction of constitutional provisions, either state or federal, the supreme court has jurisdiction, on appeal, to review all matters necessary to a complete determination of the cause, though the amount involved is less than that prescribed by statute. (*Spangler v. Green*, 259.)

3. **NO APPEAL LIES** from a judgment to which the appellant consented. (*Schmidt v. Oregon etc. Min. Co.*, 759.)

4. **CONSENT DECREE—PRESUMPTION.**—Where it appears in a decree that it was entered upon consent of the defendant, and it grants the relief prayed for in the complaint, and fixes the compensation of the plaintiff's attorneys and of the referee and the stenographer, the consent of the plaintiff thereto will be presumed on appeal therefrom. (*Schmidt v. Oregon etc. Min. Co.*, 759.)

5. **APPELLATE PRACTICE—OVERRULING OF A MOTION** to make a complaint more specific cannot be considered on appeal as an assignment of error unless it is brought into the record by bill of exceptions. (*Lake Erie etc. R. R. Co. v. Clark*, 442.)

6. **APPELLATE PROCEDURE.**—What purports to be a bill of exceptions though filed with the clerk cannot be considered unless signed by the judge. (*Robinson v. Dickey*, 417.)

7. **APPEAL—SUFFICIENCY OF BILL OF EXCEPTIONS.**—Though a bill of exceptions, containing testimony, does not have an express statement that all the evidence has been certified, it is sufficient if, after each party's testimony, there is the expression that such party "here rested his testimony," as this is equivalent to an express statement that the evidence contained in the bill is all that was introduced at the trial. (*Spangler v. Green*, 259.)

8. **APPELLATE PRACTICE.—TRANSCRIPT OF EVIDENCE** certified to by the shorthand reporter, but not incorporated into a bill of exceptions, nor signed by the trial judge, does not authorize a review on appeal of questions depending thereon. (*Lake Erie etc. R. R. Co. v. Clark*, 442.)

9. **APPEAL—SUFFICIENCY OF GENERAL VERDICT—ERRONEOUS INSTRUCTION.**—A general verdict cannot be upheld, where several issues were tried, if the court gave the jury an erroneous instruction upon any one of the issues. (*Funk v. St. Paul etc. Ry. Co.*, 608.)

10. **APPELLATE PRACTICE.**—An offer of a respondent to consent to a modification of judgment to correct error after an appeal has been taken does not affect the right of the appellant to a reversal of the judgment. (*Leake v. Hayes*, 34.)

11. **APPELLATE PROCEDURE—HARMLESS ERROR.**—If a case is tried and determined upon one paragraph or count of a complaint, a judgment will not be reversed because of an error in overruling a demurrer to another paragraph or count. (*Robinson v. Dickey*, 417.)

12. TRIAL—THE ACCIDENTAL ABSENCE OF COUNSEL. WHEN THE VERDICT IS RECEIVED, if not due to any action on the part of the court, or of the opposing counsel or parties, is not ground for the reversal of the judgment. (*Fitzgerald v. Clark*, 665.)

13. JUDGMENTS—EXCESSIVE—WAIVER OF ERROR.—A judgment assessing damages in excess of the ad damnum of the declaration should not be reversed on appeal, if the excess is merely for interest accruing after the commencement, and objection thereto is first made on appeal. The error in rendering judgment in excess of the amount claimed in the declaration is waived unless specific objection thereto is made in the trial court. (*Metropolitan Accident Assn. v. Frolland*, 359.)

14. APPEAL, WAIVER OF RIGHT OF.—CONSENT excuses error, and ends all contention between the parties. It waives the right of appeal. (*Schmidt v. Oregon etc. Min. Co.*, 759.)

15. APPELLATE PRACTICE—CAPITAL CASES—EXCEPTION WHEN NOT NECESSARY.—Erroneous statements of the law, or improper comments upon the facts or evidence bearing upon them, may be reviewed and corrected on appeal in a capital case without any exception, when it can be seen that they may have operated to the prejudice of the accused. (*People v. Barberi*, 717.)

16. APPELLATE PRACTICE—CAPITAL CASES.—On reviewing a capital case, the court must be satisfied that a fair trial has been had, and when it appears that the case was submitted to the jury upon an erroneous theory prejudicial to the accused, and which had a controlling influence upon the trial and its result, the court will regard the principle which has been decided, rather than the concrete form in which the question arose at the trial, and will not seek for some technical ground not urged at the trial to sustain the ruling. (*People v. Barberi*, 717.)

17. JURY TRIAL—PREJUDICIAL COMMENTS OF THE JUDGE. It is prejudicial error for a judge, on the trial of a woman for homicide, to refer to her as having parted with her honor without any promise of marriage, and as having broken from the moorings of her home to go and live with the decedent as his mistress, when her testimony tends to prove that she acted under a promise of marriage, and that her seduction was accomplished by fraud, and aided by some drug administered to her by him. (*People v. Barberi*, 717.)

See Attorney and Client, 1, 2; Instructions; Marriage and Divorce, 5; Partnership, 5.

ASSESSMENTS.

See Corporations 19-21; Insurance 39, 40.

ASSETS.

See Receivers, 4-6.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See Attachment, 3, 4; Partnership, 1.

ASSOCIATIONS.

1. SOCIAL CLUBS, SALE OF WINES AND LIQUORS BY.—A social club, not organized for the purpose of evading any law, but to establish and maintain a library and readingrooms, and to promote social intercourse among its members, and which serves liquors to them upon their written order, at a price fixed by one of its committees, is not guilty of the selling of liquors, within the meaning of a statute prohibiting any person without license from selling either

strong or spirituous liquors in less quantity than five gallons at a time, to be drunk or used on the premises where the same shall be sold. (*People v. Adelphi Club*, 700.)

2. INTOXICATING LIQUORS, SALES OF BY SOCIAL CLUBS. If the object of its organization is merely to provide its members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then the sale of liquors by a club to its members is contrary to the provisions of the excise law. If, on the other hand, the club is organized and conducted in good faith, with a limited and select membership, as well as owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquors to its members is merely incidental, in the same way and to the same extent as the supplying of dinners or daily papers might be, its furnishing of liquors to its members, though such liquors are paid for by them, is not a sale within the meaning of that law. (*People v. Adelphi Club*, 700.)

See Insurance 37-41.

ATTACHMENT.

1. ATTACHMENT OF GOODS IN WAREHOUSE—SUFFICIENCY OF LEVY.—Goods stored in a warehouse are sufficiently levied upon under a writ of attachment, by taking actual possession of and placing them in charge of a keeper. (*Sinsheimer v. Whitely*, 192.)

2. CORPORATIONS, FOREIGN—ATTACHMENT OF STOCK OF.—Shares of stock in a foreign corporation created and existing by the laws of another state, and belonging to a nonresident, cannot be attached or garnished in an action in Indiana, although the certificate of stock is held in trust in the latter state. (*Smith v. Downey*, 467.)

3. MOTIONS AND ORDERS—RES JUDICATA—DISSOLUTION OF ATTACHMENT.—If an assignment for the benefit of creditors is made after the levy of an attachment, an order denying a motion to dissolve the attachment, virtually upon the ground that the assignment did not, ipso facto, work a dissolution of the attachment, this being the only question litigated or decided on the motion, is not *res judicata* upon the question whether the attachment was dissolved by an amendment of the complaint, and affidavit for attachment, made subsequently to the assignment, and does not preclude the court from deciding that such amendment, where it entirely changed the cause, did dissolve the attachment as to the assignee in the assignment proceeding. (*Hedel v. Benedict*, 592.)

4. ATTACHMENT—DISSOLUTION OF, BY AMENDMENT, AFTER ASSIGNMENT FOR BENEFIT OF CREDITORS.—If an attachment has been levied, which is followed by a general assignment for the benefit of creditors, an amendment of the complaint, and affidavit for attachment, made after the execution of the assignment, and substituting an entirely different and distinct cause of action, for the one set up in the original complaint and affidavit, discharges the attachment as to the assignee in the assignment proceeding, whatever may be its effect as between the parties to the action. (*Hedel v. Benedict*, 592.)

See Judgments, 8; Warehousemen, 4.

ATTESTATION.

See Wills, 3.

ATTORNEY AND CLIENT.

1. IF ATTORNEYS ACT BEYOND THEIR AUTHORITY IN CONSENTING to a decree, the remedy is not by appeal, but by some appropriate proceeding in the court where the consent was received and acted upon. (*Schmidt v. Oregon etc. Min. Co.*, 759.)

2. JUDGMENT BY CONSENT—PRESUMED POWER OF ATTORNEYS.—Where it appears that a judgment was entered by consent, and that it fixes the compensation of plaintiff's attorneys in the suit, it will be presumed, on appeal, in the absence of any showing to the contrary, that the attorneys were authorized to request, consent to, and have entered, just such a decree as was entered, and which the plaintiff seeks to have reversed upon appeal. (*Schmidt v. Oregon etc. Min. Co.*, 759.)

3. ATTORNEY, NONE BUT CLIENT CAN RECOVER FOR NEGLIGENCE OF.—A son cannot recover of an attorney damages suffered by him through the negligence of the attorney in the preparation of a will of the mother of the son, the employment being by the mother, not by the son. (*Buckley v. Gray*, 88.)

4. ATTORNEYS' FEES, ALLOWANCE OF.—In a suit by a trustee to foreclose a mortgage by the terms of which he is entitled to reasonable attorney's fees, together with his costs and disbursements, the court may, though there is no issue upon the subject, fix the amount of the fees due the attorney, referee, and the stenographer, and provide in the decree for the payment thereof to them, where the provision appears to have been made by consent. (*Schmidt v. Oregon etc. Min. Co.*, 759.)

5. ATTORNEYS, JUDGMENT IN FAVOR OF FOR THEIR COMPENSATION.—Where an allowance to the complainant is proper on account of attorneys' fees, it may be made directly to the attorneys themselves. (*Schmidt v. Oregon etc. Min. Co.*, 759.)

ATTORNEYS.

See Witnesses, 1.

ATTORNEYS' FEES.

See Injunctions, 13, 14.

AUCTION.

See Executors and Administrators, 2.

AUTHENTICATION.

See Evidence, 14.

BAGGAGE.

See Carriers, 13.

BANKS.

1. BANKS AND BANKING—STOLEN CERTIFICATES OF DEPOSIT—RIGHTS OF DEPOSITORS.—A bank is not authorized, as against a customer and depositor, to pay the money due such depositor or creditor on certificates of deposit duly issued by it, which have been stolen and bear the forged indorsement of the payee when he is not guilty of negligence and has notified such bank of the theft, and it pays in reliance solely on the indorsement of other banks that have prior thereto accepted and paid the certificates. The debt owing the payee of such certificates is not discharged by such payment, and the bank of deposit is still liable therefor. (*First National Bank v. Bremer*, 461.)

2. BANKS AND BANKING—CERTIFICATION OF CHECK—EFFECT.—The certification of a check in the hands of the payee, the body of which is unaltered, releases the drawer from further liability, and creates a direct liability from the bank to the payee, while as between the bank and the drawer, it operates as a payment to that extent on his account, and although prior to its being certified the check may be countermanded by the drawer, yet after its certification it has passed beyond his control, and he no longer has power to countermand its payment. (*Meridian Nat. Bank v. First Nat. Bank*, 450.)

3. BANKS AND BANKING—CHECKS—CERTIFICATION OF ASSUMED NAME OF PAYEE.—The certification of a check by the bank upon which it is drawn and its subsequent indorsement by the man to whom it was actually issued and by whom the drawer intended the money should be received is effectual to pass the title to the check to another bank paying the amount of it in good faith to the drawee upon presentment, although the latter acts under an assumed and fictitious name during the whole transaction while not really impersonating any other individual. In such case any loss on the check must fall on the bank certifying it, and through such bank, upon the drawer. (*Meridian Nat. Bank v. First Nat. Bank*, 450.)

4. CORPORATIONS—SUSPENSION OF BANK—INTEREST ON DEPOSITS DETAINED.—If a pass-book is balanced and the bank then suspends business, refusing to pay its depositors, it thereafter detains money received to their use and is liable for interest thereon. (*McGowan v. McDonald*, 149.)

5. CORPORATIONS—SAVINGS BANKS—LIABILITY OF STOCKHOLDERS.—If constitutional provisions impose personal liability upon stockholders in all corporations for corporate debts, the legislature cannot exempt stockholders in savings banks from such liability. (*McGowan v. McDonald*, 149.)

See Evidence, 15.

BARBERS.

See Sunday, 3, 4.

BENEFICIARIES.

See Insurance, 80.

BONA FIDE PURCHASERS.

See Deeds, 4; Homesteads, 6.

BONDS.

See Injunctions, 15; Judgments, 13; Municipal Corporations, 9, 10.

BOUNDARIES.

1. BOUNDARIES—LAKES—MEANDER LINES.—A grant of land bounded by the meandered lines of a natural lake conveys only to the water's edge. (*Fuller v. Shedd*, 380.)

2. BOUNDARIES—MEANDER LINES.—LAKES, whether great or small, if of such size that, in making the original survey they are meandered, are subject to the same rule as to riparian rights. (*Fuller v. Shedd*, 380.)

3. BOUNDARIES—MEANDER LINES.—In a grant of land bordering on a river which has been meandered in making the survey, the meander line, in and of itself, is not a boundary line, for the purpose of determining quantity in a fractional part. (*Fuller v. Shedd*, 380.)

4. BOUNDARIES—MEANDER LINES.—If a narrow strip of land lies between the meander line and the natural boundary, as a stream or river, and its proportions are much smaller than the land granted, it is included in the grant, and the center of the stream is the boundary, unless a different intention is manifested by the terms used. (*Fuller v. Shedd*, 380.)

5. BOUNDARIES, MEANDER LINES.—If the land outside of the meander line of the grant is so grossly in excess of that sold that it is apparent that there is fraud or mistake in the survey, such excess is not included in the grant and the meander line is the boundary. (*Fuller v. Shedd*, 380.)

6. BOUNDARIES—MEANDER LINES.—RESURVEY of lands, the greater part of which are covered by water, within the meandered line of a natural lake, without fraud or mistake in the original survey, or material changes in conditions, cannot be made by the land department and the land therein patented to other parties, as against those holding under the original grants. (*Fuller v. Shedd*, 380.)

See Injunctions, 5, 6.

BUILDING CONTRACTS.

1. BUILDING CONTRACTS—DELAY IN COMPLETION—PENALTY OR DAMAGES.—A stipulation in a building contract for the recovery of a specified amount as damages for each day that the completion of the building is delayed after a certain time, is a provision for liquidated damages, and not for a penalty. (*Reichenbach v. Sage*, 51.)

2. BUILDING CONTRACTS—DELAY—LIQUIDATED DAMAGES.—A contractor is not relieved from liability for liquidated damages for delay in the completion of a building by the fact that the delay was caused by the failure of a subcontractor to furnish material. (*Reichenbach v. Sage*, 51.)

3. BUILDING CONTRACTS—DELAY IN COMPLETION.—Severity of weather is not alone sufficient to relieve a contractor from liability for liquidated damages for failure to complete a building within stipulated time, if the delay caused by such weather could have been avoided and the work carried on with safety and durability by the exercise of extra means or effort on the part of the contractor during the continuance of such weather. (*Reichenbach v. Sage*, 51.)

See Mechanic's Liens.

BURDEN OF PROOF.

See Corporations, 27, 32; Instructions, 2; Negligence, 3.

CARRIERS.

1. CARRIERS.—THE DUTY TO DELIVER GOODS RECEIVED BY A CARRIER for transportation is imposed by law as soon as he accepts them, and whether expressed or not, becomes a part of the contract. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

2. CARRIERS.—NOTICE OF THE ARRIVAL OF GOODS at the place of destination given to a person who personated, and falsely and fraudulently represented himself to be, the consignee cannot reduce the liability of the carrier to that of a warehouseman. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

3. A CARRIER'S LIABILITY AS SUCH IS NOT TERMINATED by the fact that goods have not been called for, for two or three weeks after their arrival, if the consignee has not had notice of such arrival,

such notice having, in fact, been given to a person who fraudulently personated the consignee. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

4. CARRIERS—DELIVERY TO PROPER PERSON.—A carrier is an insurer of the safe delivery of the goods to the person to whom they are consigned. (*Pacific Express Co. v. Shearer*, 824.)

5. CARRIERS—DELIVERY OF GOODS TO A PERSON OTHER THAN THE CONSIGNEE is not justified by the fact that such other person had procured and presented to the carrier a duplicate bill of lading, not assigned by either the consignee or the consignor. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

6. A CARRIER DELIVERING GOODS TO A WRONG PERSON is not excused by any circumstances of fraud, imposition, or mistake. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods. Delivery to another, whether by innocent mistake or through fraud practiced upon the carrier, is a conversion by him. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

7. CARRIERS—LIABILITY FOR DELIVERY TO WRONG PERSON—FRAUD.—A carrier cannot escape liability on the ground that deception, imposition, or fraud may have been resorted to by an impostor to obtain from the agent of the carrier the goods intrusted to its care. (*Pacific Express Co. v. Shearer*, 824.)

8. CARRIERS—DELIVERY TO WRONG PERSON—IMPOSITION.—An express company is liable for delivering a package of money to an impostor who represents that he is the consignee, where the one who sent the money, as directed by telegraph, believed that the telegram was from the person by whom it purported to have been sent, although such impostor telegraphed for the money in the name of the supposed consignee, and a reply to the telegram was delivered to the impostor. The company, without reference to the party who may have ordered the money sent, or who may have telegraphed for it, is bound to deliver it to the real person to whom it is consigned. (*Pacific Express Co. v. Shearer*, 824.)

9. CARRIERS—PLACE OF DELIVERY.—Goods consigned generally to a designated consignee without stating his office or place of business are deliverable at the station or depot of the carrier, and a delivery of them at the building in which the consignee has an office to a person there fraudulently personating him is not a proper delivery, and cannot relieve the carrier from liability for such goods. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

10. CARRIERS OR WAREHOUSEMEN—VARIANCE.—A plaintiff suing the defendant as a common carrier may recover against him as a warehouseman, in every proper case. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

11. A CARRIER ACCEPTING FOR CARRIAGE GOODS DIRECTED TO A DESTINATION BEYOND its own route assumes, in the absence of an express contract upon the subject, the obligation to transport them to the place to which they are directed. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

12. CARRIERS CONNECTING.—Where property delivered to a carrier, consigned to a place beyond its route, is, at the end of such route, received by another carrier for transportation to the place of destination, it becomes answerable to the owner for any negligence or misfeasance in completing the carriage, whether there is an express contract or not. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

13. CARRIERS—LIABILITY FOR BAGGAGE.—If a common carrier, without any contract, express or implied, to carry baggage, received under the mistaken supposition that it belonged to a passenger who had bought a ticket over its road, undertakes to carry

such baggage, it assumes no duty to the owner, except to abstain from willful, wanton, or intentional injury to the property while in its possession. It is not liable for the loss of the property if the train carrying it breaks through a bridge which has become defective through the gross negligence of the carrier. (*Beers v. Boston etc. R. R. Co.*, 293.)

14. CARRIERS.—A PASSENGER IS A PERSON whom a common carrier has contracted to carry from one place to another, and has in the course of the performance of that contract received under his care either upon the means of conveyance or at the point of departure of that means of conveyance. The relation of carrier and passenger does not arise until the traveler puts himself in charge of the carrier for the purpose of being conveyed to his destination. (*Chicago etc. R. R. Co. v. Field*, 444.)

See Railroads, 3-12.

CAVEAT EMPTOR.

See Judicial Sales, 3; Landlord and Tenant, 3, 6.

CERTIFICATES OF DEPOSIT.

See Banks, 1.

CERTIORARI.

CERTIORARI.—Whether a court has jurisdiction must be determined from the record taken as a whole. (*Wulff v. Superior Court*, 78.)

CHANCERY PRACTICE.

See Equity, 3-5.

CHARITIES.

CHARITABLE INSTITUTIONS, WHAT ARE.—A society or institution may be charitable within the meaning of the law exempting the property of charitable institutions from taxation, though its benefits do not extend to the general public, but are restricted to its own members and their families. (*Hibernian Benev. Society v. Kelly*, 769.)

See Taxes, 5.

CHECKS.

See Banks, 2, 3; Gifts, 4.

CLAIMS.

See Executors and Administrators, 1; Mechanics' Liens, 2, 3.

CLOUD ON TITLE.

ADVERSE POSSESSION—PLEADING.—In an action to quiet title, an allegation of ownership in fee admits proof of any title, including that acquired by adverse possession. (*Rogers v. Miller*, 20.)

COLLATERAL ATTACK.

See Insane Persons, 5; Judgments, 3, 5, 6.

COLOR OF TITLE.

See Adverse Possession, 2.

COMMISSIONER'S REPORT.

See Equity, 3-5.

CONFIRMATION.

See Partition, 13; Judicial Sales, 1, 2.

CONFLICT OF LAWS.

See Husband and Wife, 2; Liens; States.

CONSENT.

See Appeal, 4, 14; Attorney and Client, 1, 2, 4; Rape.

CONSIDERATION.

See Contracts, 1, 2; Gifts, 3.

CONSTITUTIONAL LAW.

See Corporations, 8, 10, 12, 13; Rape; Statutes, 6-10, 12; Sunday, 3, 4.

CONSTITUTIONS.

CONSTITUTIONAL LAW—COAL MINING.—"DUE PROCESS OF LAW" AND "LAW OF THE LAND" are synonymous phrases. They refer to general, public law, operating upon all alike, and not to partial or private laws, such as those which make an arbitrary division of the business of coal mining and impose special burdens and restrictions upon the operators of one class of mines, whose product is shipped by rail or water, but which burdens and restrictions are not imposed upon the other. (*Harding v. People*, 344.)

See Taxes, 1, 3.

CONTRACTORS.

See Building Contracts; Contracts, 4.

CONTRACTS.

1. CONSIDERATION.—THE PRIVILEGE OF NAMING A CHILD is a sufficient consideration to support a promise to pay a designated sum to such child. (*Eaton v. Libbey*, 511.)

2. A PROMISE, THOUGH PAYABLE TO AN INFANT and given in consideration of the privilege of naming him, is enforceable by action. (*Eaton v. Libbey*, 511.)

3. STATUTE OF FRAUDS.—IF THE NAME OF A PARTY to be bound on a contract appears in the body of the memorandum thereof, instead of being signed at the end, this is a sufficient subscription, if the name was so written by him or his authorized agent. (*New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 516.)

4. CONTRACTS, THIRD PARTY WHEN NOT ENTITLED TO SUE THEREON.—Though a contract with a city for the doing of work upon its streets contains a provision that the contractor will pay all sums of money due from him for materials furnished or work done by others in connection with his contract, he is not answerable to persons who did work or furnished materials for one to whom he had sublet work to be done under his contract. (*Brower Lumber Co. v. Miller*, 307.)

5. A CONTRACT BETWEEN TWO PERSONS cannot be held to be for the benefit of a third from the mere fact that its breach, or

negligence in discharging the duties undertaken by it, has resulted in injury to another. (*Buckley v. Gray*, 88.)

6. **CONTRACT, ACTION UPON BY THIRD PERSON.**—The section of the Civil Code of California declaring that a contract made by one person for the benefit of a third, may be enforced by the latter, does not entitle the devisee under a will to maintain an action against the attorney of a testator, on the ground that the latter, acting under the directions of the testator to draft a will in the plaintiff's favor, was guilty of negligence and carelessness in the preparation of such will, by reason of which the testator's intention was not properly expressed, to the injury of the plaintiff. (*Buckley v. Gray*, 88.)

7. **POLICE POWER—GENERAL WELFARE—PENALTY.**—The right of the sovereign power to direct that which is for the welfare of the general public cannot be abridged by contract stipulations between individuals; nor can a party to a contract be mulcted into a penalty because of obedience to the mandate of the commonwealth. (*Fidelity Trust Co. v. Fridenberg*, 851.)

8. **THE ILLEGALITY OF A CONTRACT NEED NOT BE SET UP** as a defense, because no court will consciously lend its aid for its enforcement. (*Claffin v. United States etc. Co.*, 528.)

9. **A CONTRACT NOT TO MANUFACTURE NOR SELL A DESIGNATED BITTERS** is broken by the sale of the same bitters under another name, especially if the vendor represents to his customers that the bitters which he manufactures and sells are superior to the bitters which he had thus sold the right to manufacture and sell. (*Gregory v. Speiker*, 70.)

CONTRIBUTIONS.

See Cotenancy, 2.

CONVERSION.

See Cotenancy, 5, 7.

CORPORATIONS.

1. **CORPORATIONS—STATUTORY PREREQUISITE—ATTACK UPON CORPORATE EXISTENCE.**—There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers, and those acts required of individuals seeking incorporation, but not made prerequisite to the exercise of such powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter. (*Jones v. Aspen Hardware Co.*, 220.)

2. **CORPORATIONS—WHEN NEITHER DE JURE NOR DE FACTO.**—A company, intended to be a corporation, but which has failed to comply with the statute requiring it to file its certificate of incorporation with the secretary of state, and to pay a fee therefor, is neither a de jure nor a de facto corporation, but simply a voluntary association of individuals in the nature of a copartnership. (*Jones v. Aspen Hardware Co.*, 220.)

3. **A DE FACTO CORPORATION** can never be recognized in violation of a positive law. (*Jones v. Aspen Hardware Co.*, 220.)

4. **TO CONSTITUTE A DE FACTO CORPORATION** there must be either a charter or a law authorizing the creation of such a corporation, with an attempt, in good faith, to comply with its terms, and, also, a user of, or attempt to exercise, corporate powers under it. (*Jones v. Aspen Hardware Co.*, 220.)

5. CORPORATION, CHANGE IN.—A SUBSCRIBER to the stock of a corporation cannot defeat an action to recover the amount of his subscription, on the ground that the corporation formed is not the one to which he subscribed, because the certificate of incorporation fixed the date of its expiration at a time different from that specified in the preliminary agreement, when he has, after the issuing of stock, voted thereon, and otherwise recognized the existence of the corporation. (*Greenbrier Industrial Exp. v. Squires*, 884.)

6. CORPORATION, ACQUIESCENCE IN CHANGE IN.—A corporator who has received stock in the corporation, and voted thereon, and paid part of the first assessment, and who was present when the certificate of incorporation was read at the organization meeting, is charged with knowledge of a variance between such certificate and the preliminary agreement for incorporation, and cannot relieve himself from the effect of his subsequent acquiescence by proving that he did not hear the reading. It was his duty to inform himself when the means of information were thus open to him. (*Greenbrier Industrial Exp. v. Squires*, 884.)

7. CORPORATIONS—TAKING OF TITLE TO PROPERTY—CORPORATE POWERS—STATUTORY PREREQUISITE.—The taking of title to property by a corporation is the exercise of a corporate power; and, if the statute prohibits a corporation from exercising corporate powers until the fee for filing its certificate of incorporation has been paid, it cannot take title to property until the terms of the statute have been complied with. (*Jones v. Aspen Hardware Co.*, 220.)

8. CORPORATIONS — CONSTITUTIONAL LAW — LIABILITY OF STOCKHOLDERS.—If a constitutional provision, and legislation necessary to carry it into effect, makes each stockholder in a corporation individually and personally liable for his proportion of all its debts and liabilities, a subsequent statute, in so far as it attempts to exempt corporations formed under it from such liability, is obnoxious to the constitution and of no effect. (*McGowan v. McDonald*, 140.)

9. CORPORATIONS—LIABILITY OF STOCKHOLDERS—EVIDENCE.—The liability of a stockholder in a corporation for its debts is primary; and any evidence competent and sufficient to show the liability of the corporation is competent to show that of the stockholder. (*McGowan v. McDonald*, 149.)

10. CORPORATIONS—LIABILITY OF STOCKHOLDERS.—The provisions of section 287 of the Civil Code of California, stipulating that no corporation formed or existing before such "code" took effect should be affected by such provisions, unless the corporation should elect to continue its existence thereunder, relates to the formation and existence of the corporation and not to the liability of its stockholders. They remain personally liable in any case, under constitutional provisions imposing such liability. (*McGowan v. McDonald*, 149.)

11. CORPORATIONS — STOCKHOLDERS — ADMISSION BY PLEADINGS.—If an allegation in a complaint alleges that defendant is the owner of certain shares of stock in a corporation, his failure to deny such allegation constitutes an admission that he is such stockholder. (*McGowan v. McDonald*, 149.)

12. CONSTITUTIONAL LAW—CORPORATIONS—OBLIGATION OF CONTRACTS.—Under a constitutional provision that all general and special laws for the formation of corporations may be altered or repealed, the legislature has power to change the law relating to the liability of stockholders without impairing the obligation of contracts, although in so doing obligations are imposed upon stock-

holders for which they were not liable when they became such. (*McGowan v. McDonald*, 149.)

13. **CONSTITUTIONAL LAW—STATUTES VOID IN PART.**—An independent unconstitutional section of a statute exempting the stockholders in a corporation from personal liability, not entering into the general object and purpose of the act under which the corporation is formed, and which may be stricken out without prejudice to the other portions of the statute, does not defeat such other portions, or affect the validity of corporations organized and formed under such act. (*McGowan v. McDonald*, 149.)

14. **CORPORATIONS, INSOLVENT—LIABILITY FOR UNPAID STOCK SUBSCRIPTION.**—A subscriber to the stock of a corporation, with notice that his stock is to be sold unless assessments are paid, cannot, after the corporation becomes insolvent, escape liability for the unpaid portion of his subscription by voluntarily assigning his certificate in blank and delivering it to the treasurer of the corporation at the request of the latter. (*Burt v. Real Estate Exchange*, 858.)

15. **CORPORATIONS, INSOLVENT.—TRANSFERS OF STOCK** in a failing corporation, made by the transferrer for the purpose of escaping his liability as a shareholder to a person, who from any cause is incapable of responding in respect to such liability, are void as to creditors of the corporation and other shareholders, although, as between the parties themselves, the transfers may be valid. (*Burt v. Real Estate Exchange*, 858.)

16. **CORPORATIONS.—IF STOCK HAS BEEN ISSUED WITHOUT THE SUBSCRIPTION THEREFOR BEING PAID** in full, and is afterward transferred, the purchaser becomes personally liable for the amount of such subscription remaining unpaid. (*Visalia etc. R. R. Co. v. Hyde*, 136.)

17. **CORPORATIONS—LIABILITY OF STOCKHOLDERS.**—If the liability imposed by statute upon stockholders in a corporation is contractual, it may be enforced outside the limits of the state. (*Cushing v. Perot*, 835.)

18. **CORPORATIONS—LIABILITY OF STOCKHOLDER.—JUDGMENT AGAINST A STOCKHOLDER** in a corporation and execution levied on his real estate in the state where the corporation is created for an amount that exhausts his liability therein is a bar to an action in another state to enforce his liability as a stockholder. (*Cushing v. Perot*, 835.)

19. **CORPORATIONS — ASSESSMENT — LIABILITY OF PURCHASER OF STOCK.**—One purchasing stock in a corporation and causing a transfer thereof to be made to himself, and entered upon its books, becomes substituted to his vendor, and therefore holds such stock on the same conditions and subject to the same obligations as such vendor held it upon prior to the transfer. (*Visalia etc. R. R. Co. v. Hyde*, 136.)

20. **CORPORATIONS.—A STOCKHOLDER TRANSFERRING HIS STOCK** in a corporation after the levying of an assessment thereon, without the transfer being entered on the books of the corporation, remains liable for the amount of such assessment. (*Visalia etc. R. R. Co. v. Hyde*, 136.)

21. **CORPORATIONS.—AN ACTION TO RECOVER AN ASSESSMENT UPON THE BALANCE REMAINING UNPAID FOR STOCK** issued by a corporation cannot be resisted on the ground that the defendant did not own the stock when the liability was incurred to meet which the assessment was made, nor on the ground that the corporation has assets sufficient to meet all its liabilities. The obligation of the defendant rests upon the contract of subscription. The propriety of making the assessment or otherwise compel-

ling the payment of the subscription has been placed in the discretion of the board of trustees. (*Visalla etc. R. R. Co. v. Hyde*, 136.)

22. CORPORATIONS—INSOLVENCY—SALE OF PROPERTY.—If after a railway company has bought rails and distributed them along a projected line of road, it is enjoined from proceeding with the construction of the road before the rails are laid, and, becoming insolvent, resells the rails to the manufacturer in part payment of the unpaid purchase price, the resale is valid after possession taken thereunder, as against another creditor of the company who subsequently attaches them as its property. (*Johnson Co. v. Miller*, 833.)

23. CORPORATIONS—SALE OF PROPERTY.—After the operation of a corporation has become a matter of direct public interest and concern, its property, which is reasonably essential to the exercise of its franchises, cannot be sold by it or its creditors piecemeal, so as to stop its operations or defeat the objects of its charter, but all of its property which has not yet become a part of its structures, and for which it has no present use, may be thus sold. (*Johnson Co. v. Miller*, 833.)

24. CORPORATIONS—TRUST FUND.—As between a corporation and its creditors it does not hold its property in trust, or subject to a lien in favor of the creditors, in any other sense than does an individual debtor. (*First Nat. Bank v. Dovetail Body etc. Co.*, 435.)

25. CORPORATIONS, PREFERENCES BY.—A corporation, though insolvent, if still in possession of its property, may prefer one creditor to another. (*First Nat. Bank v. Dovetail Body etc. Co.*, 435.)

26. CORPORATIONS—PREFERENCES BY.—A mortgage executed by an insolvent corporation in pursuance of an agreement to execute it is valid, and cannot be set aside as a preference, though given for money borrowed to satisfy a debt for which the president and secretary were jointly liable with the corporation. (*First Nat. Bank v. Dovetail Body etc. Co.*, 435.)

27. CORPORATIONS INSOLVENT—PREFERENCES TO OFFICERS—PRESUMPTION—BURDEN OF PROOF.—The act of the directors of an insolvent corporation, or of a corporation in failing circumstances, in voting themselves preferences, is *prima facie* fraudulent, and the burden of proof is upon them to show that their debt is *bona fide*. (*Schufeldt v. Smith*, 628.)

28. CORPORATIONS, INSOLVENT—PREFERENCES BY, TO OFFICERS.—A corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another, and may so prefer its stockholders and officers who are *bona fide* creditors. (*Schufeldt v. Smith*, 628.)

29. CORPORATIONS—OFFICERS—LOANS BY—RIGHT TO SECURE.—Directors or officers of a corporation may loan it money or indorse for it, and have the same right to collect the debt or secure themselves as is accorded to other creditors of the corporation. (*Schufeldt v. Smith*, 628.)

30. CORPORATIONS—RECOVERY BY ALLEGED CORPORATION AS A COPARTNERSHIP.—Though a company, as plaintiff, may not be entitled to recover as a corporation, yet it may maintain the action as a copartnership, if the facts alleged show that the company is a copartnership and not a corporation. (*Jones v. Aspen Hardware Co.*, 220.)

31. CORPORATIONS—PLEADINGS EXISTENCE OF.—If an action is brought against a defendant in a name implying a corporation the complaint need not expressly allege that the defendant is a corporation. (*Lake Erie etc. R. R. Co. v. Griffin*, 465.)

32. CORPORATIONS—PROOF OF CORPORATE CAPACITY.—If a company is plaintiff in a suit, and relies on its corporate capacity, it must, as a general rule, assume the burden of proving it. (*Jones v. Aspen Hardware Co.*, 220.)

33. CORPORATION, ESTOPPEL TO DENY EXISTENCE OF.—One who signs a preliminary agreement for the formation of a corporation, but fails to acknowledge it, and who attends the organization meeting held by the stockholders, and, after the issuing of a certificate of stock to him, votes for directors, and pays part of the first assessment thereon, and recognizes the authority of the directors, only claiming that he had subscribed for a different amount of stock, is estopped from denying the corporate existence, and from urging technical defects in its organization. He, therefore, cannot resist an action to recover the balance of his subscription. (*Greenbrier Industrial Exp. v. Squires*, 884.)

34. CORPORATIONS—ESTOPPEL—DENIAL OF CORPORATE EXISTENCE.—One dealing with a corporation is not estopped to deny its existence unless the corporation has, at least, a de facto existence. Hence, though one assists in the organization of a company which is intended to be a corporation, and sells stock in trade to it, neither he nor his attaching creditor is estopped to deny the corporate existence of the company where the statute requires it to file its certificate of incorporation, and this has not been done, because, until that is done, the company has no existence, in fact, as a corporation. (*Jones v. Aspen Hardware Co.*, 220.)

35. FOREIGN CORPORATION, TRANSACTION OF BUSINESS BY, WHAT IS NOT.—The purchase by a foreign corporation of a promissory note in this state with no purpose of doing any other act here is not a transaction of business within the meaning of the statute requiring every such corporation, before transacting business in the state, to execute and cause to be recorded a power of attorney in the county clerk's office in each county where it has a resident agent. (*Commercial Bank v. Sherman*, 811.)

36. FOREIGN CORPORATION, SUIT BY, RIGHT TO PROSECUTE AGAINST NONRESIDENTS, WHEN WILL BE DENIED.—The courts of equity of this state are not open to foreign corporations as a matter of private right, but only as a matter of comity. If it appears that complete justice cannot be done here, or that the amount involved is small, and the defendant will be subjected to great and unnecessary expense and inconvenience, and that the investigation required will be surrounded, if conducted here, with many and great, if not insuperable, difficulties, which will all be avoided without special hardship to the plaintiff if suit is brought against defendant in the state where he lives, and where the alleged debt was contracted, and where personal service can be made upon him, our court should decline jurisdiction. (*National Teleph. etc. Co. v. Du Bois*, 503.)

See Attachment, 2; Injunctions, 1; Receivers, 1, 3-6.

COSTS.

1. COSTS.—WHERE NO OBJECTION IS MADE TO A COST BILL within the time allowed by law, the clerk of the court has no discretion to disallow any part thereof. (*Nicklin v. Robertson*, 790.)

2. COSTS IN EQUITY.—Parties who resist a suit to have a resulting trust enforced in favor of a widow out of lands standing in the name of her deceased husband, but which she claims were paid for out of her separate estate, ought not to be excused from the payment of the costs of suit, if a decree is entered against them after a defense interposed by them making necessary a trial and the expenditure of money. (*Berry v. Weldman*, 866.)

3. COSTS, RELIEF FROM TAXATION OF IN EQUITY.—If a decree grants costs to one of the litigants, the court has no discretion, after the lapse of the time within which it was authorized to grant relief from a judgment, to review or affect the taxation of costs on the ground that the party aggrieved by such taxation was prevented from applying for relief through his surprise, mistake, or excusable neglect. (*Nicklin v. Robertson*, 790.)

4. JUDGMENT, RELIEF FOR MISTAKE, ETC.—If the affidavits filed in support of a motion for relief against a cost bill do not show that it was taxed against the moving party through his mistake, inadvertence, surprise, or excusable neglect, no relief can be granted though the motion was made and heard within the time allowed by law. (*Nicklin v. Robertson*, 790.)

See Time.

COTENANCY.

1. TENANTS IN COMMON, WHO ARE.—Persons owning undivided interests in real property are tenants in common, though their titles were acquired by separate conveyances and at different times. (*Stevens v. Reynolds*, 422.)

2. A COTENANT BY THE PURCHASE OF AN OUTSTANDING TITLE acquires only the right to compel contribution to the expenses thereof, if he and his fellow tenants hold joint possession or otherwise occupy relations presumed to be of trust and confidence. (*Stevens v. Reynolds*, 422.)

3. COTENANT'S PURCHASE OF OUTSTANDING TITLE.—WHAT IS A REASONABLE TIME within which a cotenant must manifest his election to share in the purchase of an outstanding title by his fellow tenant must be determined by the peculiar circumstances of the case. Whatever delay has taken place must be consistent with perfect fair dealing and in nowise attributable to an effort to seek the advantage, while shirking the responsibilities, of the new acquisition. (*Stevens v. Reynolds*, 422.)

4. A COTENANT WISHING TO SHARE IN THE BENEFIT OF AN OUTSTANDING TITLE acquired by one of his fellow tenants must, within a reasonable time, elect to contribute to the expense of his acquisition. His refusal to so contribute may be either express or necessarily implied from his conduct. (*Stevens v. Reynolds*, 422.)

5. EACH COTENANT IS EQUALLY ENTITLED TO THE POSSESSION OF PERSONAL PROPERTY, and if the possession of one excludes the other, this does not amount to a conversion. (*Robinson v. Dickey*, 417.)

6. EACH COTENANT IS BOUND TO PRESERVE THE ESTATE IN GOOD FAITH for the equal benefit of all. Neither can acquire an outstanding title and thereby oust his cotenants, or do any act to injuriously affect their interests in the property when the relation between them is one of trust and confidence. (*Stevens v. Reynolds*, 422.)

7. A COTENANT OUT OF POSSESSION OF PERSONAL PROPERTY has no remedy at law against his cotenant in possession, unless the latter's dealing with the property amounts to a conversion. (*Robinson v. Dickey*, 417.)

8. A COPARCENER OCCUPYING MORE THAN HER SHARE of the common property is not liable to account for the profits realized, where she does not oust or exclude the other co-owners, though there is a statute imposing liability to account on joint tenants, tenants in common, and their personal representatives for profits realized from occupying the common property. (*Ward v. Ward*, 911.)

9. COTENANCY — LIABILITY FOR EXCLUSIVE OCCUPANCY.—A joint tenant, or a tenant in common, is not answerable by the common law for exclusively occupying the common property, or more than his share thereof, unless he agreed to pay rent, or has ousted his cotenants. This rule does not prevail in West Virginia, the courts of Virginia having construed the statutes of the state as making a cotenant liable for occupying more than his share, as well as for receiving more than his proportion of the rents, except when the property is susceptible of a several occupation by the different co-owners, in which event a cotenant in exclusive possession of a part, without hindering the others from the use of their shares, is not answerable to them for profits realized from the portion in his exclusive occupancy. (Ward v. Ward, 911.)

10. COTENANCY—LIABILITY FOR RENTS AND PROFITS.—A cotenant in exclusive possession is not liable for use and occupation or rents and profits until after demand made therefor by his cotenants. (Leake v. Hayes, 34.)

11. COTENANCY—REPAIRS.—At the common law, one cotenant could compel the others to unite in the expense of repairing a house or mill, by the writ of *de reparatione facienda*, if they, after request, refused to join in such repairs, but no recovery could be had for repairs already made. (Ward v. Ward, 911.)

12. COTENANCY—IMPROVEMENTS.—A cotenant called on in equity to account for rents or profits may deduct therefrom expenses for repairs, on the principle that he who seeks equity must submit to equity. (Ward v. Ward, 911.)

13. COTENANCY—IMPROVEMENTS.—One cotenant cannot compel another to make improvements on the common property, nor maintain an action against him personally to compel contribution to the expense of improvements made thereon without his consent, express or implied, nor fix it as a lien on his interest in the estate, except that by the writ of *de reparatione facienda* all the tenants could be compelled to unite in the expenses of the necessary repairs of the house or mill owned by them. (Ward v. Ward, 911.)

14. COTENANCY—IMPROVEMENTS.—The fact that when improvements were made on the common property, it was in the possession of the holder of an estate for life, does not deprive the cotenant making them of his right to be allowed in a suit for partition by sale the amount which such improvements enhanced the value of the property, when sold. (Ward v. Ward, 911.)

See Partition.

COUNSEL.

See Appeal, 12.

COUNTIES.

See Execution, 2, 3.

COURTS.

1. AMENDMENT AND CORRECTION OF RECORDS.—Every court of record has the inherent right to cause its acts and proceedings to be correctly set forth in its records; and whenever it is properly brought to the knowledge of the court that a record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the court has authority to correct its record in accordance with the facts, but it cannot, under the form of an amendment of its record, correct a judicial error, or make of record an order or judgment that was never in fact given. (Kaufman v. Shain, 139.)

2. AMENDMENT OF RECORDS—TIME.—The power of a court to amend its records to make them correspond with the facts, may be exercised at any time. (*Kaufman v. Shain*, 139.)

3. AMENDMENT OF RECORD AFTER TERM.—The common-law rule that a court record can be amended after the term, only when there is something in the record to amend by, does not extend to minute entries, or orders of court not forming a part of the judgment-roll. (*Kaufman v. Shain*, 139.)

4. AMENDMENT OF RECORD—CONCLUSIVENESS OF ACTION OF COURT.—A motion to amend a minute entry must be addressed to the court in which the entry is made, and the amount and kind of evidence requisite to satisfy that court as to what was its real order must rest with that court, its determination upon any conflict of evidence concerning the order actually made being conclusive. (*Kaufman v. Shain*, 139.)

5. AMENDMENT OF RECORD—ORDER OF DISMISSAL.—If an order dismissing an action is entered by the clerk in the minute-book in connection with an order sustaining a demurrer without argument, in the absence of plaintiff and of one of the codefendants, the court may at any time, or as late as three years afterward, upon satisfactory proof that there has been no order, in fact, made directing a dismissal of the action, correct the entry, and it may also set aside the judgment of dismissal at any time within six months after its entry. It is immaterial that the judgment was in favor of the moving party, or entered at his request. (*Kaufman v. Shain*, 139.)

6. PRORATE SALES—JURISDICTION.—A court of probate when ordering a sale of the real estate of a deceased person, is exercising a special statutory power, and not one that pertains to the ordinary settlement of the estate. Such power must be strictly followed or the order is void. (*Dorrance v. Raynsford*, 266.)

COVENANTS.

1. COVENANTS, WHEN PERSONAL.—A covenant appended to a lease of real property, whereby the covenantor becomes surety for the prompt and full payment of the rent and performance of the covenants as specified in the lease, is a personal covenant, and an action thereon may be maintained by the administrator of the lessor, and not by his heirs, and the recovery is not restricted to nominal damages, but extends to the entire damages arising from the non-performance of the covenant. (*Walsh v. Packard*, 508.)

2. DAMAGES.—BREACH OF CONTRACT or covenant entitles the injured party to recover such damages only as proximately results from such breach and were within the contemplation of the parties when the contract was entered into. Remote and speculative damages cannot be recovered. (*Hamilton v. Feary*, 485.)

See *Landlord and Tenant*, 5, 9, 12-14.

CRIMINAL LAW.

CRIMINAL LAW, COMMISSION OF AN OFFENSE DIFFERENT FROM THAT INTENDED.—If one intentionally commits a crime, he is responsible criminally for the consequences of the act, though the offense proves different from what he intended. (*Commonwealth v. Murphy*, 496.)

See *Appeal*, 15-17; *Forgery*; *Homicide*; *Injunctions*, 8, 9; *Instructions*, 4-6; *Rape*.

CROSS-EXAMINATION.

See *Witnesses*, 3, 4.

CROSSINGS.

See Railroads, 18-25.

DAMAGES.

THE MEASURE OF DAMAGES FOR MANUFACTURING AND SELLING A MEDICAL COMPOUND which the defendant had agreed not to manufacture nor sell is not the profits which the defendant has realized in violation of his agreement, but the value of the business lost to the plaintiff thereby. The profit made by the defendant may be considered in evidence, if it should be shown to correspond in whole or in part with the loss of the plaintiff. (*Gregory v. Speiker*, 70.)

See Appeal, 18; Building Contracts; Covenants; Execution, 7, 8; Husband and Wife, 1; Injunctions, 13-15; Landlord and Tenant, 12-14; Municipal Corporations, 14, 15.

DEATH.

See Evidence, 5-8; Insurance, 41; Marriage and Divorce, 21.

DECLARATIONS.

See Agency, 2, 3; Insurance, 24, 25.

DEEDS.**1. DEEDS—CONDITIONS—FORFEITURE—POLICE POWER.**

The erection of a fire escape in compliance with police power regulations is not a violation of a condition in a deed prohibiting the construction of an addition to a building beyond a certain height. No forfeiture can be asserted by reason of such erection. (*Fidelity Trust Co. v. Fridenburg*, 851.)

2. DEEDS—CONDITIONS—FORFEITURE—LACHES.—If, in

violation of a condition in a deed that buildings standing on the property conveyed shall be torn down within one year from the time of the conveyance, and that thereafter no building shall be maintained upon the property exceeding a certain height, buildings are so erected and maintained for more than twenty-five years before the grantor or his successor in interest brings suit in equity to compel their removal, he cannot, ten years after the dismissal of his bill for gross laches in seeking to enforce his right, maintain an action in ejectment to enforce a forfeiture of the estate for such violation of the condition in the deed. (*Fidelity Trust Co. v. Fridenburg*, 851.)

3. A CONVEYANCE BY QUITCLAIM, made by a purchaser in good faith for a valuable consideration, having no notice of a prior unrecorded conveyance, vests title in the grantee and prevails over such prior conveyance, if first recorded. (*Wilhelm v. Wilken*, 743.)

4. A PURCHASER RECEIVING A QUITCLAIM DEED is entitled to be regarded as a bona fide purchaser, and to be protected against a prior, but subsequently recorded, deed, especially when the subject of the deed is particularly described realty, with all the appurtenances, and all the right, estate, title, and interest of the grantor, with an habendum to the grantee, his heirs and assigns, forever. Such a deed implies that the grantor professes to have an interest in the premises which he could convey. (*Wilhelm v. Wilken*, 743.)

See Insane Persons, 1.

DE FACTO.

See Corporations, 2-4.

DEFAULT.

See Intervention; Judgments, 3.

DEFINITIONS.

Charitable institutions. (*Hibernian Ben. Soc. v. Kelly*, 769.)
"Land claim." (*Rogers v. Miller*, 20.)
Passenger. (*Chicago etc. R. R. Co. v. Field*, 444.)
"Railroads." (*Funk v. St. Paul etc. Ry. Co.*, 608.)
"Remaining." (*Lake v. Minnesota etc. Relief Assn.*, 533.)
"Street railway." (*Funk v. St. Paul etc. Ry. Co.*, 608.)
"Taking poison." (*Travelers' Ins. Co. v. Dunlap*, 855.)
Tenants in common. (*Stevens v. Reynolds*, 422.)

DE JURE

See Corporations, 2.

DELIVERY.

See Carriers, 4-9; Gifts, 1, 2.

DEMURRER TO EVIDENCE.

See Pleading, 5.

DEVISE

See Estates, 1-4.

DIRECTING VERDICT.

See Trial, 5.

DISCRIMINATION.

See Sunday, 5; Wills, 4, 5.

DISSOLUTION.

See Attachment 3, 4; Partnership, 4.

DIVORCE.

See Marriage and Divorce.

DOMICILE.

See Elections, 4, 5.

DUE PROCESS OF LAW.

See Constitutions.

DYING DECLARATIONS.

See Evidence, 2.

EJECTMENT.

See Partition, 5.

ELECTIONS.

1. ESTOPPEL—OFFICERS—ELECTIONS.—Street-corner prophecies of success and promises of assistance, made by an officer to a candidate for election to the same office, do not estop the promisor from denying that any election was authorized by law, particularly

where it does not appear that he was a candidate, or that he voted, and where it does not appear that any reliance was placed upon such prophecies and promises. (*McPhail v. People*, 306.)

2. **ELECTIONS—REGISTRATION.**—The right to vote at any election, general or special, resides in those possessing the constitutional qualifications, subject only to compliance with such reasonable provisions respecting registration and regulating the exercise of the right, as the legislature may provide, but the mere failure or neglect of the legislature to make any provision for registration does not operate to deprive those having the constitutional qualifications from exercising the elective franchise. (*Stallcup v. Tacoma*, 25.)

3. **ELECTIONS—COMPLIANCE WITH STATUTE.**—Courts will not undertake to disfranchise an elector by rejecting his ballot, where his choice can be gathered from it, viewed in the light of the circumstances surrounding the election, unless the statute declares that a strict compliance with its requirements by the elector is essential to have his ballot counted. (*Young v. Simpson*, 254.)

4. **ELECTIONS—TEMPORARY ABSENCE—DISQUALIFICATION.**—An elector's mere temporary absence from his precinct, caused by business and prolonged by sickness, and without any intention of changing his residence, does not disqualify him if he returns to the precinct of his residence in time to vote. (*Young v. Simpson*, 254.)

5. **ELECTIONS—NONRESIDENCE—ILLEGAL BALLOT.**—A ballot cast by one who has not maintained a residence for the length of time required by statute is illegal, and should not be counted. (*Young v. Simpson*, 254.)

6. **ELECTIONS—PARTICULAR DESIGNATION CONTROLS CROSS AFTER PARTY EMBLEM.**—If a voter, under a statute requiring an elector, who desires to vote for all the nominees of a particular party, to place a cross opposite the emblem of such party in the appropriate place, but, if he desires to vote partly for the nominees of one party and partly for those of another, to place a cross opposite the names of the candidates for whom he elects to vote, particularizes his intention, after putting a cross opposite a party emblem, by placing a cross opposite the names of certain candidates upon the ticket, the particular designation controls, and a candidate opposite whose name there is no mark is not entitled to the vote. (*Young v. Simpson*, 254.)

7. **ELECTIONS—CROSS AT LEFT OF NAME INSTEAD OF TO THE RIGHT.**—Though the customary and better practice is to put a cross to the right of the name of the candidate intended to be voted for, yet, if the statute does not designate whether the cross shall be placed to the right or to the left of the candidate's name, a ballot marked with a cross to the left and before the candidate's name should be counted. (*Young v. Simpson*, 254.)

8. **ELECTIONS—DEFECTIVE MARKING OPPOSITE PARTY EMBLEM.**—Though a voter designates his choice by placing a cross, not in the space prepared for that purpose, but fifteen-sixteenths of an inch to the right of the square opposite the emblem of the party whose candidates he wishes to vote for, the ballot should be counted, as the intent of the voter is clearly manifest. (*Young v. Simpson*, 254.)

EQUITY.

1. **EQUITY JURISDICTION—NEW CONTINGENCIES.**—A court of equity should adapt its practice as far as possible to the existing state of society, and apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and should not, from too strict an adherence to the

forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy. (*Columbian Athletic Club v. State*, 407.)

2. **EQUITY—REMEDY BY ONE OUT OF POSSESSION.**—If one out of possession can assert only an equitable title, he may have his equitable remedy. (*Brown v. Wilson*, 228.)

3. **CHANCERY PRACTICE—FINDINGS BEYOND THE ISSUES.**—The report of facts by a commissioner, when not supported by the pleadings, presents a case of error appearing on the face of the report, and exceptions thereto may therefore be sustained. (*Ward v. Ward*, 911.)

4. **CHANCERY PRACTICE—EXCEPTIONS TO COMMISSIONER'S REPORT.**—Where a commissioner is appointed to make inquiry and report facts, his report, if not excepted to within ten days, must be taken, as against all adult parties, to be correct, and will not be examined except for errors appearing on its face. (*Ward v. Ward*, 911.)

5. **CHANCERY PRACTICE.—EXCEPTION TO THE REPORT OF A COMMISSIONER** may be made more than ten days after the filing thereof. On such exception the party is not entitled to take evidence, but can only contend that the commissioner reached an erroneous conclusion on the evidence taken by him. (*Ward v. Ward*, 911.)

See Corporations, 36; Costs, 2, 3; Injunctions; Insurance, 10; Partition, 21; Trial, 6.

ESTATES.

1. **DEVISE—ESTATE CREATED BY.**—If the primary gift made by will vests in the first taker an absolute interest in personal, or an absolute fee simple in real, property, it exhausts the entire estate, so that there can be no valid remainder. (*Mansfield v. Shelton*, 285.)

2. **DEVISE IN FEE** made by will cannot be reduced to a life estate by mere implication from a subsequent gift over, but may be by subsequent language clearly indicating such intent and equivalent to a positive provision. (*Mansfield v. Shelton*, 285.)

3. **DEVISE.—A LIFE ESTATE** expressly created by will is not converted into a fee absolute or qualified, or into any other form of estate greater than for life, merely by reason of there being coupled with it a power of disposition, however general or extensive. (*Mansfield v. Shelton*, 285.)

4. **DEVISE INCLUDING POWER OF DISPOSITION—WORDS VESTING LIFE ESTATE.**—Under a devise by a husband to his wife of the residue of his estate, "to be used and appropriated by her so much as she may wish for her happiness, without any restrictions, or limitations whatever," and upon her decease, the payment of her debts, and the settlement of her estate, the remainder to vest in a trustee in trust for the children of a third party during their lives, the wife takes a life estate only, and the trust to take effect upon her death is valid. (*Mansfield v. Shelton*, 285.)

5. **ESTATES—FORFEITURE—LACHES.**—No court, either of law or equity, declares an estate forfeited unless compelled to do so by unbending and rigid rules, and certainly never when the complaining party has a remedy in an action for damages, and has stood for years without asserting by action his intention to insist upon a forfeiture. (*Fidelity Trust Co. v. Fridenburg*, 861.)

ESTOPPEL.

1. **ESTOPPEL—JUDGMENT.**—To make a judgment a technical bar. It must appear to have been between the same parties. (*Bamf v. Chicago etc. R. R. Co.*, 618.)

2. ESTOPPEL—JUDGMENT—LACHES—GRANTEE.—If a party, by his negligence and laches, loses his right to impeach the validity of a judgment by extraneous evidence, one claiming under him is estopped by the judgment. (*Brown v. Wilson*, 228.)

See Corporations, 33, 34; Elections, 1; Judgments, 7; Judicial Sales, 1; Landlord and Tenant, 1; Marriage and Divorce, 9; Quo Warranto, 2; Taxes, 6.

EVIDENCE.

1. EVIDENCE—PECULIAR KNOWLEDGE OF ONE PARTY—BURDEN OF PROOF.—When a fact is peculiarly within the knowledge of a party, he must produce the necessary evidence to prove it. (*Lake v. Minnesota etc. Relief Assn.*, 538.)

2. EVIDENCE—DYING DECLARATIONS ARE NOT ADMISSIBLE IN A CIVIL ACTION. Their admission is, by the common law, restricted to prosecutions for homicide. (*Thayer v. Lombard*, 607.)

3. EVIDENCE.—AN UNANSWERED LETTER containing the writer's argumentative presentation of his view of his rights and grievances is a declaration in his own behalf and inadmissible in his favor. (*Dempsey v. Dobson*, 816.)

4. LAWS OF OTHER STATES.—The courts of West Virginia will, under its code, take judicial notice of the laws of other states, and, in exercising this power, may consult the statutes thereof or any other book. (*Wilson v. Phoenix Powder Mfg. Co.*, 890.)

5. THE LAWS OF ANOTHER STATE ARE PRESUMED to be the same as our own, and this presumption extends to its statutory as well as to its common law. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

6. EVIDENCE—PRESUMPTION—SUICIDE.—The love of life is ordinarily a sufficient inducement for its preservation, and, in the absence of proof that death resulted from other than natural causes, suicide will not be presumed. (*Hale v. Life Indemnity etc. Co.*, 616.)

7. EVIDENCE—PRESUMPTION—SUICIDE.—When death may have resulted from accident, mistake, or suicide, it should not be presumed to be on account of suicide, but rather from accident or mistake. (*Hale v. Life Indemnity etc. Co.*, 616.)

8. EVIDENCE—DEATH—PRESUMPTION OF.—A person who suddenly and mysteriously disappears, and is not seen, heard of, or known to be living, for seven years thereafter, is presumed to be dead; but the presumption of death does not arise until the expiration of that time, unless it is shown that, in the mean time, he has come in contact with some specific peril of such nature as to quicken the operation of time. (*Mutual Benefit Co's Petition*, 814.)

9. STATUTE OF FRAUDS—MEMORANDUM, EVIDENCE TO PROVE MEANING OF LETTERS IN.—The meaning of the letters "F C" in a memorandum of sale, when they are technical abbreviations used in the wool trade, may be shown by parol evidence. (*New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 516.)

10. STATUTE OF FRAUDS—SALE.—PAROL EVIDENCE is not competent to contradict or vary the terms of a memorandum of sale to prove what was intended, but the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown to apply it to the subject matter. (*New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 516.)

11. EVIDENCE.—THE PLEADINGS IN another case may be received in evidence to prove an admission made therein by the party against whom they are offered. (*Wilson v. Phoenix Powder Mfg. Co.*, 890.)

12. ESTOPPEL—PARTIES.—A judicial record is not admissible against a party to it in favor of a stranger thereto, when offered as an estoppel. (*Wilson v. Phoenix Powder Mfg. Co.*, 890.)

13. EVIDENCE OF FORM OF FOREIGN JUDICIAL PROCEEDINGS.—The law and practice determining the form of judicial proceedings in a foreign court may always be shown by parol or other evidence. (*Fisher v. Fielding*, 270.)

14. EVIDENCE, FOREIGN RECORDS, AUTHENTICATION OF, WHERE THE JUDGE IS ALSO THE CLERK.—Though the statute requires the record of a foreign court to be certified by the clerk and authenticated by the judge thereof, it is admissible when certified by the judge to be a complete and correct copy, if he is also the clerk of the court. (*Wilson v. Phoenix Powder Mfg. Co.*, 890.)

15. CORPORATION—EVIDENCE.—PASS-BOOKS OF DEPOSITORS in a bank are admissible in evidence in an action against its stockholders to enforce their personal liability for the balance due as shown by such books. (*McGowan v. McDonald*, 149.)

See Accessories, 2; Homicide, 4; Trial, 1-3.

EXECUTION.

1. AN EXECUTION ISSUED BY THE CLERK OF A COURT OTHER THAN THE ONE ENTERING JUDGMENT, unless authorized by some special statute, is void. (*Willamette Real Estate Co. v. Hendrix*, 800.)

2. COUNTIES—EXECUTION AGAINST.—An execution may issue against a county upon a judgment rendered against it, and may be levied upon any property owned by such county not needed for governmental or public purposes. (*State v. Buckles*, 478.)

3. EXECUTION AGAINST COUNTIES—FAILURE TO MAKE RETURN—LIABILITY OF SHERIFF.—A sheriff who fails to make return of an execution issued against a county within the time provided by law, is liable in nominal damages, without reference to the question whether or not there was any property out of which he could have made a levy and return. (*State v. Buckles*, 476.)

4. EXEMPTIONS—IMPLEMENTS OF TRADE.—A photographic lens used by a photographer in his business is an implement of his trade, and, as such, is exempt from attachment and execution. (*Davidsen v. Hannon*, 282.)

5. SHERIFF'S SALE.—THE CONFIRMATION OF A SHERIFF'S SALE cannot cure infirmities in the judgment. Such a confirmation is a determination of the regularity of the proceedings under the writ only, and supplies all defects, except those founded on the want of jurisdiction. (*Willamette Real Estate Co. v. Hendrix*, 800.)

6. SHERIFF'S DEED, RECITALS, WHEN NOT CONCLUSIVE. Though a sheriff's deed recites that the property was sold under an execution issued out of the county court, such recital cannot prevail in the face of a copy of the execution, received in evidence, from which it appears to have been issued out of another court. (*Willamette Real Estate Co. v. Hendrix*, 800.)

7. EXECUTION—WRONGFUL SEIZURE—REMOTE DAMAGES.—After part of a merchant's stock of goods has been wrongfully levied upon, seized, and carried away by virtue of a writ of execution, the loss resulting to him by reason of his inability to continue business, and his being compelled to sell the remainder of his stock for less than its value, is too remote a consequence of such wrongful levy and seizure to form the basis of an assessment for damages. (*Casper v. Klippen*, 604.)

8. EXECUTION—WRONGFUL SEIZURE—REMOTE DAMAGES—LOSS OF PROFITS.—Though part of a merchant's stock of goods is wrongfully levied upon, seized, and carried away, by virtue of a writ of execution, damages caused by the loss of future profits, occasioned by the business being broken up, are too speculative, remote, and uncertain to be allowed. (*Casper v. Khippen*, 604.)

See *Homestead*, 8-6; *Insurance*, 18; *Pledge*, 5.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS.—In presenting claims against estates, it is sufficient if the statement shows the nature and amount of the claim with sufficient precision to bar another action, and discloses a prima facie right to recover. (*Parrett v. Palmer*, 479.)

2. EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY FOR BORROWED MONEY.—An administrator is personally liable for money borrowed by him in his representative capacity without an order of court, and used in the payment of the debts of the estate generally, other than existing debts created by the deceased, or for administration expenses, or for the actual preservation of the estate. (*First Nat. Bank v. Collins*, 695.)

3. EXECUTORS, LIABILITY OF ESTATE FOR MONEYS RECEIVED BY.—If an executor having authority to sell real property at public auction receives a bid for it at a private sale, together with a deposit of money on account of such bid, his action in so doing is entirely unauthorized, and cannot be regarded as in his official capacity. The estate, therefore, cannot be held liable for such deposit, unless it is shown to have been actually made a part of the assets of the estate by being used for its benefit, or accounted for to it. (*Schlicker v. Hemenway*, 116.)

4. PARTIES, DEFECT OF.—The administrator of a deceased husband, where there are no debts, and no relief is sought against the personal estate, is not a necessary party to a suit by the wife of the deceased to compel a conveyance to her of lands standing in his name at his death, but which she claims were purchased with her moneys, and held in trust for her. (*Berry v. Weidman*, 866.)

5. PROBATE SALES, WHEN MAY BE ORDERED.—Real estate of a deceased person vests immediately upon his death in his heirs or devisees, and can be taken from them only to satisfy some claim, existing against him in his lifetime, or some condition arising in the settlement of his estate which makes a sale of the land necessary or advantageous, and then only in the manner pointed out by law. (*Dorrance v. Raynsford*, 266.)

6. PROBATE SALES—JURISDICTION, HOW ACQUIRED.—An order of a probate court directing the sale of land of a deceased person, and the administrator's deed given pursuant to such sale, can be valid only when public notice of the application to sell has been given to all parties adversely interested in the estate. The burden of proof is upon the person claiming under the administrator's deed to show that such notice was given. (*Dorrance v. Raynsford*, 266.)

7. A JUDGMENT AGAINST AN ADMINISTRATOR OR EXECUTOR for money due from him, as such, to the estate is, in the absence of fraud or collusion, binding upon the sureties on his bond, and cannot be collaterally attacked in an action on the bond. (*Nevitt v. Woodburn*, 815.)

8. EXECUTORS AND ADMINISTRATORS—SUIT ON EXECUTOR'S BOND—DEMAND.—In a suit upon an executor's bond, a demand is not necessary where the statute does not require it. (*Nevitt v. Woodburn*, 815.)

9. EXECUTORS AND ADMINISTRATORS—JUDGMENT—RECOVERY ON EXECUTOR'S BOND BY ADMINISTRATOR DE BONIS NON.—The fact that a judgment against an executor, who has been removed from office, does not order the amount to be paid to the administrator de bonis non, who is not appointed at the time the judgment is rendered, does not prevent a recovery, on the executor's bond, by such administrator, when he is appointed, of the amount found due from the executor to the estate. (*Nevitt v. Woodburn*, 315.)

10. EXECUTORS AND ADMINISTRATORS—REMOVAL OF EXECUTOR PENDING SETTLEMENT OF ACCOUNTS—LIABILITY OF SURETY.—A surety on an executor's bond is not relieved from liability for an amount found due from the executor to the estate, where the original judgment was rendered against the executor, as such, before his removal, though after such removal this judgment was reversed on appeal, the cause remanded with directions to reduce the judgment, and a new and final judgment was entered against him individually, as the court did not lose jurisdiction. (*Nevitt v. Woodburn*, 315.)

See Courts, 6; Limitations of Actions, 6; Pleading, 4.

EXEMPTIONS.

See Execution, 4; Homestead; Public Lands, 8, 9; Taxes, 3-7.

FEEES.

See Attorney and Client, 4, 5.

FELLOW-SERVANTS.

See Master and Servant, 3-5; Railroads, 14, 15.

FIRE COMMISSIONERS.

See Municipal Corporations, 3, 4.

FIRE ESCAPES.

See Deeds, 1.

FIRE LIMITS.

See Injunctions, 3, 4.

FIRES.

See Municipal Corporations, 2, 3; Railroads, 26-28.

FIXTURES.

1. FIXTURES—GAS.—AS BETWEEN MORTGAGOR AND MORTGAGEE, gas fixtures, consisting of chandeliers and burners, screwed to the ends of gaspipes projecting from the walls and ceilings of the mortgaged building, and which can be readily unscrewed, are not a part of the realty. (*Capehart v. Foster*, 582.)

2. FIXTURES—STEAM RADIATORS.—AS BETWEEN MORTGAGOR AND MORTGAGEE, steam radiators attached at the floor of the mortgaged building to steampipes, by being screwed to those pipes, are a part of the realty. (*Capehart v. Foster*, 582.)

3. FIXTURES—ELECTRIC ANNUNCIATOR.—AS BETWEEN MORTGAGOR AND MORTGAGEE, an electric annunciator attached to the wall of the mortgaged building and to all the wires of the electric bell system thereof, is a part of the realty. (*Capehart v. Foster*, 582.)

4. FIXTURES—CIGAR COUNTER.—AS BETWEEN MORTGAGOR AND MORTGAGEE, where the evidence is conflicting as to whether a cigar counter is fastened to the floor of the mortgaged building, and is specially designed for use therein, it is a question for the jury to say whether or not the counter is a part of the realty. (*Capehart v. Foster*, 582.)

5. FIXTURES—OFFICE DESK.—AS BETWEEN MORTGAGOR AND MORTGAGEE, an office desk, about twenty-five feet long resting on a tile floor of the mortgaged building, between projections in the walls, to which it is fastened by means of screws, the space behind the desk forming an office for the building, is a part of the realty. (*Capehart v. Foster*, 582.)

FORFEITURE.

See Deeds, 1, 2; Estates, 5.

FORGERY.

1. FORGERY.—TO CONSTITUTE FORGERY, there must be the making of a writing which falsely purports to be the writing of another. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. To make it such there must be a design to pass as the genuine writing of another person, that which is not his writing. (*People v. Bendit*, 186.)

2. FORGERY AT COMMON LAW AND UNDER STATUTE.—As to what constitutes forgery of instruments which are subjects of forgery the common law and the statute—California Penal Code, section 470—do not differ. Under both, forgery consists in the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. The common law and the statute differ only as to the kinds of instruments which are the subject of forgery. (*People v. Bendit*, 186.)

3. FORGERY BY AGENT.—If one fraudulently executes and issues an instrument purporting on its face to be executed by him, as the agent of a principal therein named, he is not guilty of forgery, though he has in fact no authority from such principal to execute the writing. (*People v. Bendit*, 186.)

FRAUD.

PLEADING FRAUD—STATUTE OF LIMITATIONS.—One seeking relief on the ground of fraud occurring more than three years prior to the filing of his complaint must allege that he did not discover such fraud until within three years before such filing. (*Castro v. Gell*, 84.)

See Carriers, 6, 7; Judicial Sales, 4; Limitations of Actions, 8.

GIFTS.

1. GIFTS.—DELIVERY OF PROPERTY with intent to give is absolutely necessary to the validity of a gift. Words alone are not sufficient. (*Wagoner's Estate*, 828.)

2. GIFTS—DELIVERY.—A gift of a bond with a warrant of attorney to confess judgment, when delivered by the donor to a third party to be held by him until the donor's death and then given to the donee, who has knowledge of this arrangement, is a valid gift in trust, which becomes absolute by delivery by the trustee to the donee after the donor's death, notwithstanding the fact that

the bond is to bear interest during the donor's life, and this mistake is rectified by the indorsement of the payment of interest on the bond without the actual payment thereof. In such case, the fact that the bond is subject to redelivery to the donor in case he outlives the donee does not invalidate the gift, if there is no express provision for such redelivery reserved in the trust. (*Wagoner's Estate*, 828.)

3. A GIFT REQUIRES NO CONSIDERATION, and depends upon no agreement, but upon the voluntary act of the donor, only, and is accomplished by a delivery of the subject of the gift. (*Pickslay v. Starr*, 740.)

4. GIFT, CHECK ON BANK AS.—The delivery to the donee of the check of the donor is a valid gift of the sum therein named, when such check is directed to a bank having funds of the donor, which he expects it to pay, and which it does pay, on presentation by the donee. (*Pickslay v. Starr*, 740.)

5. HUSBAND AND WIFE, PRESUMPTION OF GIFT.—The fact that a conveyance of land is taken in the name of a husband, the purchase money for which was furnished by his wife, does not create the presumption of a gift from her to him. (*Berry v. Weidman*, 866.)

6. GIFT, MISTAKE AS A GROUND OF AVOIDING.—A gift intentionally made, and perfected by delivery, cannot be avoided on the ground that the donor when making it temporarily forgot a business arrangement into which he had entered with the donee and on account of which he would have withheld the gift, had such arrangement been present in his mind. (*Pickslay v. Starr*, 740.)

See Husband and Wife, 3, 4, 7.

HIGHWAYS.

See Nuisance, 2; Railroads, 2.

HOMESTEADS.

1. HOMESTEAD—URBAN PROPERTY—UNDIVIDED BLOCKS. If blocks in the platted and laid out part of an incorporated city are generally subdivided on the plat into lots of various sizes, the owner of a part of one block which has not been thus subdivided, and which is urban in character, is entitled to hold only a tract equal in area to the average size of platted lots in that part of the city. (*Heidel v. Benedict*, 592.)

2. HOMESTEADS—JUDGMENT LIENS AGAINST.—As between a judgment creditor and his debtor in possession of a homestead within the statutory size and value, the judgment, on a debt created since the record of the homestead, creates no lien on the homestead property. (*Macke v. Byrd*, 649.)

3. HOMESTEADS—EXCESS—JUDGMENT LIENS AGAINST.—As against the homestead debtor, a judgment reaches the excess of quantity or value of the homestead beyond the statutory maximum only after an ascertainment and setting out, of the part to which the exemption applies. Until such excess is defined and set apart, it cannot be subjected to execution. (*Macke v. Byrd*, 649.)

4. HOMESTEADS—EXCESS—JUDGMENT LIENS.—If, after land has been set apart as a homestead to an execution defendant, another judgment is obtained against him, and he then sells the homestead for a sum in excess of the statutory limit of homestead exemption, the lien of the last judgment does not attach to such excess as against the purchaser, in the absence of an ascertainment of such excess and a setting apart of the homestead before the sale. (*Macke v. Byrd*, 649.)

5. HOMESTEADS—DIVESTITURE OF EXEMPTIONS.—SUBSEQUENT PURCHASERS of land from a homestead claimant, after the rights of a bona fide purchaser at execution sale against him have attached, cannot defeat the title of the execution purchaser by proof of a latent equity in favor of the homestead claimant, of which such purchaser had no notice. (*De Lany v. Knapp*, 160.)

6. HOMESTEADS—DIVESTITURE OF EXEMPTION—RECONVEYANCE—EXECUTION CREDITOR AS BONA FIDE PURCHASER.—An execution creditor who purchases land bona fide and for value at execution sale against a homestead claimant upon a levy made after the latter has conveyed the land, and its reconveyance to him, is protected against every secret trust arising from such conveyance by the homestead claimant without consideration to protect his title against his creditors. In such case the execution creditor is protected against latent equities of which he has no notice, although he is in position to defeat the transfer made by the homestead claimant. (*De Lany v. Knapp*, 160.)

7. HOMESTEADS—REINVESTMENT OF PROCEEDS.—A judgment debtor may sell his homestead and invest the proceeds in another, and carry the exemption of the first homestead into the one subsequently acquired, even as against debts created before the acquisition of the latter. (*Macke v. Byrd*, 649.)

See Public Lands, 8, 9.

HOMICIDE.

1. MURDER.—ONE CANNOT BE GUILTY OF MURDER IN THE FIRST DEGREE UNLESS the act was perpetrated not only with intent to kill, but also with deliberation and premeditation. If a mortal wound is inflicted in a sudden transport of passion, excited by what was then said and by preceding events which, for a time, destroy reason and deprive the accused of capacity to reflect, or while under the influence of some sudden and uncontrollable emotion excited by the final culmination of his misfortunes, he is not guilty of murder in the first degree. (*People v. Barberi*, 717.)

2. MURDER.—DELIBERATION AND PREMEDITATION imply a capacity at the time to think and reflect, sufficient volition to make a choice, and by the use of those powers to refrain from doing a wrongful act. (*People v. Barberi*, 717.)

3. MURDER, EVIDENCE OF PRIOR RELATIONS OF THE PARTIES.—On the trial of a woman for the murder of a man with whom she had had illicit relations, she is entitled to have laid before the jury all testimony tending to prove the condition of her mind at the time, and this condition of her mind cannot be ascertained solely by what took place at the time of the homicide. The prior relations of the parties are competent for the consideration of the jury, if they were connected with the tragedy, and of such a character as to produce a powerful influence on her mind at the time she inflicted the fatal wound. (*People v. Barberi*, 717.)

4. MURDER—EVIDENCE, ERROR IN EXCLUDING CORROBORATION OF THE DEFENDANT.—Where, on a trial for murder, the prior relations of the parties are a proper subject for the consideration of the jury to enable them to determine the condition of the mind of the accused at the time of the homicide, an error of the court in excluding the testimony of third persons entitles the defendant to a new trial, though she was herself permitted to testify fully on that subject, unless the truth of her statements was conceded. (*People v. Barberi*, 717.)

See Appeal, 17; Evidence, 2; New Trial; Trial. 9.

HUSBAND AND WIFE.

1. MARRIED WOMAN, DAMAGES RECOVERABLE BY, FOR PERSONAL INJURIES.—A married woman, in an action to recover damages for personal injuries, is entitled to have considered as elements of damage the impairment of her capacity to perform labor, if the statutes of the state provide that in all cases where married women shall, by their own labor, earn wages, payment shall be made to them therefor, and that the earnings of every married woman from her trade, business, labor, or services shall be her sole and separate property. (*Harmon v. Old Colony R. R. Co.*, 499.)

2. HUSBAND AND WIFE—PROPERTY RIGHTS—HOW AFFECTED BY MARRIAGE.—The respective rights of husband and wife in their personal property acquired by them by their marriage are determined by the law of the place of their matrimonial domicile, and this, in the absence of any contrary intention, is the domicile of the husband at the time of the marriage. (*Parrett v. Palmer*, 479.)

3. HUSBAND AND WIFE—SEPARATE ESTATE—USE BY HUSBAND.—If a husband uses his wife's money, with her consent, to build a family residence, it is presumed, in the absence of facts indicating a gift by her, that he is a trustee for her, and either he, or his estate, is liable to her for such money. (*Parrett v. Palmer*, 479.)

4. HUSBAND AND WIFE—SEPARATE ESTATE—USE BY HUSBAND.—If a wife voluntarily delivers her money to her husband, the law presumes that he takes it as trustee for her, and not as a gift, even though there is not express promise to repay. (*Parrett v. Palmer*, 479.)

5. HUSBAND AND WIFE—SEPARATE ESTATE.—Not only the property actually acquired by a wife by gift, devise, or descent, during her marriage, is preserved to and becomes her separate estate, but also the proceeds of such property, whether the natural increase, or the money produced by its sale, or other property purchased with that money. (*Parrett v. Palmer*, 479.)

6. MARRIED WOMEN—SEPARATE PROPERTY.—THE PERSONAL EARNINGS of a wife, acquired from keeping boarders and from work done by her as a dressmaker, under an agreement with her husband that the money so acquired should belong to her alone, are her separate property as against subsequent creditors of the husband. (*Yake v. Pugh*, 17.)

7. MARRIED WOMEN—SEPARATE PROPERTY—GIFT FROM HUSBAND.—If articles of personalty are purchased with money earned by a wife under an agreement with her husband, that such money should be her separate property, and such articles are brought into the house and taken possession of by her as her separate property with the consent of her husband, such acts amount to a gift from the husband to the wife, and constitutes such articles her separate property. (*Yake v. Pugh*, 17.)

See Executors and Administrators, 4; Gifts, 5; Insurance, 24; Limitations of Actions, 7; Marriage and Divorce; Trusts, 1, 2, 4, 5.

IMPROVEMENTS.

See Cotenancy, 12-14; Partition, 6-11.

INCOME.

See Trusts, 4-6.

INDORSEMENT.

See Negotiable Instruments, 2, 3.

INDICTMENT.

See Accessories, etc., 1.

INFANTS.

See Negligence, 4, 5; Rape, 3.

INJUNCTIONS.

1. AN INJUNCTION MAY ISSUE TO RESTRAIN A CORPORATION when it is abusing powers given for public purposes, or committing a breach of trust, or acting adversely to public policy. (*Columbian Athletic Club v. State*, 407.)

2. TAXATION.—AN INJUNCTION will not issue to restrain the collection of taxes merely because of illegality or irregularity appearing upon the face of the assessment, but the complainant will be left to his remedy at law. (*Hibernian Benev. Society v. Kelly*, 769.)

3. INJUNCTION—MOVING BUILDING INTO "FIRE LIMITS"—COMPLIANCE WITH ORDINANCE.—Persons who desire to remove a wooden building in a city to premises within the "fire limits" may be enjoined from so doing by neighboring property owners, until they have complied with the requirements of the ordinance regulating such removal. Fraudulently obtaining the written consent of property owners to such removal does not satisfy the ordinance. (*Griswold v. Brega*, 350.)

4. INJUNCTION—MOVING BUILDING INTO "FIRE LIMITS"—WRITTEN CONSENT—FRAUD.—Neighboring property owners may enjoin persons from seeking to obtain, and restrain a city and its officers from issuing, a permit to remove a wooden building into a block within the "fire limits," where the written consent of the property owners, required by ordinance, was obtained by fraud, and such removal would increase fire hazards and be a permanent detriment to other property. (*Griswold v. Brega*, 350.)

5. BOUNDARIES—TREES UPON—INJUNCTION.—A landowner is not entitled to an injunction restraining an adjoining owner from interfering with a tree and well upon the boundary line, merely because the former has offered to pay such sum for the adjoining premises as may be appraised by persons selected by the parties. (*Robinson v. Clapp*, 298.)

6. BOUNDARIES—TREES UPON—INJUNCTION.—If a landowner intends to remove so much of a tree standing upon the boundary line as is necessary to enable him to build up to such line, and the granting of an injunction to restrain interference with the tree would work a greater irreparable injury to such owner than the necessary cutting and probable destruction of the tree would cause the adjoining owner, the injunction should not be granted. (*Robinson v. Clapp*, 298.)

7. EQUITY—INJUNCTION—POLITICAL RIGHTS—OFFICERS. A court of equity has no jurisdiction to determine political questions between the mayor and council of a city concerning the appointment and removal of officers, nor can it exercise jurisdiction in determining the right of a party to an office. Hence, an injunction will not lie to restrain the mayor of a city from interfering with the exercise of an office by an officer whom he has removed, upon the ground that the removal was illegal, and that no successor was appointed. (*Heffran v. Hutchins*, 353.)

8. INJUNCTIONS—IRREPARABLE INJURY—VIOLATION OF CRIMINAL LAW.—If an act complained of threatens an irreparable injury to the property of an individual, its commission may be en-

joined, although a violation of criminal law. (*Hamilton-Brown Shoe Co. v. Saxey*, 622.)

9. **EQUIVY, CRIME, ENJOINING COMMISSION OF.**—An injunction will not be denied because the act sought to be enjoined is a crime, if it is also such an act that the complainant is entitled to preventive relief against it. Thus, the use of property so as to create a nuisance may be enjoined, though the maintaining of the nuisance is punishable as a crime. (*Columbian Athletic Club v. State*, 407.)

10. **INJUNCTION TO PREVENT PRIZE FIGHTS.**—In a proceeding against a corporation for violating its franchise by giving exhibitions of prize fighting an injunction may issue to prevent the giving of such exhibitions. (*Columbian Athletic Club v. State*, 407.)

11. **STRIKES—INJUNCTION AGAINST—TRIAL BY JURY.**—An injunction may issue to restrain persons from attempting, by unlawful means, to compel employes to quit work and join in a strike, although the acts sought to be restrained, if committed, constitute a crime. The granting of such injunction does not take away the constitutional right of trial by jury. (*Hamilton-Brown Shoe Co. v. Saxey*, 622.)

12. **STRIKES—INJUNCTION AGAINST.**—Persons may be prevented by injunction from attempting, by intimidation and threats of violence, to coerce employes to leave their work and join a strike. They may also be restrained from assembling for that purpose in the vicinity of the place where such employes work. (*Hamilton-Brown Shoe Co. v. Saxey*, 622.)

13. **INJUNCTION.—ATTORNEY'S FEES** for services rendered in preparing for the trial or defense of a suit, and in resisting an order to show cause why the restraining order should not continue in force until the determination of the suit, and in prosecuting an unsuccessful motion to dissolve the injunction, are not recoverable under an undertaking to pay the damages which the defendant may sustain by reason of an injunction. (*Curtiss v. Bachman*, 111.)

14. **INJUNCTION.—ATTORNEY'S FEES INCURRED** by the defendant by reason of a preliminary injunction are part of the damages for which he has a right to indemnity, but only such fees as may be incurred after the injunction has been issued and prior to the determination of the action can be considered as within the rule. If defendant, instead of attempting to remove the preliminary injunction, seeks rather to prevent the issuing of a permanent injunction, or directs his efforts to defeating the action of the plaintiff, the expense of counsel fees incurred is an incident of the suit, and is not recoverable as damages sustained by reason of the injunction. (*Curtiss v. Bachman*, 111.)

15. **INJUNCTION BONDS, ELEMENTS OF DAMAGES.**—If the condition of an undertaking is that if an injunction shall issue and remain in force, plaintiff will pay the defendants such damages as they may by reason of such injunction sustain, if the court shall decide the plaintiff was not entitled thereto, moneys paid to defendants' attorneys, and costs incurred in the action, and loss of time or injury to business, are not elements of damages within the terms of the undertaking, unless such damages were caused solely by reason of the injunction. (*Curtiss v. Bachman*, 111.)

INSANE PERSONS.

1. **THE DEED OF AN INSANE PERSON** not under guardianship and whose incapacity has not been judicially determined is not void, but voidable only. (*Castro v. Geil*, 84.)

2. **JUDGMENTS AGAINST LUNATICS** are neither void nor voidable. (*Pollock v. Horn*, 66.)

3. JUDGMENTS AGAINST LUNATICS.—The property of a lunatic is not exempt from the operation of an execution paid upon a judgment not fraudulently or wrongfully obtained against him, although it was rendered after the fact that he is a lunatic has been legally established. (*Pollock v. Horn*, 66.)

4. JUDGMENT AGAINST AN INSANE SURETY on a forthcoming bond in attachment is not void, such surety not being insane at the time that the bond was given. (*Pollock v. Horn*, 66.)

5. JUDGMENTS—INSANE PERSONS—COLLATERAL ATTACK.—Mere irregularities in proceedings, resulting in a judgment against a lunatic, cannot be raised in a collateral attack. (*Pollock v. Horn*, 66.)

INSTRUCTIONS.

1. INSTRUCTIONS—FURTHER AND MORE SPECIFIC.—If there is any reason to apprehend that instructions given are not sufficiently specific, further and more specific instructions should be requested. (*Hohl v. Chicago etc. Ry. Co.*, 598.)

2. INSTRUCTIONS—BURDEN OF PROOF.—An instruction that, plaintiffs having the burden of proof, they must establish the material allegations of their complaint by a preponderance of evidence," is not erroneous as assuming that either party has established a right to recover. (*Fitzgerald v. Clark*, 665.)

3. JURY TRIAL.—EXCEPTIONS TO INSTRUCTIONS GIVEN BY THE COURT of its own motion are not sufficiently reserved by the statement of counsel made at the time that he saves an exception to each, every, and all instructions given by the court of its own motion. The exceptions ought to point out specifically the portions objected to, in order that the judge may have an opportunity to correct any error he may have inadvertently fallen into. This rule does not apply to instructions prepared and presented by either of the parties. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

4. INSTRUCTIONS—REASONABLE DOUBT.—MORAL CERTAINTY is that degree of conviction from the evidence of the truth of the fact sought to be proved that the juror himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests. (*State v. Gleim*, 655.)

5. INSTRUCTIONS—REASONABLE DOUBT.—An instruction in a criminal case that, in order to warrant a conviction, the jury need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, and that it is sufficient if, taking all the testimony together, they are satisfied beyond a reasonable doubt that the defendant is guilty, is erroneous, and prejudicial to his rights. If circumstantial evidence alone is relied upon, each fact and circumstance to complete the chain must be proved beyond a reasonable doubt. (*State v. Gleim*, 655.)

6. INSTRUCTIONS—WEIGHT OF EVIDENCE.—The jury being the sole judges of the weight of the testimony in a criminal case, it is error to instruct that admissions made by the defendant and importance to his own interests. (*State v. Gleim*, 655.)

See Master and Servant, 8; Mines, 12.

INSURANCE.

1. A CONTRACT OF INSURANCE is an agreement by which one person for a consideration promises to pay money or its equivalent, or to do some act of value to the insured upon the destruction or injury of something in which he has an interest. (*Clafin v. United States etc. Co.*, 528.)

2. INSURANCE CONTRACT OF, WHAT IS.—An agreement to purchase at a fixed price all accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied is a contract of insurance. (*Claflin v. United States etc. Co.*, 528.)

3. INSURANCE—CONSTRUCTION OF POLICY.—An insurance policy must be liberally construed in favor of the assured, but construction must not make a new contract for the parties. (*Schuermann v. Dwelling-House Ins. Co.*, 377.)

4. INSURANCE—CONSTRUCTION OF POLICY IN FAVOR OF INSURED.—If there is doubt or uncertainty as to the meaning of terms employed in a policy of insurance, the language must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in effecting the insurance, it was his object to secure. (*Travelers' Ins. Co. v. Dunlap*, 355.)

5. INSURANCE—FORCE AND CONSTRUCTION OF CONTRACT.—The rights of both insurer and insured are governed by the contract of insurance. If it is susceptible of two constructions, that one will be adopted which is more favorable to the assured; but if its language is clear and unambiguous, its effect cannot be destroyed by construction. (*German Ins. Co. v. Hayden*, 206.)

6. INSURANCE.—AN ORAL CONTRACT of insurance is valid. (*Brown v. Franklin etc. Ins. Co.*, 534.)

7. INSURANCE, ORAL CONTRACT FOR.—As the statute of frauds and perjuries does not apply to insurance, an agreement to insure need not be in writing. (*Croft v. Hanover etc. Ins. Co.*, 902.)

8. INSURANCE, ORAL.—TO SUSTAIN AN ACTION on a contract of insurance, where no policy has issued, the elements must have been agreed upon, and nothing left open and undetermined, and all conditions precedent complied with. (*Croft v. Hanover etc. Ins. Co.*, 902.)

9. INSURANCE, ORAL CONTRACTS OF.—The power of an insurance corporation to make an oral contract of insurance is not impaired by a provision in its by-laws that its "directors may authorize the president and secretary to make insurance, and will issue policies at such rates of insurance and under such limitations and restrictions as they shall prescribe." These are enabling, not restraining, words. (*Brown v. Franklin etc. Ins. Co.*, 534.)

10. INSURANCE, REMEDY, WHEN THE CONTRACT IS NOT WRITTEN.—When a contract has been made, but no policy of insurance to evidence it has been issued, the remedy of the insured, after a loss, may be by bill in equity; and the court may at once decree the payment of the amount which would have been recovered under the policy, had it been issued. (*Croft v. Hanover etc. Ins. Co.*, 902.)

11. INSURER.—PAYMENT OF PREMIUM is not necessary to an oral contract of insurance, if credit was given to the assured. (*Croft v. Hanover etc. Ins. Co.*, 902.)

12. INSURANCE—INCORRECT DESIGNATION OF ASSURED. The fact that the agents' memorandum of insurance designated one person, when the insurance was applied for, and intended to be paid to, another does not invalidate an oral contract of insurance. (*Croft v. Hanover etc. Ins. Co.*, 902.)

13. INSURANCE, FAILURE TO DESIGNATE INSURER.—If persons contract for insurance with the agents of several insurance companies, without specifying in which the insurance is desired, and a month later the agents designated a particular corpora-

tion as the insurer, they possessing power to make such designation, this completes the contract, and makes the insurer so designated answerable for a subsequent loss. (*Croft v. Hanover etc. Ins. Co.*, 902.)

14. **INSURANCE—DURATION OF, WHEN SUFFICIENTLY AGREED UPON.**—Though the assured insists that he contracted for insurance for a year, and the agents of the insurer that it was for three years, yet if the agents had blank policies, signed by the officers of the insurer, with authority to fill them out and deliver them, and they made a memorandum on their books, and the failure to actually issue the policy was due only to neglect or forgetfulness on their part, there is an existing agreement to insure, which will support an action, if the property is destroyed within one year from the perils insured against. (*Croft v. Hanover etc. Ins. Co.*, 902.)

15. **INSURANCE—PUBLIC LANDS—FAILURE OF TITLE—NOTICE—LIABILITY FOR LOSS.**—If one enters land as a placer mining claim, which entry is approved by the local land officers, and a policy of insurance issues to the claimant, who has a building on the land, upon an application for insurance, in which it is stated that the title of the insured is "good," but the policy contains a stipulation that it shall be void if the building stands on land to which the insured has not a perfect title, the insurance company is not liable for a loss by fire, occurring nearly eighteen months after such entry was canceled by the secretary of the interior, for the reason that the land was agricultural, and not subject to entry as mineral land; and where no notice of a failure of title had been given to the company, such cancellation avoided the claimant's title ab initio, and presented the very condition which the parties had agreed should forfeit the policy. (*German Ins. Co. v. Hayden*, 206.)

16. **INSURANCE—PRIOR INSURANCE.**—A policy of insurance is not void by reason of prior insurance which had lapsed before the issuance of the policy sued on. (*German Ins. Co. v. Hayden*, 206.)

17. **INSURANCE, TRANSFER OF INTEREST.**—The fact that a member of a partnership had transferred his interest therein to a third person before a policy of insurance issued does not affect the unconditional and sole ownership of the firm in its real estate, and hence does not avoid a policy containing a condition that it shall be void, if the interest of the assured shall be other than an unconditional and sole ownership, or if any change takes place in the interest, title, or possession of the subject of the insurance. (*Wood v. American etc. Ins. Co.*, 733.)

18. **INSURANCE, CHANGE OF INTEREST.—A SALE OF REAL PROPERTY UNDER EXECUTION**, when the statute gives the debtor time for redemption, and entitles him to remain in possession until the expiration of that time, does not avoid a policy of insurance containing a condition that it shall become void if any change, other than by the death of the assured, takes place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by the voluntary act of the assured, or otherwise. (*Wood v. American etc. Ins. Co.*, 733.)

19. **INSURANCE—VACANCY OF PREMISES—QUESTION FOR JURY.**—Whether a building is vacant or unoccupied, within the meaning of an insurance policy, at the time a loss by fire occurs, is a question of fact for determination by the jury. (*Schuermann v. Dwelling-House Ins. Co.*, 377.)

20. **INSURANCE—VACANCY OF PREMISES.**—The meaning of the term "vacant or unoccupied," as used in a policy of insurance, and its construction with other clauses, is a question of law. (*Schuermann v. Dwelling-House Ins. Co.*, 377.)

21. **INSURANCE—VACANCY OF PREMISES.**—A dwelling or tenement house is vacant and unoccupied if the occupant or occupants

have moved out, although some trifling articles of furniture of little value are left in one of the rooms; and, if it is destroyed while in such condition, the loss is forfeited under a covenant in a policy of insurance, exempting from liability for loss if the insured premises shall be or become "vacant or unoccupied." (*Schuermann v. Dwelling House Ins. Co.*, 377.)

22. INSURANCE—VACANCY OF PREMISES—KNOWLEDGE OF INSURED.—The enforcement of a covenant in a policy of insurance, that the premises becoming vacant and unoccupied shall cause a forfeiture, cannot be made to depend upon the knowledge of the insured as to the fact of such vacancy. (*Schuermann v. Dwelling-House Ins. Co.*, 377.)

23. INSURANCE—LOSS PAYABLE TO MORTGAGEE—DEFENSES.—The fact that a loss is payable to the mortgagee of insured premises does not increase, lessen, or otherwise change, the burden assumed by the insurance company. The same defenses may be made against the mortgagee, who brings an action on the policy, as could have been made against the insured. (*German Ins. Co. v. Hayden*, 206.)

24. INSURANCE, LIFE.—A DECLARATION purporting to be made by a wife in an application for insurance on the life of her husband in fact made by his signing her name to such application is not admissible against her in an action upon another policy of insurance on his life to which she is one of the beneficiaries. (*Yore v. Booth*, 81.)

25. INSURANCE, LIFE.—DECLARATIONS MADE BY THE ASSURED AFTER the issuance of a policy to him on his life payable to his legal heirs, are not admissible as evidence against them to prove the falsity of statements made by him in an application for such insurance. (*Yore v. Booth*, 81.)

26. INSURANCE, LIFE.—THE PRESUMPTION is that the statements made in an application for life insurance are true, and if the statement is as to the age of the person on whose life insurance is sought, such presumption is not overcome by statements made in proofs of death furnished by one of the beneficiaries under the policy. (*Yore v. Booth*, 81.)

27. INSURANCE, LIFE—DEFENSE OF SUICIDE—BURDEN OF PROOF.—If the defense of suicide is set up to an action on a policy of life insurance, the burden of proving it is upon the defendant, especially where there is no concession on the part of the plaintiff that the insured came to his death by any other than a natural cause. (*Hale v. Life Indemnity etc. Co.*, 616.)

28. INSURANCE, LIFE—DEATH BY SUICIDE—EVIDENCE.—In an action upon a life insurance policy, it is reversible error for the court to take from the jury the question of death by suicide, upon the ground that there is not sufficient evidence to go to the jury upon that issue, where it is shown that, up to the time of taking morphine, the deceased was in perfect health, that he was in the prime of life, that he died suddenly, and that his life was insured for a large amount, and in which his creditor claimed an insurable interest. The jury should also consider, as bearing upon this question, the financial condition of the deceased, the business in which he was engaged, and whether there was any reason for his taking his own life, if he did do so. (*Hale v. Life Indemnity etc. Co.*, 616.)

29. INSURANCE, LIFE—DEATH AS QUESTION FOR JURY.—If there is any evidence showing that the death of an insured person may have resulted from negligence, accident, or suicide, it is for the jury to say how it occurred. (*Hale v. Life Indemnity etc. Co.*, 616.)

30. INSURANCE, LIFE, CHANGE OF BENEFICIARIES.—One who procures a policy of insurance upon his own life, payable to his

legal heirs, although he pays the premium himself, and keeps the policy in his exclusive possession, has no power to change the beneficiaries, unless the policy or the charter of the insurance company so provides. (*Yore v. Booth*, 81.)

31. INSURANCE—ACCIDENT—DEATH BY POISON.—Death of an insured person, caused by poison accidentally taken by mistake, is not within an exception in a policy excluding liability if death is caused by "poison in any way taken, administered, absorbed, or inhaled." (*Metropolitan Accident Assn. v. Froiland*, 359.)

32. INSURANCE, ACCIDENT—"TAKING POISON" DOES NOT INCLUDE ACCIDENTAL TAKING.—"Taking poison," within the meaning of an exception in an accident insurance policy, cannot be construed to mean the accidental taking of poison merely on the ground that, if the cause of injury or death is not accidental, it is manifestly not within the scope of the policy, where suicide and other causes of death and injury not accidental are embraced in the same exception. (*Travelers' Ins. Co. v. Dunlap*, 355.)

33. INSURANCE, ACCIDENT—MEANING OF "TAKING POISON."—The words "taking poison," as employed in a clause of an accident insurance policy exempting the company from liability for death from "taking poison," mean the voluntary, intentional taking of poison, and do not include cases of accidental poisoning. Hence, the company is liable for the death of one who, by mistake, drinks carbolic acid for peppermint, which he wishes to take for some ailment, and dies from the effects of the poison. (*Travelers' Ins. Co. v. Dunlap*, 355.)

34. INSURANCE, ACCIDENT—"TAKING POISON" IS LIMITED TO INTENTIONAL TAKING.—The term "taking poison" in an exception of an accident insurance policy, is limited to the intentional taking of poison, although death so caused is covered by the clause relating to suicide, where the entire exceptions of the policy recognize that death may result wholly or partly, directly or indirectly, from voluntarily taking poison without suicidal intent. (*Travelers' Ins. Co. v. Dunlap*, 355.)

35. INSURANCE—ACCIDENT—WAIVER OF PROOF OF LOSS. A refusal on the part of an insurance company to pay a claim for accident insurance, on the ground that the death was caused by poison, and the loss not covered by the policy, is a waiver of a requirement contained in the policy that prescribed proofs of loss be furnished. (*Metropolitan Accident Assn. v. Froiland*, 359.)

36. INSURANCE—ACCIDENT—WAIVER OF TIME FOR BRINGING ACTION.—Refusal on the part of an insurance company to allow the beneficiary in an accident policy to inspect its by-laws upon request made at its general office, and a misstatement as to the time within which suit may be brought, constitute a waiver of a by-law limiting the time for bringing the action. (*Metropolitan Accident Assn. v. Froiland*, 359.)

37. BENEVOLENT INSURANCE ASSOCIATIONS.—Under the by-laws of an association entitling a member to recover a stated sum when, by reason of accident or disease, he becomes permanently disabled from following his usual or some other occupation, he is not precluded from recovery where he has been injured so as to be unable to pursue his ordinary occupation, though not incapacitated from pursuing another occupation in which his wages are much inferior, and which requires for its duties much less physical or mental ability. (*Niel v. Order of United Friends*, 738.)

38. INSURANCE, MUTUAL LIFE—DUES "REMAINING" IN TREASURY—CONSTRUCTION.—The word "remaining," used in the articles of association of a masonic relief society, which is merely a mutual life insurance company, proceeding on the assess-

ment plan, and with articles limit the sum provided for the payment of a death benefit to the total sum of dues "remaining" in the treasury of said society, must be construed as meaning "received" or "realized." (*Lake v. Minnesota etc. Relief Assn.*, 538.)

39. INSURANCE, MUTUAL LIFE—EFFECT OF FAILURE TO MAKE ASSESSMENT.—If a membership insurance company, proceeding on the assessment plan, insures the life of a member, the beneficiary may maintain an action at law on the contract, though the company has refused or neglected to make the proper assessment. The company cannot defeat a recovery in such an action by showing that it has not made an assessment. To permit it to do so would be to allow it to take advantage of its own wrong. (*Lake v. Minnesota etc. Relief Assn.*, 538.)

40. INSURANCE, MUTUAL LIFE—AMOUNT OF RECOVERY ON DEATH BENEFIT—BURDEN OF PROOF.—If the articles of association of a masonic relief society, which is merely a mutual life insurance company, proceeding on the assessment plan, provide that the funds to pay the beneficiary of a deceased member shall be raised by voluntary contributions to the same, by members of the association, of such dues as the by-laws provide, said sum "in no case to exceed the total sum of such dues remaining in the treasury of said society," and the by-laws expressly provide that the amount to be paid shall be one dollar for each member, not exceeding the limit of the benefit, and there is no contract to pay out of a special fund, there is an implied, if not an express, obligation upon the company, when the death of a member is proved, to make an assessment, to the full extent authorized by the by-laws, to raise funds to pay the benefit. In case an assessment has been made, and the beneficiary sues upon the certificate of membership, the plaintiff's recovery would be limited to the amount realized; but the burden of proving that it was made, and that the amount realized therefrom was less than one dollar for each member, is on the defendant. Unless the defendant does show that an assessment was made as provided by the by-laws, the beneficiary is entitled to recover the sum of one dollar for each member. (*Lake v. Minnesota etc. Relief Assn.*, 538.)

41. EVIDENCE—DEATH—PRESUMPTIONS.—If a member of a benefit association, without being exposed to any specific peril, suddenly disappears under circumstances of such character as to refute the theory of abandonment of family, friends, and business, and soon after his name is stricken from the roll of members for non-payment of an assessment falling due after his disappearance, and his widow shortly thereafter brings an action to recover death benefits, it must be presumed that the member lived for seven years after his disappearance. The presumption of death does not arise until the expiration of the seven years. The burden of proof is on the widow to show that the member was dead at the time his name was stricken from the roll, and without such proof she cannot recover. (*Mutual Benefit Co's Petition*, 814.)

42. INSURANCE, USAGE AS TO POWER OF AGENTS.—A general usage or custom to the effect that persons authorized to solicit insurance can bind their principal until notice of the refusal of the risk is received by the agent and communicated to the person desiring insurance, is valid, and is binding both upon stock and mutual insurance corporations insuring against loss by fire. (*Brown v. Franklin etc. Ins. Co.*, 534.)

43. INSURANCE.—PRIVATE INSTRUCTIONS TO AN AGENT LIMITING HIS AUTHORITY cannot bind persons having no knowledge thereof. (*Brown v. Franklin etc. Ins. Co.*, 534.)

44. INSURANCE—FALSE ANSWERS WRITTEN BY AGENT—ESTOPPEL.—An insurance company is estopped to take advantage of the falsity of an answer, in an application for insurance, respecting the amount of encumbrance on the property, where the agent of the company, being correctly informed, at the time, as to the amount of the encumbrance, fills out the false answer without the knowledge of the insured, and where such error in the application occurs through no fault of the insured, but is the result of the agent's negligence. (*German Ins. Co. v. Hayden*, 206.)

45. INSURANCE—WAIVER BY AGENT.—The general agents of insurance corporations may waive stipulations and conditions contained in a policy of insurance with respect to the conditions upon which it shall go into operation, by delivering it with knowledge of the facts, and receiving the premium. (*Wood v. American etc. Ins. Co.*, 733.)

46. INSURANCE, PROVISIONS, PROHIBITIONS WAIVED BY AGENTS.—Restrictions in a policy of insurance against the power of agents to waive any condition, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract, when it appears that the agent delivered it, and received the premium with full knowledge of the actual situation. (*Wood v. American etc. Ins. Co.*, 733.)

47. INSURANCE—VARIANCE.—A bill to enforce an oral contract of insurance cannot be defeated by proof that the date of the alleged insurance is incorrectly stated in such bill. The date is not a matter of substance. (*Croft v. Hanover etc. Ins. Co.*, 902.)

See Limitations of Actions, 2; Railroads, 23.

INTEREST.

See Banks, 4.

INTERPLEADER.

1. IN INTERPLEADER PLAINTIFF CANNOT CLAIM relief against any of the defendants, but only that he be protected against the claims of all. (*North Pac. Lumber Co. v. Lang*, 780.)

2. INTERPLEADER.—THE ALLEGATIONS OF A BILL OF INTERPLEADER ARE that two or more persons have preferred claims against the complainant to the same thing, and that he has no beneficial interest therein, and cannot determine without hazard to himself to which of them it belongs. It was usual under the equity practice to annex to the bill an affidavit of the plaintiff that there was no collusion between him and any of the defendants. (*North Pac. Lumber Co. v. Lang*, 780.)

3. INTERPLEADER.—ONE OF THE ESSENTIAL REQUISITES to equitable relief by bill of interpleader is, that the adverse titles of the respective claimants must be connected or dependent, or one derived from the other, or from a common source. There must be privity of some sort between all the parties, such as privity of estate, title, or contract, and the claims should be of the same nature or class. (*North Pac. Lumber Co. v. Lang*, 780.)

4. INTERPLEADER—PRACTICE.—THE FIRST THING TO BE DONE is to determine whether the interpleader will lie or not. If not, it is unnecessary to go further. If it will, then the plaintiff should be discharged from liability with his costs upon bringing the money in dispute into court, and the suit should thereafter proceed upon issues properly joined between the defendants. (*North Pac. Lumber Co. v. Lang*, 780.)

5. INTERPLEADER—PRACTICE.—After determining that interpleader will lie, the court may, for the purpose of determining what

are the issues as between the defendants, adopt any course or method of procedure which may seem appropriate and best adapted to raising such issues, and when once raised or settled, the court will pursue the prevailing equity practice in trying them. (*North Pac. Lumber Co. v. Lang*, 780.)

6. INTERPLEADER.—THE DEFENDANTS CANNOT HAVE CONTENTIONS AS BETWEEN themselves unless it is determined that the interpleader will lie. (*North Pac. Lumber Co. v. Lang*, 780.)

7. INTERPLEADER—PREMATURE DETERMINATION OF THE RIGHTS OF THE DEFENDANTS.—An order of court determining the claims between the various defendants, or some of them, before deciding whether a bill of interpleader can be entertained, is premature. (*North Pac. Lumber Co. v. Lang*, 780.)

8. INTERPLEADER—CLAIMS FOR TORTS.—A complainant cannot maintain a bill of interpleader against a defendant whose claim to the property subject to the bill is that plaintiff has by a tortious act become answerable therefor or for some part thereof. (*North Pac. Lumber Co. v. Lang*, 780.)

INTERVENTION.

INTERVENTION AFTER DEFAULT.—Under a statute providing that any person may intervene "before the trial of an action," a default takes the place of a trial, and a party cannot file a complaint in intervention after defendant's default has been entered, and nothing remains to be done but to enter the judgment. (*Safely v. Caldwell*, 693.)

INTOXICATING LIQUORS.

See Associations.

INVENTIONS.

See Master and Servant, 2.

IRRIGATION.

See Waters, 5-8.

JUDGMENTS.

1. JUDGMENT, JURISDICTION WHEN MUST APPEAR AFFIRMATIVELY.—Whenever a mode of acquiring jurisdiction not in accordance with the general course of the common law has been prescribed by statute, that mode must be strictly followed, and the facts necessary to sustain jurisdiction must appear on the face of the record. (*Willamette Real Estate Co. v. Hendrix*, 800.)

2. JUDGMENT AGAINST NONRESIDENTS.—A personal judgment rendered upon service of summons by publication, the record not disclosing that any property has been attached, is void. (*Willamette Real Estate Co. v. Hendrix*, 800.)

3. JUDGMENT—JURISDICTION OF PERSON—COLLATERAL ATTACK.—The judgment of a court of general jurisdiction is not void unless it appears from the record itself that the court in pronouncing it acted without jurisdiction. A judgment rendered without bringing the defendants into court is not for this reason void, but voidable only, unless the failure to obtain jurisdiction over them appears from the record. If the proceedings are regular upon the record, the judgment can only be avoided upon extraneous evidence. (*Brown v. Wilson*, 228.)

4. JUDGMENT.—PROVISIONS OUTSIDE OF THE ISSUES may be sustained and enforced, if the decree containing them was

entered by consent of all the parties, and they have reference to the subject matter of the litigation, and fall within the general scope of the case made by the pleadings. (*Schmidt v. Oregon etc. Min. Co.*, 750.)

5. JUDGMENT, COLLATERAL ATTACK.—Defects of an affidavit for the publication of a summons, or its falsity, cannot subject the judgment to a collateral attack. (*Stevens v. Reynolds*, 422.)

6. JUDGMENTS—PRESUMPTION—COLLATERAL ATTACK. As against collateral attack on the ground that the summons was insufficient to confer jurisdiction, it must be presumed in aid of the judgment reciting that service of the complaint and notice had been duly made according to law, that another and sufficient summons was issued and served, if there was ample time therefor after the completion of the publication of the first summons, and there is no evidence to the contrary. (*Rogers v. Miller*, 20.)

7. A JUDGMENT IS CONCLUSIVE AS AN ESTOPPEL, THOUGH IT IS SUBJECT TO BE OPENED on an application to let in a defendant, so long as it stands unopened. (*Stevens v. Reynolds*, 422.)

8. JUDGMENTS—RES JUDICATA.—A judgment by default rendered in attachment proceedings is not *res judicata* as to a defendant, who, though represented by counsel, filed no answer and made no defense. (*Smith v. Downey*, 467.)

9. JUDGMENT—RES JUDICATA—RULE AS TO SAME PARTIES.—The general rule that the judgment of a court having jurisdiction of the subject matter, of the parties, and the process, and rendered directly upon the point in question, is conclusive between the same parties, is not applicable when the same person, though a party in both suits, is such in different capacities, occupying in one a distinctively representative position, such as an administrator, or general guardian, or guardian *ad litem*, and in the other a position as an individual. (*Bamka v. Chicago etc. R. R. Co.*, 618.)

10. JUDGMENT—RES JUDICATA—ACTION BY FATHER FOR INJURIES TO CHILD.—A judgment for defendant, in an action by a father to recover in his own name damages for an injury to his minor child, does not bar the father's right to maintain an action, in his individual right, to recover for loss of services, for expenses incurred, and for compensation for care and trouble sustained, by him, growing out of injuries to his minor son, alleged to have been the result of defendant's carelessness and negligence, as the former action is solely for the benefit of the child, and damages sustained by a parent by reason of the injuries, such as loss of services, are not recoverable in such an action. (*Bamka v. Chicago etc. R. R. Co.*, 618.)

11. RES JUDICATA—PROVIDING FUNDS FOR LITIGATION. If certain persons cause a mining company to institute an action, and others afterward purchase bonds of the company at a heavy discount for the purpose of providing funds for carrying on that litigation, they are, for this reason, bound by the judgment in the action. (*Brown v. Wilson*, 228.)

12. JUDGMENTS—RES JUDICATA.—The supreme court of the state will take judicial notice of its records, and of what issues were presented for determination by the record in a given case, and will not entertain or consider an unfounded allegation of a complaint that certain questions were not presented for determination in such case. (*Stallcup v. Tacoma*, 25.)

13. JUDGMENTS—RES JUDICATA—MUNICIPAL BONDS.—In an action by a taxpayer, on behalf of himself and all others similarly situated, to restrain a city from issuing municipal bonds, a decision determining their validity is, in the absence of fraud or collusion,

conclusive, in a subsequent action by another taxpayer to restrain the payment of interest thereon, especially when the same questions concerning the legality of the bonds are presented in both actions. (*Stallcup v. Tacoma*, 26.)

14. JUDGMENT, RELIEF AGAINST FOR EXCUSABLE NEGLIGENCE, TIME WITHIN WHICH MAY BE GRANTED.—Under a statute authorizing the court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, at any time within one year after notice thereof, a motion for relief made within the year will not support an order, made after the expiration of the year, granting the motion. (*Nicklin v. Robertson*, 790.)

15. AMENDMENT OF JUDGMENT.—It is not necessary that the minute entry on the record of the court should have been actually amended in accordance with an order therefor before it is available upon motion to amend the judgment resting on such erroneous entry. The direction for amendment is, for the purposes of such motion, equivalent to actual amendment. (*Kaufman v. Shain*, 189.)

16. JUDGMENT, AMENDMENT.—Where there is nothing appearing on the face of the record to show any error or mistake and the moving party must rely on evidence allunde, the court cannot alter its judgment after the close of the term. (*Nicklin v. Robertson*, 790.)

17. EXECUTION—MISNOMER OF DEFENDANT—AMENDMENT.—Though the true name of the defendant nowhere appears in the proceedings of an action, or judgment, or any name by which he was ever known, yet, in a collateral proceeding, his true name may be stated, and he may be connected with the judgment by proper averments. (*Casper v. Klippen*, 604.)

18. EXECUTION—JUSTIFICATION—MISNOMER OF DEFENDANT—AMENDMENT.—If a person is sued by a wrong Christian name, by which he was never known, and his true name nowhere appears in the proceedings, though they are otherwise regular, and judgment by default is obtained, under which execution is levied, such judgment, in an action by the defendant against the sheriff and his deputy for wrongfully carrying away and converting the property, is not absolutely void. It, and all of the proceedings, may be amended by a direct proceeding for that purpose, but neither the judgment nor the execution can be used for the purpose of justification until they have been amended. (*Casper v. Klippen*, 604.)

19. JUDGMENTS—FOREIGN—PLEADING.—In an action upon a foreign judgment, the plaintiff need not specifically allege that the foreign court had jurisdiction of the action, of the parties, or of the subject matter, nor that the defendant had notice of its pendency, or was summoned to appear, or that any hearing or trial was had. These facts are necessarily implied in the averment that such court "duly adjudged" against defendant, and are indispensable conditions to the due adjudication of that court. (*Fisher v. Fielding*, 270.)

20. JUDGMENTS—FOREIGN—CONCLUSIVENESS.—A foreign judgment in personam for a money demand, not procured by fraud, and rendered by a competent court of England against a citizen of one of the states of the American Union, who was personally served with process within the jurisdiction of the foreign court, is conclusive upon the merits in an action to collect the judgment brought in the state of which the defendant is a citizen. (*Fisher v. Fielding*, 270.)

21. JUDGMENTS—FOREIGN—DEFENSES.—In an action upon a foreign judgment, it is no defense that the action in which the judgment was recovered was brought when the defendant was about to leave the foreign country, for the purpose of embarrassing and im-

peding him, and to prevent his having a fair opportunity to defend the suit, unless he prolonged his stay indefinitely. (*Fisher v. Fielding*, 270.)

See Corporations, 18; Estoppel; Executors and Administrators, 7, 9, 10; Homestead, 2-4; Insane Persons, 2-5; Limitations of Actions, 3.

JUDICIAL NOTICE.

See Evidence, 4; Judgments, 12.

JUDICIAL SALES.

1. JUDICIAL SALES—INADEQUACY OF PRICE—ESTOPPEL.—If the owner of property does not object to the confirmation of a judicial sale thereof on the ground of inadequacy of price, he is estopped from denying the adequacy of price obtained under the conditions of the sale, and the officer who makes the sale cannot avoid the terms and conditions made by him with the purchaser. (*Hammond v. Calleaud*, 167.)

2. JUDICIAL SALES—MISREPRESENTATIONS.—If the officer making a judicial sale makes any error, irregularity, or misrepresentation, whether intentional or not, whereby the purchaser has been misled to his prejudice to such an extent as to make it unconscionable that his contract of purchase should be enforced against him, the sale will not be confirmed. (*Hammond v. Calleaud*, 167.)

3. JUDICIAL SALES—MISREPRESENTATIONS—KNOWLEDGE OF PURCHASER—PRESUMPTION.—Purchasers at judicial sales are not held to presumptive knowledge of the limits of the power of the officer making the sale, and if they are misled by his representations as to the state of the title or encumbrances, they are not bound by the rule of caveat emptor. (*Hammond v. Calleaud*, 167.)

4. JUDICIAL SALES—FRAUD—AGREEMENT AMONG BIDDERS.—A purchase of a judgment from an execution creditor by another execution creditor, who buys at a judicial sale with an agreement that the former shall not bid, does not render the sale absolutely void in law. The question whether such sale is void or not depends upon the question of actual fraud which is always to be answered by the jury, and if it is determined that no fraud was contemplated or committed on the judgment debtor or his creditors, the sale is valid. (*Woodruff v. Warner*, 845.)

See Notice, 2, 3; Subrogation.

JURISDICTION.

See Appeal 1, 2; Certiorari; Judgments, 1-3; Public Lands, 1-5.

JURORS.

See Trial, 7, 8.

JUSTICES OF THE PEACE.

JUSTICES OF THE PEACE.—POLICE MAGISTRATES are justices of the peace, in law and in fact, though different in name. (*McPhail v. People*, 306.)

LACHES.

See Deeds, 2; Estates, 5; Estoppel, 2; Mines, 5, 6; Trusts, 2.

LAKES.

See Boundaries, 1, 2; Waters, 2, 3.

LAND DEPARTMENT.

See Mines, 3, 4; Public Lands, 2-5.

LANDLORD AND TENANT.

1. LEASE, ESTOPPEL TO DENY THAT THE PROPERTY IS AS DESCRIBED THEREIN.—If a lease is made of certain premises, described by name, "together with all the appurtenances thereto belonging, including six salt wells," and the lessee was acquainted with the premises when he accepted the lease, he is estopped from denying that they contained six salt wells. Therefore, he cannot maintain an action for damages against his lessor on the ground that there were but five such wells. (*Clifton v. Montague*, 872.)

2. LEASE, PAROL UNDERSTANDING.—A lessee, in an action of covenant, is confined to the terms of his written lease, and cannot recover upon an oral understanding existing contemporaneously with the execution. (*Clifton v. Montague*, 872.)

3. LANDLORD AND TENANT.—THE MAXIM OF CAVEAT EMPTOR applies between lessor and lessee; and it is for the latter to make the examination necessary to determine whether the premises are sufficient, and are adapted to the purposes for which they are leased. (*Clifton v. Montague*, 872.)

4. LANDLORD AND TENANT.—THERE IS NO IMPLIED WARRANTY by a lessor of the fitness of the premises for the purposes for which they are leased. Hence, one receiving a lease of premises, including six salt wells, cannot maintain an action against his lessor to recover damages arising from the wells or premises not being in a fit condition for the production of salt. (*Clifton v. Montague*, 872.)

5. LANDLORD AND TENANT—IMPLIED COVENANTS.—Though a lease describes the property leased as the "Bedford Salt Furnace Property," including six salt wells, with the right to mine coal to run such furnace, there is no covenant implied that the wells have any particular fitness for the purpose of supplying salt water for the use of the furnace, nor that such wells are in a state of repair fitting them for the purpose for which they were designed. (*Clifton v. Montague*, 872.)

6. LANDLORD AND TENANT—SAFETY OF PREMISES.—A landlord does not insure the safety of the premises, nor does he impliedly warrant them to be inhabitable or fit for certain uses, and, as a general rule, the tenant, under the maxim, caveat emptor, assumes all risks incident to the occupancy. (*Hamilton v. Feary*, 485.)

7. LANDLORD AND TENANT—LIABILITY FOR FAILURE TO MAKE REPAIRS.—A landlord is liable to his tenant for injury, if the former, though not bound to do so, undertakes to make repairs, and makes them in so negligent a manner as to produce injury, or if he has covenanted to make repairs and upon being notified has repeatedly promised and led the tenant to believe in good faith that he will make them. (*Hamilton v. Feary*, 485.)

8. LANDLORD AND TENANT—LATENT DEFECTS IN PREMISES.—A landlord is liable to his tenant for injury arising from the fact that the premises contain some hidden defect or defects, or are infected with some noxious disease, rendering them dangerous or uninhabitable, and of which dangerous elements or defects the landlord had some knowledge or information, but which were not open to the

view of the tenant and of which he was ignorant. (*Hamilton v. Feary*, 485.)

9. LANDLORD AND TENANT—REPAIRS.—In the absence of an express covenant on the part of a lessor, he cannot be held answerable for repairs made by the tenant of the leased premises. (*Olifton v. Montague*, 872.)

10. LANDLORD AND TENANT—DEFECTIVE PREMISES—DAMAGES—NEGLIGENCE.—A tenant cannot recover upon tort for negligence against the landlord for failure to repair the leased premises, or in failing to disclose a defect therein, if the tenant is also guilty of negligence in not avoiding danger arising from the existence of such defect. (*Hamilton v. Feary*, 485.)

11. LANDLORD AND TENANT—DEFECTIVE PREMISES—DAMAGES.—A tenant who, with full knowledge of the existence of an excavation on the leased premises before he takes possession, continues to occupy them in such condition during the period of the lease, and after the landlord upon repeated demands has failed and refused to put such excavation in a safe condition, cannot recover in an action of tort for injury received from falling into such excavation, especially when the landlord practices no concealment, fraud, or deception upon the tenant, and the cause of injury, if latent, is not known to the landlord any more than to the tenant. (*Hamilton v. Feary*, 485.)

12. LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR—DAMAGES.—If a landlord covenants with his tenant to repair and put in safe condition an excavation existing on the premises at the time they are leased, but fails and refuses to make such repairs after repeated requests, and the tenant while performing necessary domestic duties falls into the excavation and is injured, he cannot recover damages therefor in an action for breach of covenant to repair; such damages are too remote and consequential. (*Hamilton v. Feary*, 485.)

13. LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR—DAMAGES.—Upon the failure of a landlord to keep his covenant to make repairs upon the leased premises after repeated requests to do so, the tenant may make the necessary repairs himself, and charge their cost to the landlord; but as it is his duty to reduce the damages as much as reasonably lies in his power, he is not permitted to allow the defect in the premises to remain, being himself fully cognizant thereof, and then sue to recover damages for an accident resulting from the dangerous condition of the property. (*Hamilton v. Feary*, 485.)

14. LANDLORD AND TENANT—BREACH OF COVENANT TO REPAIR—DAMAGES.—Although a landlord is clearly guilty of a breach of covenant to repair the leased premises, the tenant cannot remain inactive and allow special damages to accrue, and recover them from the landlord, when, at slight expense, he might have averted the injurious consequences complained of. (*Hamilton v. Feary*, 485.)

LAW OF THE LAND.

See Constitutions.

LEASE.

See Covenants, 1; Landlord and Tenant.

LEGISLATURE.

See Corporations, 12.

LETTERS.

See Evidence, 2.

LIBEL.

LIBEL—PLEADING IN JUDICIAL PROCEEDING—PRIVILEGED COMMUNICATION.—In an action for libel, based on an allegation in a pleading in another action, the defendant cannot justify the defamatory allegation as a privileged communication, where it is apparent that it was wholly gratuitous, irrelevant, and immaterial; and it is alleged that it was well known by the defendant to be false and untrue, and that it was published without cause or justification, and with express malice. (*Sherwood v. Powell*, 614.)

LICENSE.

See Municipal Corporations, 5-8.

LIENS.

LIEN, CONTINUANCE OF AFTER REMOVAL OF PROPERTY FROM THE STATE.—If a statute providing for a lien upon logs declares that it shall not bind them, unless within twelve months a civil action to enforce the lien shall be brought in a competent court, the lien cannot be enforced in another state into which the logs have been taken, in a suit brought there more than a year after the inception of the lien, though such a suit was brought within less than a year in the state in which the logs were when the lien attached. (*North Pac. Lumber Co. v. Lang*, 780.)

See Mechanics' Liens.

LIMITATIONS OF ACTIONS.

1. THE STATUTE OF LIMITATIONS DOES NOT EXTINGUISH a debt nor affect a trust created for its payment. (*Townsend v. Tyndale*, 518.)

2. THE RUNNING OF THE STATUTE OF LIMITATIONS AGAINST a debt which a policy of insurance was pledged to secure does not prevent the enforcement of a claim arising out of such policy, nor does it impair the rights of the holders of the indebtedness to the proceeds of the insurance. (*Townsend v. Tyndale*, 518.)

3. JUDGMENTS—SUSPENSION OF STATUTE OF LIMITATIONS.—A judgment in ejectment in favor of one cotenant against another claiming by adverse possession, suspends the statute of limitations from the time of commencement of the action; and such suspension continues during the life of the judgment, although no writ of restitution is issued, nor is possession taken under the judgment. (*Snell v. Harrison*, 642.)

4. LIMITATIONS OF ACTIONS—SUIT PENDING.—The statute of limitations does not run while an action to recover the matter in dispute is pending, and the action is pending until final judgment. (*Nevitt v. Woodburn*, 315.)

5. QUO WARRANTO.—A STATUTE OF LIMITATIONS applicable to ordinary civil actions does not apply to a quo warranto proceeding to oust a person wrongfully acting as a police magistrate, as this is a matter of public concern, and the maxim, *Nullum tempus occurrit regi*, applies. (*McPhail v. People*, 306.)

6. LIMITATIONS OF ACTIONS—SUIT ON EXECUTOR'S BOND.—In a suit on an executor's bond, for a sum of money found due from him, as executor, to the estate, where the judgment has

been reversed on appeal, as being too large, and the case has been remanded, the statute of limitations begins to run from the date of a new and final judgment for the amount as reduced by the direction of the appellate court. (*Nevitt v. Woodburn*, 315.)

7. HUSBAND AND WIFE.—STATUTE OF LIMITATIONS does not run as to dealings between husband and wife. (*Parrott v. Palmer*, 479.)

8. FRAUD, ACTION, WHEN DEEMED TO BE FOR—STATUTE OF LIMITATIONS.—If a person agrees not to manufacture or sell a specified medicine, and, in violation of his agreement, does manufacture and sell it under another name, concealing the fact that it is the same medicine, he is guilty of a fraud, and a suit to enjoin a further violation of his contract, and to recover for the fraudulent breach thereof, may be commenced within three years after the discovery by the plaintiff of such breach. (*Gregory v. Spelker*, 70.)

9. STATUTE OF LIMITATIONS.—DISABILITIES occurring after the accruing of a cause of action do not stop the running of the statute of limitations. (*Castro v. Geil*, 84.)

See Adverse Possession, 4; Fraud.

LOGS.

See Liens.

LOTTERIES.

1. LOTTERIES ARE PROHIBITED, in Colorado, both by the constitution and by statute. (*Branham v. Stallings*, 213.)

2. LOTTERIES—SCHEME AS TO TOWN LOTS.—A scheme by which persons associate themselves together into an organization called the "Denver Lot Club," under an agreement that each shall pay two dollars per week; that drawings for town lots shall be had every Monday, at which drawings one of the members is to receive a lot; and that such drawings shall be continued for a period of sixty weeks, is a lottery within the meaning of a statute prohibiting the disposal of lands or real estate by chance of any kind. (*Branham v. Stallings*, 213.)

3. LOTTERIES—NO RECOVERY FOR MONEY PAID.—Members of a lottery association, formed for the purpose of disposing of town lots by chance, and who have joined it in direct violation of the statutes of the state, are all in *pari delicto*, and cannot invoke the aid of either a court of equity or a court of law. Those who have paid out money for chances to obtain lots in such an association cannot recover it back. The maxim, *In pari delicto potior est conditio defendentis*, applies in such a case. (*Branham v. Stallings*, 213.)

LUNATICS.

See Insane Persons.

MAGISTRATES.

See Justices of the Peace; Officers, 1.

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—ANNULMENT OF MARRIAGE.—PRESUMPTIONS in favor of the legality of a marriage regularly solemnized prevail in an action to annul that marriage over the presumption of the continuance of the life of a former hus-

band who has been absent and unheard of for less than seven years. (Hunter v. Hunter, 180.)

2. **MARRIAGE AND DIVORCE—ANNULMENT OF MARRIAGE—PRESUMPTIONS.**—Rather than hold a second marriage regularly solemnized, invalid, and that the parties have committed a crime or been guilty of immorality, the presumption of death of the former and absent husband or wife, in less than seven years before the second marriage, is indulged, or if the absent party is shown to be living at that time, it is to be presumed that he or she has procured a divorce, and the burden of proof is on the party asserting guilt or immorality, to prove that the first marriage had not ended before the second marriage. (Hunter v. Hunter, 180.)

3. **MARRIAGE AND DIVORCE—ANNULMENT OF SECOND MARRIAGE—DIVORCE FROM FIRST HUSBAND—EVIDENCE—ESTOPPEL.**—If a woman in an action to obtain a divorce from her first husband, after marrying another man, makes affidavits to secure publication of summons, based upon rumor, in which she states that her first husband was living at the time of her second marriage and that she was not divorced from him, such affidavits, though strong evidence against her in an action to annul the second marriage, do not create an estoppel against her to deny the facts stated therein. (Hunter v. Hunter, 180.)

4. **MARRIAGE AND DIVORCE—ANNULMENT OF SECOND MARRIAGE—DIVORCE FROM FIRST HUSBAND—CONCLUSIVENESS OF.**—A decree of divorce obtained by a woman from her first husband and based upon service by publication of summons after living twenty-two years with her second husband, is conclusive in an action by him to annul his marriage, of the fact that his wife is no longer the wife of the first husband, but is not conclusive of the fact that the first husband was alive at the time that the decree was rendered, or, that the woman was his wife at the time that she married the second husband. (Hunter v. Hunter, 180.)

5. **MARRIAGE AND DIVORCE—ANNULMENT OF MARRIAGE—APPEAL FROM JUDGMENT—ALIMONY.**—An appeal from a judgment refusing to annul a marriage, if taken too late, must be dismissed, and objection to the allowance of alimony cannot be considered. (Hunter v. Hunter, 180.)

6. **JUDGMENT CREDITOR, WHO IS A.**—A JUDGMENT FOR ALIMONY in favor of a woman makes her a judgment creditor of her former husband, and, as such, she is entitled to avail herself of all the remedies given by the statute to judgment creditors. (Wetmore v. Wetmore, 752.)

7. **A JUDGMENT AWARDING ALIMONY** in a suit for divorce, to be paid to the plaintiff for her future support and that of her children, makes the husband, in effect, a debtor owing the wife the amount adjudged to be paid, and entitles her to the same remedies as any judgment creditor. (Wetmore v. Wetmore, 752.)

8. **TRUST ESTATE, ALIMONY, ENFORCING PAYMENT OUT OF.**—A wife in whose favor judgment has been entered for alimony may enforce payment thereof out of the income of personal property devised to a trustee by the father of her late husband, with directions to apply the net income to the support of the son so long as he shall live. (Wetmore v. Wetmore, 752.)

9. **DIVORCE, VOID DECREE OF—ESTOPPEL—PROPERTY RIGHTS.**—If a husband leaves his wife and home in this state, and lives in another state, without supporting her, and never lives with her again or returns to this state, and she obtains a judgment of divorce against him, upon the grounds of desertion, which judgment, however, is void because of a defective service of summons, and the husband had actual knowledge of the pendency of the action, but

declined to appear and defend, and afterward, upon learning that a divorce had been granted, married another woman, with whom he lived and cohabited as his wife, and she had a child by him, he is estopped, upon the subsequent decease of his abandoned wife, in this state, from taking advantage of the fact that the judgment of divorce so rendered was void for want of proper service of the summons, and cannot successfully assert against the heirs or devisees of his former wife a right to her estate as her surviving husband. This application of the doctrine of estoppel does not, however, countenance the idea that parties may become divorced upon the ground of estoppel by conduct. It simply precludes the husband from asserting the former relation, and the invalidity of the decree of divorce, solely for the purpose of obtaining the property of his former wife. (*Marvin v. Foster*, 586.)

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

1. MASTER AND SERVANT.—FOR A SERVANT DRIVING A DUMPCART TO INVITE A BOY to drive it for the latter's pleasure is not within the scope of the former's authority, and the master is, therefore, not answerable for injuries received by the boy while so driving. (*Driscoll v. Scanlon*, 523.)

2. MASTER AND SERVANT—RIGHT TO INVENTIONS MADE BY SERVANT.—If a servant experiments at the expense of his master and for the latter, with a view to the immediate use of the result of such experiments in the master's business, the invention or recipe resulting from the experiments belongs to the latter, so as to give him the right to use it. The servant has a right to preserve the invention or recipes for his own future use; but this right is not exclusive as against his master; and if the servant does not record it in the master's books which it is his duty to keep, and records it in his own private book alone, the master is entitled to a copy when the servant leaves the employment, and is not liable in damages for detaining the servant's books in order to make and preserve such copy. (*Dempsey v. Dobson*, 816.)

3. NEGLIGENCE—INSTRUCTIONS.—In an action by a servant to recover for personal injuries sustained through the alleged negligence of the master, an instruction which ignores the possible effect of the negligence of a fellow-servant, upon which there is evidence, is erroneous. (*Giberson v. Patterson Mill Co.*, 823.)

4. FELLOW-SERVANTS ARE those who are so far working together as to be practically co-operating, and who have an opportunity to control, or influence the conduct of, and who have no superiority over, one another. (*Flannegan v. Chesapeake etc. Ry. Co.*, 896.)

5. FELLOW-SERVANTS—EVIDENCE TO PROVE THE PERFORMANCE OF DUTY BY.—In an action by a servant to recover for injury claimed to have resulted from the negligence of a vice-principal, but which may have resulted from the negligence of a fellow-servant, the plaintiff, after establishing the negligence of such vice-principal, is not bound to assume the burden of proving the absence of contributory negligence on the part of such fellow-servant. The court cannot infer negligence on the part of such fellow-servant in the absence of any, or a doubtful state of evidence relating thereto. (*Flannegan v. Chesapeake etc. Ry. Co.*, 896.)

See Agency, 3; Railroads, 14-17.

MAXIMS.

In pari delicto potior est conditio defendentis. (Branham v. Stillings, 218.)

Nullum tempus occurrit regi. (McPhail v. People, 306.)

MECHANICS' LIENS.

1. **MECHANIC'S LIEN.**—A DESCRIPTION of property sufficient for identification is indispensable to a mechanic's lien. (Fernandes v. Burleson, 75.)

2. **MECHANIC'S LIEN, DESCRIPTION IN CLAIM OF.**—A notice of a mechanic's lien declaring that it is upon a mining claim, and giving the metes, bounds, and monuments, with all improvements, wheels, pumps, and mining facilities and appurtenances situate thereon, and that the work for which the lien is claimed was done at the special instance and request of B. and P., owners of the premises, cannot be applied to a claim adjoining that specifically described, on the ground that of the two the latter is the one having thereon wheels, pumps, and mining facilities. (Fernandez v. Burleson, 75.)

3. **MECHANIC'S LIEN, REFORMATION OF CLAIM OF.**—The notice of a claim of mechanic's lien is not an instrument susceptible of reformation. (Fernandez v. Burleson, 75.)

4. **MECHANIC'S LIEN—ESTATE INVOLVED.**—A proceeding to enforce a mechanic's lien does not involve a freehold. ((Spangler v. Green, 259.)

5. **MECHANIC'S LIEN—CHANGE IN LAW—WHAT GOVERNS.**—If the rights of parties to a building contract have accrued under an agreement made before the passage of amendments to the mechanic's lien law, which amendments materially impair the contract rights of the parties, the law in force when such rights accrue, and not the amendments, must govern. (Spangler v. Green, 259.)

MENTAL CAPACITY.

See Mortgages, 1.

MINES.

1. **MINES—LOCATION OF MINERAL LANDS—ALIENS.**—The mineral lands of the government are open to location and purchase only by a citizen of the United States, or one who has declared his intention to become such. (Justice Min. Co. v. Lee, 216.)

2. **MINES—MINERAL LAND—CONCLUSIVENESS OF GRANT TO ALIEN.**—After a grant of title to mineral land, or the equivalent of such grant, is made to an alien, it cannot be attacked by any third party. (Justice Min. Co. v. Lee, 216.)

3. **MINES—MINERAL LANDS—LAND DEPARTMENT—CONCLUSIVENESS OF FACTS FOUND.**—After an application to purchase mineral land of the government has been approved by the officers of the land department, in the exercise of their jurisdiction, and the entry has been allowed, the fact of citizenship, as well as all other questions of fact, is presumed to have been established, and is not open to review by the courts at the instance of third parties. (Justice Min. Co. v. Lee, 216.)

4. **MINES—MINERAL LAND—INTERFERENCE OF COURTS WITH LAND DEPARTMENT.**—While proceedings to acquire title to mineral land of the United States are pending in the land-office, that department has exclusive jurisdiction of the matter, and any attempt on the part of the courts to control its action is, ordinarily,

an unwarranted assumption of jurisdiction. (*Justice Min. Co. v. Lee*, 216.)

5. **EQUITY—LACHES—ASSERTION OF TITLE TO MINING PROPERTY.**—If mining property has been developed by the courage and energy and at the expense of the defendant, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of the plaintiff's rights. (*Brown v. Wilson*, 228.)

6. **EQUITY—LACHES—ASSERTION OF TITLE TO MINING PROPERTY.**—The laches that will bar a recovery in a particular case depends, to a large extent, upon the character and nature of the circumstances surrounding the transaction. If the subject matter of litigation is unpatented mining property, purely speculative in value, the necessity for prompt assertion of title has always been recognized. (*Brown v. Wilson*, 228.)

7. **MINES AND MINING—FAULT IN VEIN—EVIDENCE.**—The existence of a fault in one vein of ore is not shown by proof that there are other and disconnected faults in another vein, claimed to be a continuity of the vein under consideration, without showing any continuity in the fault. (*Fitzgerald v. Clark*, 665.)

8. **MINES AND MINING—RIGHT TO FOLLOW DIP.**—Under section 2322 of the United States Revised Statutes, providing that locators of mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and also the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from the perpendicular in their course downward, as to extend outside the vertical side lines of such surface location, the miner who has the apex in his location is entitled to as much length of the vein on the strike, no matter how deep he may go in the dip, as he has length of apex within his surface lines, whether that apex reaches the surface or is found beneath, within the planes of his exterior boundary lines extending downward perpendicularly. (*Fitzgerald v. Clark*, 665.)

9. **MINES AND MINING—LOCATION ON APEX.**—The loss which a miner must suffer, who has the apex of the vein in his location, but is obliged to make his location before he can trace the apex and strike of the vein for its whole distance, and thus makes his location irregularly, is of so much of the vein on the strike by his irregular location as he has failed to obtain of length on the apex. (*Fitzgerald v. Clark*, 665.)

10. **MINES AND MINING—LOCATION ON APEX OF VEIN—RIGHT TO FOLLOW DIP.**—The locator of a mining claim on the apex of a vein, which enters on the end line, and passes out on the side line, is entitled to so much of the strike of the vein on the dip extending beyond the side line as is embraced between a vertical plane dropped into the ground through such end line extended and a parallel vertical plane dropped through the point of intersection of the apex and the side line. (*Fitzgerald v. Clark*, 665.)

11. **MINES AND MINING—CONTINUOUS VEIN.**—In an action to recover the value of ore taken from a portion of a vein lying within defendant's claim, with its apex in plaintiff's claim, the defendant claiming that a continuous vein with the apex thereof entirely upon his ground connects with the ore bodies, such connection can only be made by following a continuous streak or body of quartz or ore or by passing through vein matter, and it cannot be made by following such material or indication as a practical miner

would follow with the expectation of finding ore. (*Fitzgerald v. Clark*, 665.)

12. MINES AND MINING—INSTRUCTIONS—MARKET VALUE OF ORE.—An instruction that the basis for finding the value of ore extracted from a mining claim is the market value of the ore on the dump, after deducting the cost of mining and hoisting, in effect allows the party liable the reasonable expense of smelting and reducing the ore. (*Fitzgerald v. Clark*, 665.)

See Constitutions; Mechanics' Liens, 2; Statutes, 6-10.

MISJOINDER.

See Pleading, 4.

MISREPRESENTATIONS.

See Judicial Sales, 1-3.

MISTAKE.

See Gifts, 6; Trusts, 10, 11.

MORTGAGES.

1. CONTRACTS—MENTAL CAPACITY.—A mortgage is not rendered void by the fact that the mortgagor was in a weak state, both bodily and mentally, at the time that it was executed, especially if the transaction upon which the mortgage is founded was agreed upon when the mortgagor was undoubtedly competent, and he understood what he was doing at the time when the mortgage was executed. (*Dahlem's Estate*, 848.)

2. MORTGAGES—DATE OF ACKNOWLEDGMENT.—IT IS PRESUMED that a mortgage dated, executed, and recorded on the same day was acknowledged on that day, although the date of acknowledgment does not appear from the certificate. (*Dahlem's Estate*, 848.)

3. MORTGAGES—ACKNOWLEDGMENT OF—DEFECTIVE CERTIFICATE.—The omission of the date in the certificate of acknowledgment of a mortgage does not render the lien of the mortgage void, provided the date of acknowledgment clearly appears from the whole instrument. (*Dahlem's Estate*, 848.)

4. MORTGAGES—DESCRIPTION OF PREMISES.—If a claimant for public land enters and settles thereon prior to its survey, and mortgages all of his "land claim," the mortgage is sufficient to pass the title to such claim as located by subsequent survey, although the description in the mortgage is erroneous, and does not correspond with that of the patent. (*Rogers v. Miller*, 20.)

See Corporations, 26; Fixtures; Insurance, 23; Public Lands, 7.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS.—A city ordinance cannot be pronounced unreasonable as a police regulation without some data or evidence showing its unreasonableness. (*Denver etc. Ry. Co. v. Denver*, 239.)

2. CONSTITUTIONAL LAW—FIRES, STATUTES IMPOSING PRECAUTIONS AGAINST.—The legislature has power to enact regulations for the protection of cities and villages against serious dangers from conflagrations. It may directly enact a code of regulations applicable to exposed localities, or may invest municipalities

with the power to pass ordinances regulating the subject. (*Fire Department v. Gilmour*, 748.)

8. FIRE COMMISSIONERS, REASONABLENESS OF REGULATIONS OF, MAY BE QUESTIONED.—Though a board of fire commissioners of a city is by its charter given power to determine whether the use of property for the storage of combustible materials by the owner or occupier is a menace to the public safety, and upon determining that the use made is dangerous, a penalty is inflicted upon the person continuing it, the determination made by such board is not conclusive, so as to preclude one prosecuted for a penalty from proving that the order made was unreasonable, unnecessary, and oppressive. (*Fire Department v. Gilmour*, 748.)

4. MUNICIPAL BOARDS—NOTICE AND HEARING.—A person affected by a determination of a board of fire commissioners that the use made of his property is dangerous is not entitled to notice and hearing, but such determination does not preclude him from contesting its correctness in the courts, and showing that it is unreasonable and unnecessary. (*Fire Department v. Gilmour*, 748.)

5. MUNICIPAL CORPORATION—LICENSE FEES—RIGHT TO EXACT.—Under a charter authorizing a city council to license cartmen, truckmen, hackmen, butchers, bakers, petty grocers or hucksters, and common victualers, and to make ordinances relative "to any and all other subjects that shall be deemed necessary and proper for the protection and preservation of the health, property, and lives of the citizens," an ordinance prohibiting the sale of adulterated or impure milk within the city and requiring everyone who sells milk of any kind therein to first procure a license therefor, is void, in so far as it requires a license from all who sell milk, whether they are petty grocers, hucksters, or common victualers or not. (*State v. Smith*, 301.)

6. MUNICIPAL CORPORATIONS—LICENSE FEES—RIGHT TO EXACT.—The right of a municipal corporation to license the pursuit of a lawful business, which, as usually carried on, does not endanger the public health or safety, and thus to limit the number of those who may engage in it, cannot be extended or enlarged by any doubtful implication. (*State v. Smith*, 301.)

7. MUNICIPAL CORPORATIONS—LICENSE TAX—RUNNING STREET-CARS.—The charter of a city conferring upon it power "exclusively to license, regulate, and tax any or all lawful occupations," etc., authorizes it to exact, of a company running street-cars, a fixed sum per car, as a license tax, and does not conflict with a constitutional provision requiring taxes to be uniform. (*Denver etc. Ry. Co. v. Denver*, 239.)

8. MUNICIPAL CORPORATIONS—PENALTY—FAILURE TO PAY LAWFUL LICENSE TAX.—A city council has power to prescribe a penalty for a failure to pay a lawful license tax, where the charter gives the council power to exact such a tax and to make all ordinances which shall be necessary and proper for carrying into execution the power specified in its charter, and to enforce the same by appropriate fines, imprisonment, or other penalties. (*Denver etc. Ry. Co. v. Denver*, 239.)

9. MUNICIPAL BONDS.—A JUDGMENT THAT NEGOTIABLE MUNICIPAL BONDS ARE INVALID, IS NOT BINDING ON HOLDERS FOR VALUE BEFORE MATURITY WHO ARE STRANGERS TO THE RECORD. (*Stallcup v. Tacoma*, 25.)

10. MUNICIPAL BONDS—ISSUANCE—VALIDITY.—The motives which induce voters to authorize the issuance of municipal bonds, cannot be inquired into by the courts, when the propriety of becoming indebted for the purpose for which such bonds are issued, has

been committed to such voters by the legislature of the state. (*Stallcup v. Tacoma*, 25.)

11. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS.—A city having exclusive control of its streets, with power to raise money to keep them in repair, is bound to keep them in a reasonably safe condition for ordinary travel. (*Lorence v. Ellensburg*, 42.)

12. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—NOTICE.—The law imputes notice to a municipality of a dangerous defect in a public street, from its existence for such time, that the city authorities, by the exercise of ordinary vigilance, could and would have discovered it in time to prevent accident. (*Lorence v. Ellensburg*, 42.)

13. MUNICIPAL CORPORATIONS—STREETS—CHANGE IN GRADE—DAMAGES.—If property is rendered more accessible by a change in the grade of a street, the benefit thereby derived must be set off against the damages inflicted, although all the property on the street receives a similar benefit. Such benefit is not within the rule excluding general benefits from consideration in determining the damages to a particular piece of property. (*Aswell v. Scranton*, 841.)

14. MUNICIPAL CORPORATIONS—STREETS—CHANGE IN GRADE—DAMAGES.—If every parcel of property along a street is made more accessible by a change of grade, then every such property is specially benefited, and the amount of that benefit should be set off against the damages, if any, inflicted by the improvement as made. The lotowner is entitled to compensation only for the actual loss suffered. (*Aswell v. Scranton*, 841.)

15. MUNICIPAL CORPORATIONS—STREETS—IMPROVEMENT OF—DAMAGES.—The loss to a property owner suffered by improvement to a street may be measured with exact justice by the depreciation in value of his property resulting from the improvement complained of. If his property is injured that others may be benefited, his loss should be made good. If the improvement increases the value of his property, as much or more than it may cost him to repair, or to readjust himself to the changed state of things, he is not a loser and cannot recover. (*Aswell v. Scranton*, 841.)

16. MUNICIPAL CORPORATIONS—REMOVAL OF CITY OFFICERS.—Under a statute authorizing the mayor of a city to remove any officer appointed by him, on any formal charge, whenever the interests of the city demand it, but which requires him to report the reasons for such removal to the council, at a subsequent meeting, within a specified time, and that the officer shall be restored to office, if the council disapproves of such removal, the mayor's removal of a city officer takes effect at once, and deprives the removed officer of the right to further discharge the functions of the office, notwithstanding the provisions as to subsequent proceedings. (*Heffran v. Hutchins*, 353.)

See Contracts, 4; Injunctions, 7; Judgments, 12.

MURDER.

See Homicide.

MUTUAL BENEFIT ASSOCIATIONS.

See Insurance, 87-41.

NEGLIGENCE.

1. NEGLIGENCE, THIRD PERSON CANNOT RECOVER FOR.—For an injury, however gross, there can be no recovery unless

AM. ST. REP., VOL. LII. — 64

there exists between the person inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter. (*Buckley v. Gray*, 88.)

2. NEGLIGENCE, CONSEQUENCES FOR WHICH NO LIABILITY EXISTS.—A person owning a cart is not bound to expect, or look out for, people falling from his cart, where they had no business to be. A boy getting on the cart assumes all risks, and therefore cannot recover if he falls under the wheels, and is run over because the driver is asleep and consequently neglecting his duties. (*Driscoll v. Scanlon*, 523.)

3. NEGLIGENCE, BURDEN OF PROOF RESPECTING.—If a plaintiff suing for damages resulting from negligence makes out a *prima facie* case, he is not bound to assume the burden of disproving contributory negligence, either on his part or that of a fellow-servant. (*Flannegan v. Chesapeake etc. R. R. Co.*, 896.)

4. NEGLIGENCE CANNOT, AS MATTER OF LAW, BE IMPUTED TO A CHILD eight years old, and *prima facie* he is incapable of exercising that care and caution which the law requires of an adult. (*Lorence v. Ellensburg*, 42.)

5. NEGLIGENCE—MINORS.—What care and caution a child of tender years must exercise to relieve himself of contributory negligence and recover for injury inflicted through the negligence of another, cannot be determined by any general rule, but must, in connection with the circumstances in each case, depend upon the intelligence, capacity, and judgment, which he is shown by the evidence to possess, and his capacity must be left to the determination of the jury under proper instructions. (*Lorence v. Ellensburg*, 42.)

See Attorney and Client, 3; Carriers, 13; Landlord and Tenant, 10; Master and Servant, 3, 5; Pleading, 3; Sunday, 6.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—JOINT AND SEVERAL NOTES—PRESENTMENT.—To bind an indorser of a note joint and several in form, presentment for payment must be made to all the makers. (*Benedict v. Schmieg*, 61.)

2. NEGOTIABLE INSTRUMENTS—LIABILITY FROM INDORSEMENT BEFORE DELIVERY.—A person, other than the payee, who writes his name on the back of a note after its execution and before delivery, is *prima facie* liable thereon as a joint maker. (*Donohoe Kelly Banking Co. v. Puget Sound Sav. Bank*, 57.)

3. NEGOTIABLE INSTRUMENTS.—NOTICE OF PROTEST OF a note to an indorser residing in the same city as the maker, by mailing such notice to him without giving the street and number of his place of business or his residence, is not equivalent to personal service. (*Benedict v. Schmieg*, 61.)

See Partnership, 2; Warehousemen, 2.

NEWSPAPERS.

See Notice, 2, 3.

NEW TRIAL.

JURY TRIAL—COMMENTS UPON EVIDENCE.—If a judge presiding at the trial of a woman for murder of a man makes a statement of any matter of fact not reconcilable with her evidence, or otherwise expresses his opinion upon any matter in issue, and respecting which the evidence is conflicting, as where he assumes that she acted with premeditation and not upon a sudden or uncontrolla-

ble impulse, she is entitled to a new trial, if convicted of murder in the first degree. (*People v. Barberi*, 717.)

NOTICE.

1. **JUDICIAL PROCEEDINGS—NOTICE.**—Before the rights of a person can be determined by judicial sentence, he must have notice, actual or constructive, of the proceedings against him. (*Dorance v. Raynsford*, 266.)

2. **NOTICE—PUBLICATION OF—PUBLIC NEWSPAPER.**—A statute requiring that execution sales of real estate shall be advertised in a public newspaper is complied with by publication in a weekly law journal containing both legal and general news of importance to the public, and having a large circulation among both laymen and lawyers. (*Pentzel v. Squire*, 373.)

3. **NOTICE—PUBLICATION—SUFFICIENCY OF CERTIFICATE.**—A certificate of publication of notice of a judicial sale in a newspaper published by a corporation, if made by its agent expressly authorized by it to make such certificates with the corporate seal attached, is sufficient, although such agent is not its president or other officer. (*Pentzel v. Squire*, 373.)

See *Municipal Corporations*, 4; *Pledge*, 2, 3, 5.

NUISANCE.

1. **NUISANCE.—PRIVATE ACTION** for a public nuisance is maintainable by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance. Interference with a common right does not of itself afford a cause of action by an individual, but special or particular damage consequent on the interference does. (*Knowles v. Pennsylvania R. R. Co.*, 860.)

2. **NUISANCE.—PRIVATE ACTION FOR—SPECIAL DAMAGE.** One having a contract for hauling a large amount of dirt from one side of a railroad to the other sustains special damages from the unauthorized obstruction of a highway by the railroad company, if, by reason of such obstruction, his most convenient way for hauling the dirt is blocked, and his work is retarded and his profits very much lessened by being thus compelled to haul the dirt over a longer route. He may maintain a private action to recover such damages. (*Knowles v. Pennsylvania R. R. Co.*, 860.)

3. **NUISANCE—POWDER WORKS.**—The manufacture and keeping of large quantities of gunpowder and other explosives in, or dangerously near to, public places, such as towns and highways, is a public nuisance, and indictable as such, whether negligently or carefully conducted. (*Wilson v. Phoenix Powder Mfg. Co.*, 890.)

4. **NUISANCE.—THE OWNER OF POWDER MILLS and works** is answerable for all damages done to person or property by their explosion, whether negligent or not, if they are so situated that such an explosion would probably involve injury to the person or property of third persons. (*Wilson v. Phoenix Powder Mfg. Co.*, 890.)

See *Injunctions*, 9.

OFFICERS.

1. **OFFICERS.—POLICE MAGISTRATES** are public officers, and exercise a part of the judicial powers of the state. (*McPhail v. People*, 306.)

2. **PLEADING—VACANCY IN OFFICE.**—In pleading a vacancy in office, it is not good and sufficient pleading to say, "there being a

vacancy," where there is no direct averment that there is a vacancy, and no facts are stated showing such vacancy. (*McPhail v. People*, 306.)

See Injunctions, 7; Municipal Corporations, 16; Quo Warranto, 2.

ORDINANCES.

See Municipal Corporations, 1.

PARENT AND CHILD.

See Judgments, 10.

PARTIES.

See Judgments, 9.

PARTITION.

1. PARTITION OF PERSONALTY.—It is not necessary that a complaint seeking partition of personal property should allege that the plaintiff had demanded distribution or division or that defendant is insolvent. (*Robinson v. Dickey*, 417.)

2. PARTITION OF PERSONALITY.—Equity has exclusive jurisdiction of suits for the partition of personal property, although the defendant denies the complainant's title. (*Robinson v. Dickey*, 417.)

3. PARTITION—PLEADING.—Partition must, of necessity, be made according to the interest of the respective owners of the land, and the court does not commit error in refusing to permit the defendant to withdraw an answer setting up the entire title in himself, and to file in its place an amended answer, setting up a cotenancy with others. (*Leake v. Hayes*, 34.)

4. PARTITION—PARTIES.—A trustee of an express trust holding the legal title to land may maintain a partition suit in his own name; and the fact that he joins minor cestuis que trust as coplaintiffs does not militate against his right to maintain the action. (*Snell v. Harrison*, 642.)

5. PARTITION—EJECTMENT—RENTS AND PROFITS.—A judgment for rents and profits in ejectment by one cotenant against another may be charged against the share of the latter in a subsequent proceeding between them for partition. (*Snell v. Harrison*, 642.)

6. PARTITION—IMPROVEMENTS.—In an action for partition, the recovery for improvements made by the cotenant in possession is not limited to the rents and profits accruing during such occupancy. (*Leake v. Hayes*, 34.)

7. PARTITION.—IF IMPROVEMENTS ARE MADE BY THE HUSBAND on land of which his wife is a cotenant under their joint belief that the property belongs solely to her; she is entitled, on partition, to recover the part improved, or, if such partition is impracticable, then to an allowance therefor out of the proceeds of a sale of the entire property. (*Leake v. Hayes*, 34.)

8. PARTITION—IMPROVEMENTS.—A cotenant who believes himself to be the owner of the entire premises, and in good faith places improvements thereon, is entitled, on partition, to be allotted that portion upon which the improvements are placed, so far as can be done consistently with an equitable partition; and if such division cannot be had, the property should be sold, and the value of the improvements awarded him out of the proceeds. (*Leake v. Hayes*, 34.)

9. **PARTITION—IMPROVEMENTS—PROFITS.**—A cotenant who enters upon the common estate, which yields no profit, and so improves it as to make it productive, is entitled, on partition, to all the profits produced by means of such improvements, without making any allowance against him for the increase in value occasioned by his improvements. (*Leake v. Hayes*, 34.)

10. **PARTITION—IMPROVEMENTS.**—Where partition is made, a part improved, if not prejudicial to others, should be allotted to the one who made the improvements, estimating its value without the improvements; but, if this cannot be done, the one to whom the improved part is allotted need not pay for the improvements. (*Ward v. Ward*, 911.)

11. **PARTITION — IMPROVEMENTS. — WHERE PROPERTY CANNOT BE DIVIDED**, but must be partitioned by sale, and improvements made by one of the cotenants have enhanced its value, he cannot be awarded the costs thereof, but should be given the actual enhancement of value therefrom existing at the time of the sale, though the improvements were not made at the request of the cotenants. (*Ward v. Ward*, 911.)

12. **PARTITION—RECOVERY OF TAXES PAID.**—A cotenant in possession is entitled on partition to recover such taxes paid by him as have inured to the benefit of the other cotenants. (*Leake v. Hayes*, 34.)

13. **PARTITION SALES — CONCLUSIVENESS UPON PURCHASER.**—An order confirming a sale in partition is appealable by the purchaser, and is conclusive upon him upon his failure to appeal as to all objections made to the confirmation of the sale, and he then becomes legally bound to complete his purchase. (*Hammond v. Cailleaud*, 167.)

14. **PARTITION SALES—RESALE AT PURCHASER'S RISK.**—Upon the refusal of a purchaser to complete a partition sale after its confirmation, the court may order the property resold at the risk of such purchaser, and such order is binding on him if he has notice thereof. (*Hammond v. Cailleaud*, 167.)

15. **PARTITION SALES—RESALE—ACTION FOR DEFICIENCY—EVIDENCE.**—A purchaser at partition sale, confirmed without appeal, when sued for a deficiency arising from a resale, cannot prove that the terms of the first sale insured a perfect title to relieve him from liability as a purchaser, but he may show such terms of the first sale and that the second sale was made expressly at the purchaser's risk, as to title, for the purpose of showing that the conditions of the two sales were different, and that the second sale was neither a just nor legal mode of ascertaining his liability for the deficiency. He cannot be held liable for such deficiency if the difference in price at the two sales was due to the difference in the conditions thereof. (*Hammond v. Cailleaud*, 167.)

See *Receivers*, 2.

PARTNERSHIP.

1. **PARTNERSHIP REAL ESTATE** is vested in the firm, and an assignment for the benefit of creditors, executed by one member thereof, does not pass any title to its real property, because it cannot be known until the partnership affairs have been settled and adjudget whether the assignee acquired anything by the assignment. (*Wood v. American etc. Ins. Co.*, 733.)

2. **A PARTNERSHIP IN WHOSE FAVOR PROMISSORY NOTES WERE GIVEN**, and which has set over such notes to the estate of one of its members, without any written assignment, may

maintain an action to enforce them, though the proceeds of the action must be held in trust for such estate. (*Townsend v. Tyndale*, 518.)

3. JUDGMENTS—PARTNERSHIP DEMANDS—PLEADING.—Whenever a judgment on a partnership demand can lawfully be given in favor of the partnership, without stating the names of the copartners, it is, in effect, a judgment in favor of such copartners individually, and may properly be declared on as such in any proceeding subsequently brought to enforce it. (*Fisher v. Fielding*, 270.)

4. PARTNERSHIP—JURISDICTION TO DIRECT SALE OF PROPERTY OF.—In an action for the dissolution of a partnership and an accounting, the court has power in advance of decreeing a dissolution to direct the sale of all the partnership assets, if it appears that they are not equal in value to the amount of the firm indebtedness, and that its business cannot be carried on except at a loss. (*Wulff v. Superior Court*, 78.)

5. PARTNERSHIP, SALE OF GOODS OF, IN PAYMENT OF PERSONAL DEBT OF ONE PARTNER.—If one member of a partnership sells goods of the firm under an arrangement that part of the price shall be applied to the payment of his personal debt, the partnership cannot recover in an action of contract the whole price of the goods so sold. A tender made after an appeal has been taken from a judgment in an action for goods sold is bad. (*Grover v. Smith*, 506.)

See Corporations, 30; Cotenancy, 8; Insurance, 17.

PASS-BOOKS.

See Evidence, 15; Witnesses, 2.

PENALTY.

See Building Contracts, 1; Contracts, 7; Municipal Corporations, 8.

PERSONAL PROPERTY.

See Cotenancy, 5, 7; Partition, 1, 2.

PLEADING.

1. PLEADING.—A PLEA must either traverse, or confess and avoid. (*McPhail v. People*, 306.)

2. PLEADING.—A PLEA is to be taken most strongly against the pleader. (*McPhail v. People*, 306.)

3. PRACTICE—AN IMMATERIAL ALLEGATION OF NEGLIGENCE need not be proved. (*Wilson v. Phoenix Powder Mfg. Co.*, 800.)

4. PRACTICE—MISJOINDER OF PARTIES.—A complaint stating a cause of action against the defendant personally and also against him as executor or administrator, no joint liability being shown, is demurrable for misjoinder of parties defendant. (*Schlucker v. Hemenway*, 116.)

5. PRACTICE—ON A DEMURRER TO THE EVIDENCE, where there is doubt which of two inferences should be adduced, the court will adopt the one most favorable to the plaintiff. (*Flannegan v. Chesapeake etc. R. R. Co.*, 896.)

6. PLEADING.—A DEMURRER ADMITS only such facts as are well pleaded. It does not admit conclusions of law stated by the pleader, or the construction placed by him upon statutes. (*McPhail v. People*, 306.)

7. PLEADING—AMENDMENT—RIGHTS OF CREDITORS.—An amendment substituting an entirely different cause of action will not be allowed to prejudice the intervening rights of creditors. (*Heidel v. Benedict*, 592.)

See Cloud on Title; Corporations, 11, 31; Evidence, 11; Fraud; Interpleader, 2-4; Judgments, 19; Officers, 2; Partition, 3; Railroads, 27.

PLEDGE.

1. PLEDGEE, SALE BY.—A PLEDGEE, on default in the payment of his debt, may sell the pledged property at public auction, giving to the pledgor notice of the time and place of sale, but he must exercise reasonable skill and diligence in order to get the value of the property; and this includes the fixing of a reasonable time and place of sale. (*Guinzburg v. H. W. Downs Co.*, 525.)

2. PLEDGE—SALE OF—NOTICE.—A pledgee is, within certain limits, a trustee for the pledgor, and must act for the latter's interests, as well as his own, but their interests are not identical; and when they may require different action, the pledgee is entitled to regard his own interest alone, after having put the pledgor on his guard by notice that he must look out for himself. (*Plucker v. Teller*, 825.)

3. PLEDGEE, FAILURE OF TO OBJECT TO TIME OR PLACE OF SALE.—A pledgor of stock having notice of the time and place of sale fixed by his pledgee, and making no objection thereto, and taking no notice thereof, by his silence waives any objection existing as to such place. (*Guinzburg v. H. W. Downs Co.*, 525.)

4. PLEDGEE'S SALE IN PRESENCE OF BUT ONE BIDDER. The fact that a pledgee's sale of stock was attended by but one bidder only does not render it invalid. (*Guinzburg v. H. W. Downs Co.*, 525.)

5. PLEDGE—EXECUTION SALE OF PROPERTY—TRUST—NOTICE.—If default is made in the payment of a pledged mortgage, and the pledgee at the request of the pledgor forecloses the mortgage and sells the property at sheriff's sale, after giving explicit notice to the pledgor that he would act only for himself and would not bid the property in for any more than enough to protect his interests, and that, if the pledgor desired to bid anything above that amount he must be on hand, the pledgee may purchase the property at such sale in his own right, free of any trust in favor of the pledgor, and the latter is not entitled to any share of the profits realized by the pledgee on a resale of the property. In such case the burden of proof is on the pledgee to show that he is entitled to purchase clear of any trust for the pledgor, but in any event he is entitled to commissions paid by him for the resale of the property. (*Plucker v. Teller*, 825.)

See Warehousemen, 4.

POISON.

See Insurance, 31-34.

POLICE POWER.

See Contracts, 7; Deeds, 1; Sunday, 2.

POWDER WORKS.

See Nuisance, 3, 4.

INDEX.

PREFERENCES.

See Corporations, 25-29.

PREMIUM.

See Insurance, 11.

PRESCRIPTION.

See Adverse Possession, 1.

PRESENTMENT.

See Negotiable Instruments, 1.

PRESUMPTION.

See Appeal, 4; Evidence, 5-8; Insurance, 26, 41; Marriage and Divorce, 1, 2.

PRINCIPAL AND AGENT.

See Agency.

PRIVILEGED COMMUNICATIONS.

See Libel.

PRIZE FIGHTS.

See Injunctions, 10.

PROBATE SALES.

See Courts, 6; Executors and Administrators, 5, 6.

PROFITS.

See Cotenancy, 10; Execution, 8; Partition, 5, 6, 9.

PROOFS OF LOSS.

See Insurance, 35.

PROTEST.

See Negotiable Instruments, 2.

PUBLIC LANDS.

1. PUBLIC LANDS—JURISDICTION OF STATE AND FEDERAL COURTS.—The right of state courts to determine state law in respect to the owners of lands on meandered lakes under government patents is superior to the right of the federal courts to construe them. (Fuller v. Shedd, 380.)

2. PUBLIC LANDS—COURTS—LAND DEPARTMENT.—It is of the highest importance that the decisions of the courts respecting public land should be in harmony with the rulings of the land department. (Wilcox v. John, 246.)

3. PUBLIC LANDS—JURISDICTION OF LAND DEPARTMENT—CONCLUSIVENESS OF JUDGMENT.—The land department of

the government was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. It must, therefore, consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is unassailable except by direct proceedings for its annulment or limitation. (*Justice Mining Co. v. Lee*, 216.)

4. PUBLIC LANDS—LAND OFFICERS—JURISDICTION—ENTRIES.—The land department of the government has the right to make necessary and reasonable rules governing the manner in which the character of the land entered shall be made to appear, both *prima facie* and ultimately; and if these rules are not complied with, or if it appears that the land is not such as can be entered under the particular claim advanced to it, as, for instance, where agricultural lands are applied for under the mining laws, it is not only the province, but the duty, of the land department to deny the entry. (*German Ins. Co. v. Hayden*, 208.)

5. PUBLIC LANDS—LAND OFFICERS—CONCLUSIVENESS OF DECISIONS.—In the absence of fraud, the decisions of the officers of the land department of the government as to matters within their jurisdiction is final and conclusive; hence, their decision that land in dispute is agricultural, and not mineral, determines the character of the land. (*German Ins. Co. v. Hayden*, 208.)

6. PUBLIC LANDS—TIMBER CLAIMS, DEVISABILITY OF.—An owner of a timber claim upon public land has no devisable interest therein before a patent issues, and upon his death before he has complied with all the conditions necessary to obtain a patent, his heirs may comply with the remaining conditions, and upon obtaining a patent, they take the land in equal shares as direct grantees of the government, and not by inheritance, regardless of the proportions in which they would have taken under the law of succession of the state. (*Cooper v. Wilder*, 163.)

7. PUBLIC LANDS—MORTGAGE OR DEED OF TRUST BY PRE-EMPTOR.—A pre-emptor of public land may, before making final proof, and obtaining a receiver's certificate, mortgage the land, or, acting in good faith, deed it in trust, as neither instrument is a "grant or conveyance," within the prohibitory clause of section 2262 of the United States Revised Statutes, providing that any grant or conveyance which such pre-emptor may have made, except in the hands of bona fide purchasers for value shall be null and void. (*Wilcox v. John*, 246.)

8. HOMESTEADS ON PUBLIC LANDS—EXEMPTIONS.—Land claimed as a homestead is not subject to execution for any debt contracted by the claimant prior to issuance of patent for the land, so long as the title remains vested in the patentee. (*De Lany v. Knapp*, 160.)

9. HOMESTEADS—DIVESTITURE OF EXEMPTIONS—RECONVEYANCE.—The character and exemptions which attach to a homestead in public lands do not revive on a subsequent repurchase by the original holder by whom it has been sold. After such repurchase it is liable for his debts contracted before he made the original sale. (*De Lany v. Knapp*, 160.)

See Insurance, 15; Mines, 1-6; Mortgages, 4.

PUNISHMENT.

See Rape, 4.

QUITCLAIM.

See Deeds, 3, 4.

QUO WARRANTO.

1. **QUO WARRANTO.**—AN INFORMATION in the nature of a quo warranto is a matter within the sound legal discretion of the court or judge, and no definite time is fixed beyond which an information will not lie, in matters of public concern, though lapse of time may be considered, with all the other circumstances of the case, as a ground for refusing leave to file it. (*McPhail v. People*, 306.)

2. **ESTOPPEL.—RECOGNITION OF OFFICER DE FACTO.—CONTESTING RIGHT TO OFFICE.**—The fact that a police magistrate recognizes another officer as a de facto police magistrate, by transmitting papers to him in case of a change of venue, does not estop the people from maintaining a quo warranto proceeding to oust the latter from office, or estop the former from being the relator in such proceeding. (*McPhail v. People*, 306.)

See Limitations of Actions, 5.

RAILROADS.

1. **THE WORDS "RAILROAD" AND "RAILWAY" are synonymous.** (*Funk v. St. Paul etc. Ry. Co.*, 608.)

2. **HIGHWAYS.—OBSTRUCTION.**—A railroad company cannot escape liability for damages arising from its erecting and maintaining a fence across a highway on the ground that such obstruction is incidental to raising its roadbed to conform to a grade authorized by municipal authority, if the work of raising the roadbed is not commenced for more than two years after the fence is erected. (*Knowles v. Pennsylvania R. R. Co.*, 860.)

3. **RAILROADS.—RULES AND REGULATIONS.**—Railroad companies not only have the right, but it is their duty, to run their trains in accordance with established rules and regulations, and passengers must exercise reasonable diligence to comply therewith, if reasonable. (*Chicago etc. R. R. Co. v. Field*, 444.)

4. **RAILROADS.—PASSENGERS, WHO ARE NOT.**—It is not within the power of any conductor, brakeman, or other employé of a railroad company to entitle any person to ride upon a vehicle not intended for the conveyance of passengers, and if such person does so even upon invitation of such employé, and even though such person and others have customarily so ridden, the person thus traveling does not thereby become a passenger. (*Chicago, etc. R. R. Co. v. Field*, 444.)

5. **COMMON CARRIERS OF PASSENGERS** are not required to notify every person who may board their train that he must enter the passenger coach in order to become a passenger. It is the duty of the latter to inquire, upon entering the train, where the coach is in which he may be carried to a certain point, and it then becomes the duty of the carrier's servants to inform him; but if he fails to make such inquiry, and in violation of the company's rules enters a vehicle not set apart for passengers, he becomes a trespasser. (*Chicago etc. R. R. Co. v. Field*, 444.)

6. **RAILROADS.—AUTHORITY TO COLLECT FARES.**—It is not within the scope of authority of the brakeman on a railroad train to collect fares, nor to waive the established rules and regulations made for running the trains, nor has any person riding on the train the right to suppose that such employé can bind the company by such an arrangement. (*Chicago etc. R. R. Co. v. Field*, 444.)

7. RAILROADS—POWER OF CONDUCTOR TO WAIVE CONDITIONS.—The conductor of a railroad train, as between him and the passengers under his charge, represents the railroad company, and can waive conditions in the contract for transportation. (*Thompson v. Truesdale*, 579.)

8. RAILROADS—COUPON TICKETS—WAIVER OF CONDITION BY CONDUCTOR—CUSTOM AS EVIDENCE.—The fact that a general custom prevails between a railroad company and its passengers to waive and disregard a condition requiring the coupons of a commutation ticket to be detached by the conductor, when received as fare, tends to prove that the conductor on the train had authority to waive such condition. It is the duty of the company to know what its conductors are openly and frequently doing. (*Thompson v. Truesdale*, 579.)

9. RAILROADS—COUPON TICKETS—REVOCATION OF WAIVER OF CONDITION—PLACARDS AS EVIDENCE—QUESTION FOR JURY.—Whether or not placards posted in railroad cars give sufficient notice of the company's intention to revoke its consent to the waiver of a condition requiring the coupons of a commutation ticket to be detached by the conductor, when presented for fare, is a question for the jury. (*Thompson v. Truesdale*, 579.)

10. RAILROADS—COUPON TICKETS—WAIVER OF CONDITION AS TO DETACHMENT OF COUPONS—EVIDENCE.—It is competent for the parties to a commutation railroad ticket, having printed provisions thereon, and upon the coupons thereof, to the effect that the ticket is not good unless the coupons are detached by the conductor, to waive such conditions, and the conductor's practice of receiving, as fare, coupons detached from the particular ticket, without requiring the remainder of the ticket to be presented, is evidence of such waiver. (*Thompson v. Truesdale*, 579.)

11. RAILROADS—COUPON TICKETS—REVOCATION OF CONSENT TO WAIVE CONDITION AS TO DETACHMENT OF COUPONS.—While a railroad company may have a right to revoke its consent to the waiver of a condition requiring the coupons of a commutation ticket to be detached by the conductor, it is the duty of the company, after the conductor has received, as fare, coupons detached from such tickets, without requiring the remainder of the tickets to be presented, to give reasonable notice of such intended revocation; and if, without such notice, and relying on such waiver, the holder of such a ticket detaches a coupon therefrom, and takes it with him upon the train, without the remainder of the ticket, the company cannot, when such coupon is presented for fare, then revoke its consent to such waiver, so as to deprive the passenger of the use of the coupon, or compel him to pay extra fare. (*Thompson v. Truesdale*, 579.)

12. RAILROADS—PASSENGERS—PERSON RIDING ON PLATFORM.—A person who takes passage on the platform of a passenger coach on a railroad train, and there continues his journey without entering the cars, in violation of the rules and regulations of the company, does not become a passenger, although his fare is demanded by, and paid to, the brakeman on the train, who is not authorized to demand or receive fares. (*Chicago etc. R. R. Co. v. Field*, 444.)

13. RAILWAYS—PASSENGER INJURED IN TOILETROOM.—A railway company is answerable for injuries received by a person then at a passenger depot for the purpose of taking a train, through its negligence in leaving an unguarded hole in the floor of a toilet-room into which, the room being without light, the person fell, while in the exercise of due care. (*Jordan v. New York etc. R. R. Co.*, 522.)

14. **FELLOW-SERVANTS, WHO ARE NOT.**—A brakeman of a railway train, and a telegraph operator in charge of a signal station, with full authority to control the running of trains, and to whom all brakemen owe the duty of obeying his orders, are not fellow-servants. The former may, therefore, recover of the common employer for injuries sustained through the negligence of the latter in giving a signal for a train to proceed, when the track is occupied by another train. (*Flannegan v. Chesapeake etc. R. R. Co.*, 898.)

15. **RAILROADS—STATUTES—NEGLIGENCE OF FELLOW-SERVANT.**—A statute, passed at a time when there were no cable or electric street railways in existence in the state, and providing that every railroad corporation owning and operating a railroad in the state should be liable for damages sustained by an agent or servant by reason of the negligence of any other agent or servant, but not broad enough in words to include unknown things, is not applicable to a street railway corporation, although its line is operated by cable. (*Funk v. St. Paul etc. Ry. Co.*, 608.)

16. **MASTER AND SERVANT—DUTIES WHICH MASTER CANNOT DELEGATE SO AS TO RELIEVE HIMSELF FROM LIABILITY.**—A railway corporation owes to its employes the duty of providing a safe place in which to work. This includes the keeping of a clear track over which to run the trains on which they serve, and the corporation cannot relieve itself from liability to its employes by placing the entire charge of this branch of business in the hands of a subordinate. Such a subordinate is a vice-principal, and an employe injured through his negligence may recover of the common employer. (*Flannegan v. Chesapeake etc. R. R. Co.*, 898.)

17. **RAILWAYS—VICE-PRINCIPALS.**—A telegraph operator, whose duty it is to control the running of a train over a track, and, to that end, to know whether or not it is obstructed, is performing the duty of the master to his employes, the performance of which cannot be delegated to another, so as to relieve the master from liability. In other words, such operator is a vice-principal. (*Flannegan v. Chesapeake etc. R. R. Co.*, 898.)

18. **RAILROADS—CARE AS TO ANIMALS AT CROSSING—RESTRAINT BY OWNER.**—There is a clear distinction as to the measure of care which a railway company, at a highway crossing, owes to the owner of domestic animals who voluntarily permits them to go at large, in violation of a law prohibiting them from going at large upon the highway, and one who uses due diligence to restrain them. (*Hohl v. Chicago etc. Ry. Co.*, 598.)

19. **RAILROADS—ANIMALS AT CROSSING, WHEN TRESPASSERS.**—Even where domestic animals are not permitted to run at large it is only where the owner suffers or permits his animals to go at large that as to him they may be treated, by a railway company at a highway crossing, as trespassers upon the highway. (*Hohl v. Chicago etc. Ry. Co.*, 598.)

20. **RAILROADS—KILLING ANIMALS AT CROSSING—WHEN LIABLE.**—If plaintiff's colt, without his fault, escapes from his premises, and goes upon the public highway, in a town wherein domestic animals are not permitted to run at large, and is killed at a crossing thereof by a railroad locomotive, through the negligence of the servants of the railroad company in charge of such locomotive, the colt, so far as the conduct of the company is concerned, in the management of its train, must be regarded as having been lawfully upon the highway, and the company is liable for killing it. (*Hohl v. Chicago etc. Ry. Co.*, 598.)

21. **RAILROADS—KILLING ANIMALS AT CROSSING—EVIDENCE ADMISSIBLE.**—In an action by the owner of a colt against

a railway company for negligently killing the colt at a highway crossing, in a town wherein domestic animals are not permitted to run at large, evidence tending to show that the animal had escaped from its inclosure without the fault of the owner is material and admissible. (*Hohl v. Chicago etc. Ry. Co.*, 598.)

22. RAILROADS—KILLING ANIMALS AT CROSSING—REQUESTS FOR INSTRUCTIONS.—In an action by the owner of a colt against a railway company for negligently killing the colt at a highway crossing, in a town wherein domestic animals are not permitted to run at large, the defendant's special requests for instructions to the jury which ignore the question of plaintiff's responsibility for the animal being upon the highway are correctly denied. (*Hohl v. Chicago etc. Ry. Co.*, 598.)

23. RAILROADS—DUTY TO SIGNAL—ANIMALS AT CROSSING.—It is the general duty of a railway company to observe due care in the movement of its trains over a highway crossing, and to give the statutory signals in order to secure so far as may be done by the exercise of ordinary care, the safety of domestic animals lawfully upon the highway. (*Hohl v. Chicago etc. Ry. Co.*, 598.)

24. RAILROADS—ANIMALS AT CROSSING—FAILURES TO SIGNAL AS EVIDENCE OF NEGLIGENCE.—A failure to comply with a statute requiring a railroad company to give signals at a highway crossing is evidence of negligence against the company. In an action against it for negligently killing a colt at a highway crossing, in a town wherein domestic animals are not permitted to run at large. (*Hohl v. Chicago etc. Ry. Co.*, 598.)

25. RAILROADS—CAUSE OF KILLING ANIMALS AT CROSSING IS QUESTION FOR JURY.—If a railroad locomotive runs over and kills a colt at a highway crossing, without having given the signals required by statute, the question as to whether such omission was the cause of the accident or not is one for the jury. (*Hohl v. Chicago etc. Ry. Co.*, 598.)

26. RAILROADS—LIABILITY FOR NEGLIGENTLY SETTING FIRE.—If a railroad company negligently permits combustible material to accumulate on its track and right of way, and setting fire thereto, negligently permits the fire to escape to adjoining lands and destroy property of another, the company is liable in damages, whether it started the fire negligently or not. (*Lake Erie etc. R. R. Co. v. Clark*, 442.)

27. RAILROADS—SETTING FIRES — PLEADING NEGLIGENCE.—In an action against a railroad company to recover damages for allowing fire to escape from its right of way, a complaint is sufficient which alleges that the plaintiff was without negligence, and charges in general terms that defendant was guilty of negligence, without alleging the specific acts constituting the negligence. (*Lake Erie etc. R. R. Co. v. Griffin*, 465.)

28. RAILROADS — SETTING FIRES — INSURANCE AS DEFENSE.—If by the actionable negligence of a railroad company, fire escapes from its right of way to adjoining property which is thereby consumed, the owner can recover his entire loss from the company without regard to the amount of insurance he may have been paid thereon. (*Lake Erie etc. R. R. Co. v. Griffin*, 465.)

29. RAILROADS.—A "STREET RAILWAY" is not a "railroad," and the term "railroad" does not include "street railway." The distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers and not of freight. (*Funk v. St. Paul etc. Ry. Co.*, 608.)

See Corporations, 22; Trial, 1.

RAPE.

1. **CONSTITUTIONAL LAW—RAPE, AGE OF CONSENT.**—A statute making it rape to have carnal connection with a female under sixteen years of age, though with her consent, is not unconstitutional. (*Commonwealth v. Murphy*, 496.)

2. **RAPE—KNOWLEDGE OF AGE OF FEMALE.**—Under a statute making the having carnal knowledge of a female under sixteen years of age, rape, whether she consented or not, the defendant may be convicted, though he did not know her age. (*Commonwealth v. Murphy*, 496.)

3. **RAPE—ASSAULT TO COMMIT ON A MINOR.**—The consent of a minor child under sixteen years of age does not constitute a defense to an indictment charging an assault with intent to commit rape on her. (*Commonwealth v. Murphy*, 496.)

4. **CRIMINAL LAW—CRUEL AND UNUSUAL PUNISHMENT.**—A statute subjecting to punishment as for rape every person having carnal knowledge of a female child under sixteen years of age is not unconstitutional as prescribing a cruel and unusual punishment. (*Commonwealth v. Murphy*, 496.)

REAL PROPERTY.

TITLE, WHEN NEEDED NOT BE PROVED.—One in possession of real estate may maintain an action to recover damages thereto from the explosion of powder works without proving his title. It will be presumed from such possession. (*Wilson v. Phoenix Powder Mfg. Co.*, 800.)

REASONABLE DOUBT.

See Instructions, 4, 5.

RECEIPT.

See Warehousemen, 2-4.

RECEIVERS.

1. **A RECEIVER OF THE PROPERTY OF A CORPORATION** may be appointed pending proceedings for its dissolution where the possession of the property by the court is essential to prevent a continuance of its use for an unlawful purpose, such, for instance, as giving an exhibition of prize fighting. (*Columbian Athletic Club v. State*, 407.)

2. **IN A SUIT FOR THE PARTITION OF PERSONALTY A RECEIVER** may be appointed to take charge of it, and if it be found indivisible, to sell it and divide the proceeds among the persons entitled thereto. (*Robinson v. Dickey*, 417.)

3. **CORPORATIONS—RECEIVER'S RIGHT TO SUE.**—Although a creditor or class of creditors of a corporation have special claims against special liabilities upon which suit has not been brought, this does not deprive the receiver for the corporation of the right to sue for and recover them all into his hands for proper distribution. (*Cushing v. Perot*, 835.)

4. **CORPORATIONS—RECEIVER'S RIGHT TO RECOVER ON STOCKHOLDER'S LIABILITY.**—It is presumed, in the absence of decision in a sister state, that the liability of a stockholder in an insolvent corporation created in that state, and not already sued upon, passes to its receiver as an asset for the payment of corporate debts. He alone can sue upon such liability. (*Cushing v. Perot*, 835.)

5. CORPORATIONS—RECEIVERS—RIGHT TO RECOVER ASSETS.—A receiver represents not only the corporation for which he is appointed, but all its creditors, and as to the latter, it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all, and the receiver, who represents all alike, is the proper party to assert the common right and pursue the common remedy for the common benefit, as to all claims not in suit at the time of his appointment. (*Cushing v. Perot*, 835.)

6. CORPORATIONS—RECEIVERS—LIABILITY OF STOCK-HOLDER AS ASSETS.—After a corporation has become insolvent and a receiver has been appointed for it, the liability of its stockholders, contractual under the statute and not as yet sued upon, constitute an asset for the payment of the corporate debts, and he alone has the right to sue and recover on such liability. (*Cushing v. Perot*, 835.)

RECORDS.

See Courts, 1-5; Evidence, 12-14.

REFORMATION.

See Mechanics' Liens.

REGISTRATION.

See Elections, 1.

REGULATIONS.

See Railroads, 2.

RELIGATION.

See Waters, 2.

REMAINDERS.

See Adverse Possession, 4; Estates, 1.

RENTS.

See Cotenancy, 9, 10; Partition, 5, 6.

REPAIRS.

See Cotenancy, 11-13; Landlord and Tenant, 7, 9, 12-14.

REPLEVIN.

REPLEVIN—CERTIFICATE OF STOCK.—IT IS NO DEFENSE to an action of replevin to recover a certificate of stock in a foreign corporation that defendant acquired it in garnishment proceedings in which, although plaintiff in replevin appeared, no issue was joined, and judgment was rendered by default. (*Smith v. Downey*, 467.)

RESALE.

See Partition, 14, 15.

RESTRAINT OF TRADE

See Contracts, 9; Statutes, 11.

RES JUDICATA.

See Attachment, 8; Judgments, 8-12.

REVOCACTION.

See Settlements; Trusts, 2.

RIPARIAN RIGHTS.

See Boundaries; Waters.

SALES.

1. **SALE OF CHATTELS, WHEN PASSES TITLE.**—In a sale of a portion of a larger mass, the whole remaining in the possession of the vendor with the right and power in him to make separation, no title passes until this is done, so as to enable him to recover the purchase price. (*New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 516.)

2. **SALE OF GOODS TO BE MANUFACTURED, TITLE WHEN PASSES SO AS TO SUSTAIN AN ACTION FOR THE PURCHASE PRICE.**—Under a contract to buy all the wool of a designated quality which the plaintiffs may make for thirty days, not to exceed fifteen thousand pounds, no title passes; and no action can be maintained for the purchase price, except as to wool which has been separated in a body by itself, not mixed with, nor a part of, any greater quantity of wool. The setting apart and shipping to the purchasers of a quantity greater than they agreed to take does not vest title to any part in them, and hence will not sustain an action. (*New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 516.)

3. **STATUTE OF FRAUDS.—A MEMORANDUM OF A SALE MUST DESIGNATE THE PROPERTY SOLD.** The want of such designation cannot be supplied by parol evidence. (*New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 516.)

4. **STATUTE OF FRAUDS.—A MEMORANDUM OF SALE SUFFICIENTLY DESIGNATES THE PROPERTY SOLD** when it describes such property as "about 2,000 to 2,500 lbs F C, and all they may make for thirty days, say up to 10,000 to 15,000 lbs," and the evidence shows that the vendor was engaged in the wool business, and the letters "F C" are used by persons in that trade as designating a particular grade of wool, and that the vendor had on hand at the time of contracting two thousand four hundred and forty-three pounds of wool recently manufactured of that grade. (*New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 516.)

5. **STATUTE OF FRAUDS.—THE ACCEPTANCE OF PART OF THE PROPERTY SOLD TAKES A CASE OUT OF THE STATUTE OF FRAUDS.** (*New England Dressed Meat etc. Co. v. Standard Worsted Co.*, 516.)

6. **SALES—WARRANTY—LIABILITY TO THIRD PERSON.**—If a tradesman sells, or furnishes for use, an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries, resulting from its defective or unsafe condition, to a person who is neither a party to the contract with him nor one for whose benefit the contract was made. (*Lewis v. Terry*, 146.)

7. **SALES—WARRANTY—KNOWN DEFECT—LIABILITY TO THIRD PERSON.**—If a tradesman sells or furnishes an article, rep-

representing it to be safe for the uses it is designed to serve, when he knows it to be dangerous because of concealed defects, he commits a wrong, independent of his contract, and renders himself liable to another person, without notice of such defects, for any injury which may be reasonably contemplated as likely to result, and which does in fact result, therefrom to that person, or to any other without notice and who is not himself in fault. (*Lewis v. Terry*, 146.)

8. SALES—WARRANTY—KNOWN DEFECTS.—Although a folding bed is not ordinarily a dangerous instrumentality, this fact does not relieve the vendor from liability for injury to a third person, if such vendor, in making the sale, represents the bed to be safe, knowing it to be really unsafe for the purposes for which it is intended to be used. (*Lewis v. Terry*, 146.)

9. SALES—WARRANTY—KNOWN DEFECT—NEGLIGENCE—PROXIMATE CAUSE.—To render the purchaser of an unsafe and defective article, represented by the seller to be safe, the culpable intervening cause relieving the vendor from liability for injury to a third person, the purchaser must actually know of the defect in the article purchased. (*Lewis v. Terry*, 146.)

See Damages.

SEPARATE PROPERTY.

See Husband and Wife, 3-7.

SETTLEMENTS.

A VOLUNTARY SETTLEMENT CANNOT BE REVOKED or set aside except upon proof of mental incapacity, mistake, fraud, or undue influence, unless it contains a power of revocation. (*Taylor v. Buttrick*, 530.)

SHERIFFS.

See Execution, 3, 5, 6.

SIGNALS.

See Railroads, 23, 24.

SOCIAL CLUBS.

See Associations.

STATES.

A RIGHT CREATED BY THE STATUTES OF ANOTHER STATE may be enforced in the courts of this. This rule applies to actions ex delicto as well as those arising ex contractu, and the limitations upon it are that its enforcement must not be against good morals or natural justice, nor prejudicial to the general interests of citizens of the forum. (*North Pac. Lumber Co. v. Lang*, 760.)

STATUTE OF FRAUDS.

See Contracts, 3; Evidence, 9, 10; Insurance, 7; Sales, 3-5.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

1. IN CONSTRUING A STATUTE, the duty of the court is simply to ascertain and declare what is in terms or substance declared

AM. ST. REP., VOL. LII.—65

therein, not to insert what has been omitted nor to omit what has been inserted. (*In re Walker*, 104.)

2. **STATUTES—CONSTRUCTION—INTENTION.**—If the language of a statute is in any manner obscure or of doubtful meaning, the court construing it may recur to the history of the time when it was enacted, and seek in that history for the mischief and defect which the statute was intended to remedy. (*Funk v. St. Paul etc. Ry. Co.*, 608.)

3. **STATUTES—INTENTION, HOW COLLECTED.**—If the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view. (*Funk v. St. Paul etc. Ry. Co.*, 608.)

4. **THE CONSTRUCTION OF A STATUTE** penal in its character by public officers charged with the duty of executing its provisions for many years, may properly be considered in determining the legislative intention. (*People v. Adelphi Club*, 700.)

5. **STATUTES—TITLE OF ACT, AND SUBJECT MATTER.**—An act entitled, "An act to fix the fees to be collected by the secretary of state for incorporation and certain other privileges," requiring a fee to be charged and collected for filing certificates of incorporation, etc., and prohibiting corporations from having or exercising any corporate powers, or from doing any business in the state until their certificates of incorporation are filed, is not obnoxious to a constitutional provision requiring every law to contain but one subject, which shall be clearly expressed in its title. (*Jones v. Aspen Hardware Co.*, 220.)

6. **CONSTITUTIONAL LAW—COAL MINING—STATUTES—UNAUTHORIZED DISCRIMINATION.**—The enactment of a statute which divides the operators of coal mines, and has provisions applicable only to those whose product is shipped in a certain manner, is not justified as an exercise of the police power, and is not authorized by a constitutional provision providing for laws to secure safety to coal miners. (*Harding v. People*, 344.)

7. **CONSTITUTIONAL LAW—COAL MINING—VOID PENAL STATUTE.**—If two persons are engaged in different branches of the business of coal mining, the statute that makes the act of one an offense, which, if done by the other, would be lawful, is unconstitutional, where there is no reason for any distinction. (*Harding v. People*, 344.)

8. **CONSTITUTIONAL LAW—COAL MINING—STATUTES—WEIGHING OF COAL.**—A statute which requires the product of certain coal mines, which is shipped by rail or water, to be weighed in a specified manner, but which does not require the product of another coal mine, that is sold on the spot, to be weighed, is unconstitutional, as there is no reason why the one product should be weighed and the other not weighed. The distinction is purely arbitrary. (*Harding v. People*, 344.)

9. **CONSTITUTIONAL LAW—COAL MINING—STATUTES RESTRICTING RIGHT TO CONTRACT.**—If coal miners are paid by weight, a statute which deprives them and their employers of the right to fix upon the amount of coal mined, or the amount due for mining it, in any manner mutually satisfactory, is unconstitutional. (*Harding v. People*, 344.)

10. **CONSTITUTIONAL LAW—COAL MINING—UNCONSTITUTIONAL STATUTE.**—A statute which singles out operators of one class of coal mines and imposes restrictions upon them not required to be borne by operators of other mines, or by persons engaged in other business, or which interferes with the right of employer and

laborer to contract with each other, is unconstitutional and void. (*Harding v. People*, 344.)

11. CONTRACT IN RESTRAINT OF TRADE NOT LIMITED AS TO TIME.—If the statute authorizes the seller of a business to agree with the purchaser not to carry on a similar business so long as the purchaser or his successor in interest carries on a like business, a contract which, on its face, is not limited in time, is not wholly void, but is enforceable to the extent that it does not transcend the permissive clause of the statute. (*Gregory v. Speiker*, 70.)

12. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—RETROSPECTIVE STATUTES.—While there can be no vested rights in mere remedies, if substantial rights themselves are infringed by an amendatory statute, it violates the constitutional provisions, both state and federal, which prohibit all laws impairing the obligation of contracts, and laws retrospective in their operation. (*Spangler v. Green*, 259.)

See Actions; Corporations, 1, 18; Elections, 3; Rape; Sunday.

STREET RAILWAYS.

See Municipal Corporations, 7; Taxes, 2.

STREETS.

See Municipal Corporations, 11-15.

STRIKES.

See Injunctions, 11, 12.

STOCKS.

See Attachment, 2; Replevin.

STOCKHOLDERS.

See Banks, 5; Corporations, 5, 6, 8-21.

SUBROGATION.

JUDICIAL SALES—SUBROGATION.—If one holding a sheriff's deed redeems land from a prior lien, claiming the right to do so as owner, and such deed is afterward adjudged to be invalid on account of some defect in the proceedings taken by the sheriff, the person so redeeming is entitled to be subrogated to the lien which he has thus discharged. (*Milburn v. Phillips*, 403.)

SUICIDE.

See Evidence, 6, 7; Insurance, 27-29.

SUNDAY.

1. SUNDAY.—THE COMMON LAW does not prohibit ordinary labor on Sunday. (*Eden v. People*, 365.)

2. SUNDAY LAWS—POLICE POWER.—The general welfare of police power of the state does not authorize a statute making it unlawful for one particular class of laborers alone to do business on Sunday. (*Eden v. People*, 365.)

3. SUNDAY LAWS, CONSTITUTIONALITY OF.—A statute forbidding and punishing the carrying on the business and work of a barber on Sunday, provided in the city of New York and in the vil-

lage of Saratoga Springs barber shops may be kept open and work performed therein until 1 o'clock of the afternoon of that day, is not in conflict with the provisions of the state constitution declaring that no person shall be deprived of life, liberty, or property without due process of law, nor does it violate the constitution of the United States by denying to any class of citizens the equal protection of the laws. (*People v. Havnor*, 707.)

4. SUNDAY LAWS—CONSTITUTIONAL LAW.—A statute making it unlawful for barbers to do business on Sunday, and applying to them alone, is unconstitutional as depriving them of their property without due process of law. (*Eden v. People*, 365.)

5. SUNDAY LAWS—UNJUST DISCRIMINATION.—A statute requiring all persons to refrain from exercising their ordinary callings on Sunday is valid, but a statute which applies only to a particular class is invalid as an unjust discrimination. (*Eden v. People*, 365.)

6. SUNDAY.—THE FAILURE TO OBSERVE A SUNDAY LAW on the part of a person injured by the negligence of a railway corporation does not constitute any defense to an action to recover compensation for such injury. (*Jordan v. New York etc. R. R. Co.*, 522.)

SUPREME COURT.

See Appeal, 1, 2; Judgments, 12.

SURETIES.

See Executors and Administrators, 7-10; Insane Persons, 4.

SURVEYS.

See Boundaries.

TAXES.

1. TAXES—CONSTITUTIONAL PROVISION AS TO UNIFORMITY.—A constitutional provision requiring all taxes to "be uniform," etc., applies only to a direct tax upon property, and does not apply to taxation imposed upon privileges and occupations. (*Denver etc. Ry. Co. v. Denver*, 239.)

2. TAXES—SPECIFIC TAX—LEGISLATIVE POWER.—The levy of a specific tax, such as imposing a license tax upon the business of running street-cars, is a valid exercise of the legislative power. (*Denver etc. Ry. Co. v. Denver*, 239.)

3. TAXATION, EXEMPTION FROM.—Under the constitution of Oregon the legislature may exempt from taxation only such property as is used for municipal, educational, literary, scientific, religious, or charitable purposes. (*Hibernian Benev. Society v. Kelly*, 769.)

4. TAXATION.—LAWS GRANTING EXEMPTIONS from taxation are strictly construed. (*Hibernian Benev. Society v. Kelly*, 769.)

5. TAXATION, EXEMPTION OF PROPERTY OCCUPIED FOR CHARITABLE PURPOSES.—Under a statute exempting from taxation the personal property of benevolent, charitable, and scientific institutions and such real estate belonging to them as shall be actually occupied for the purpose for which they were incorporated, the real property of such a corporation is subject to taxation when rented out to tenants, though the proceeds are devoted to the objects for which the institution was established. (*Hibernian Benev. Society v. Kelly*, 769.)

6. TAXATION, ESTOPPEL FROM DENYING EXCEPTIONS.—A state is not estopped from taxing the property of a charitable in-

stitution by the fact that for many years it has not taxed such property, and that in reliance upon the exemption from taxation the corporation has borrowed money, and made a mortgage on its property to secure its repayment, and agreed to pay all taxes on such mortgage. (*Hibernian Benev. Society v. Kelly*, 769.)

7. ESTOPPEL.—THE NEGLIGENCE OR OMISSION OF PUBLIC OFFICERS to assess property cannot control a duty imposed by law upon their successors, or affect the legal provisions of the statute under which the exemption from taxation is claimed. (*Hibernian Benev. Society v. Kelly*, 769.)

See Adverse Possession, 3; Charities; Injunctions, 2; Partition, 12.

TENDER.

See Partnership, 5.

TICKET.

See Railroads, 8-11.

TIMBER CLAIMS.

See Public Lands, 6.

TIME.

TIME, COMPUTING.—The time allowed by law for filing cost-bills or objections thereto must be computed by excluding the first day and including the last, except when the last day falls upon Sunday. In which event the party is entitled to act on the day following. (*Nicklin v. Robertson*, 790.)

TORTS.

See Interpleader, 8.

TREES.

See Injunctions, 5, 6.

TRIAL.

1. PRESUMPTION FROM FAILURE TO PRODUCE EVIDENCE.—If a railway corporation sued for damages to an employé, claimed to have resulted from negligence, has it in its power to produce evidence of employés present at the time of the accident, and, instead of so doing, it demurs to the evidence offered by the plaintiff, it will be presumed that the testimony of the employés, had it been produced, would have been favorable to the plaintiff. (*Flamegan v. Chesapeake etc. R. R. Co.*, 896.)

2. TRIAL—EVIDENCE.—A MOTION TO STRIKE out all testimony relating to a certain subject is properly denied if some of the testimony is clearly competent. (*Yake v. Pugh*, 17.)

3. TRIAL—QUESTION FOR COURT.—Whether there is any evidence legally tending to prove a fact to authorize its submission to the jury, is to be determined by the court. (*Schuermann v. Dwelling House Ins. Co.*, 377.)

4. TRIAL COURT MAY REOPEN A CASE after submission and receive other testimony after due notice to the parties. (*Rogers v. Miller*, 20.)

5. VERDICT—WHEN COURT MAY DIRECT.—If the evidence is not sufficient to support a verdict for the plaintiff, or if one, if found, must be set aside, the court may direct a finding for the defendant. (*Schuermann v. Dwelling House Ins. Co.*, 377.)

6. TRIAL.—A JUROR'S AFFIDAVIT IMPEACHING his verdict in an equity case is properly disregarded, when the verdict is merely advisory. (*Fitzgerald v. Clark*, 665.)

7. JURORS—COMPETENCY.—A juror who has formed a fixed opinion as to the guilt or innocence of the person charged to be the principal offender is not competent to sit upon the trial of the person charged as an accessory. (*State v. Glehn*, 655.)

8. JURY TRIAL—QUALIFIED OPINIONS OF JURORS.—It is not error for a court to overrule a challenge of jurors who, on their voir dire, state that they have read in the newspapers what purported to be the facts of the case, and had formed and expressed some opinion therefrom upon the merits, but that it was not fixed, and would not influence their verdict. (*State v. Kelly*, 777.)

9. JURY TRIAL—CAPITAL CASE.—It is improper for a judge, on the trial of a woman for the murder of a man with whom she has had illicit relations, she claiming that such relations were induced by a promise of marriage, and also by fraud and the use of drugs, to declare that nature has endowed women with better powers of resistance than men, and made women by nature capable of protecting their honor and defending their virtue. (*People v. Barbier*, 717.)

10. JURY TRIAL—CONFESSIONS, EXAMINATION IN PRESENCE OF THE JURY RELATING TO ALLEGED.—It is not error to overrule defendant's motion to exclude the jury from the courtroom during a preliminary hearing before the court as to the competency of an alleged confession which the court, after hearing, refused to admit in evidence, because obtained by undue influence and improper inducement exercised and held out to the defendant by persons in authority. Whether such an examination shall be conducted in the presence of the jury must be left to the sound discretion of the trial court. (*State v. Kelly*, 777.)

See Instructions, 1.

TRUST DEEDS.

See Public Lands, 7; Trusts, 6-11.

TRUST FUNDS.

See Corporations, 24.

TRUSTS.

1. HUSBAND AND WIFE, TRUST RESULTING IN HER FAVOR.—When a husband buys property with his wife's money, taking a conveyance in his own name, there arises a resulting trust in her favor, unless a different intention on her part is shown. The burden of proof is on him to show that she intended a gift. (*Berry v. Weidman*, 866.)

2. TRUST, RESULTING, LACHES IN ASSERTING.—A wife is not precluded, after the death of her husband, from maintaining a suit to enforce a resulting trust in her favor to lands purchased with her moneys, by the fact that the purchase was made, and the conveyance taken, twenty-five years before his death, if they, during all that time, lived upon the land as their common home, and he also admitted her ownership thereof. (*Berry v. Weidman*, 866.)

3. TRUST INTEREST, PROCEEDING TO REACH AND APPLY TO THE PAYMENT OF DEBTS.—Under the statutes of New York, if a trust is created to receive and pay over the income of personal property, an action may be maintained by a judgment creditor of the beneficiary, after the return of an execution unsatisfied, to reach the surplus income beyond what is necessary for the suitable sup-

port and maintenance of the cestui que trust and those dependent upon him. (*Wetmore v. Wetmore*, 752.)

4. TRUST INCOME, APPLYING TO THE PAYMENT OF ALIMONY.—A judgment directing the income of a trust in favor of a husband to be applied to the payment of alimony to his wife, due and to become due, should not deprive him of his support out of such fund, if it should become necessary for him to have recourse thereto, and though he at the time has a large estate and ample means of support therefrom, he should not be deprived of the right to apply to the court at any future time for leave to share in such income. (*Wetmore v. Wetmore*, 752.)

5. TRUST, INCOME OF, DUTY OF HUSBAND TO APPLY TO THE SUPPORT OF HIS WIFE.—Where a trust is created in a will, and a trustee directed to pay the income for the support of the testator's son, the wife of the latter is included within the equity of the trust, and will not be permitted to starve while the husband is provided for; and if a decree has been entered against him providing that he shall pay her alimony, a court of equity may direct the trustee to pay over to her the surplus of the income already accumulated, and also to make therefrom such payments as shall thereafter accrue and be necessary to satisfy the decree for alimony. The whole of the trust income may be taken, leaving none for the husband, if it appears that he has other estate ample for his support. (*Wetmore v. Wetmore*, 752.)

6. TRUST DEEDS EXEMPTING PROPERTY FROM CREDITORS.—A person cannot settle his property in trust to pay the income to himself for life, with a provision that it shall not be alienated by anticipation so as to prevent his creditors from reaching the income. (*Taylor v. Buttrick*, 530.)

7. A TRUST DEED CANNOT BE SET ASIDE because the grantor did not understand its legal effect, if he understood its contents. (*Taylor v. Buttrick*, 530.)

8. A TRUST DEED WILL NOT BE SET ASIDE because it contains no power of revocation. (*Taylor v. Buttrick*, 530.)

9. TRUST DEEDS, ATTACK UPON BY MAKER.—THE BURDEN OF PROOF is not upon the defendant to establish that the plaintiff who made and seeks to cancel a deed of trust understood it at the time it was executed. (*Taylor v. Buttrick*, 530.)

10. TRUST DEED—MISTAKE AVOIDING FOR.—A trust deed will not be set aside in equity where it conveys property in trust to pay the net income to the grantor for life and upon her death without will, leaving a child or children, to pay the principal to them; otherwise, to pay it over to those entitled to take under the laws of the state, merely because it contains no restraint on the power of anticipation and no power of revocation, though the grantor or her adviser would probably have desired such restraint had their attention been called to the subject, and also would have wished the grantor's life estate to be more inaccessible to herself and her creditors than it is in fact. (*Taylor v. Buttrick*, 530.)

11. MISTAKE IN A DEED OF TRUST, WHAT IS NOT.—A deed of trust cannot be set aside for mistake if it was read over to the grantor before execution, and no provision was omitted which he supposed to be inserted, though he failed to think of some contingency concerning which, had he thought, some provision would have been made which is not contained in such deed. (*Taylor v. Buttrick*, 530.)

See Gifts, 2; Husband and Wife, 3, 4; Marriage and Divorce, 8; Partition, 4.

UNDUE INFLUENCE.

See Wills, 5.

USAGE.

See Insurance, 42.

VACANCY.

See Officers, 2.

VACANT AND UNOCCUPIED.

See Insurance, 19-22.

VARIANCE.

See Insurance, 47.

VERDICT.

See Trial, 5, 6.

VICE-PRINCIPAL.

See Railroads, 17.

WAIVER.

See Appeal, 14; Insurance, 35, 36, 45, 46.

WAREHOUSEMEN.

1. A WAREHOUSEMAN DELIVERING GOODS TO ONE NOT ENTITLED THERETO because he presented a duplicate bill of lading therefor, not signed or indorsed by either the consignee or the consignor, is answerable to the owner for any resulting loss. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

2. WAREHOUSE RECEIPTS are negotiable unless they have the words "non-negotiable" printed in red ink across their face, and a transfer in good faith passes title to the goods covered thereby. (*Cavallaro v. Texas etc. Ry. Co.*, 94.)

3. WAREHOUSEMEN—POWER TO ISSUE WAREHOUSE RECEIPTS.—It is only persons who pursue the calling of warehousemen by receiving and storing goods in a warehouse as a business for profit, that have power to issue technical warehouse receipts, the transfer of which is a good delivery of the goods represented by them. (*Sinsheimer v. Whitely*, 192.)

4. WAREHOUSEMEN—RECEIPTS OF—WEIGHING TAGS—DELIVERY—ATTACHMENT.—To constitute a writing a warehouse receipt there must be something on its face to indicate that a contract of storage has been entered into. Weighing tags, given by a company charging no storage and only showing the weight and quantity of the property weighed for a person named therein are not warehouse receipts; and their transfer to a pledgee does not transfer possession of the property so as to exempt it from attachment by a creditor of the pledgor. (*Sinsheimer v. Whitely*, 192.)

See Attachment, 1; Carriers, 2, 10.

WARRANTY.

See Landlord and Tenant, 4-6; Sales, 6-8.

WATERS.

1. RIPARIAN RIGHTS AND PROPRIETORSHIP are property rights of value to which are attached rights and privileges conferred by law of which the owner cannot be deprived by an illegal proceeding. (*Fuller v. Shedd*, 880.)

2. WATERS OF MEANDERED LAKES and the land thereunder are held by the state in trust for the people, who alike have benefit thereof in fishing, boating, and the like. (*Fuller v. Shedd*, 880.)

3. BOUNDARIES—LAKES—ACCRETION—RELICTIO.—If accretions come to riparian proprietors of lands bounded by meandered lakes, they take to the water's edge, and follow the gradual recession of the waters to their edge, but if a large body of land is suddenly and perceptibly formed by reliction, it belongs to the state. (*Fuller v. Shedd*, 880.)

4. WATERS AND WATERCOURSES—RIPARIAN RIGHTS—ALTITUDE OF LAND.—The right to use water for the purpose of irrigation results from the need of water upon the land; and assuming this need in any given case to exist equally as to all riparian land, the respective rights of the proprietors to divert water for this purpose must be in proportion to their respective ownerships upon the stream, irrespective of the altitude of their land. (*Charnock v. Higuerra*, 195.)

5. WATERS AND WATERCOURSES—IRRIGATION—MODE OF DIVERSION.—The method of obtaining the water of a stream with which to irrigate land has nothing to do with the process of irrigation or the meaning of the word, nor with the reasonableness or lawfulness of any given diversion of water. (*Charnock v. Higuerra*, 195.)

6. WATERS AND WATERCOURSES—RIPARIAN RIGHTS—USE OF PUMPS FOR IRRIGATION.—A riparian proprietor has the right to raise a reasonable quantity of the waters of a stream by means of pumps for the purpose of irrigation. (*Charnock v. Higuerra*, 195.)

7. WATERS AND WATERCOURSES—IRRIGATION—ALTITUDE OF LAND—MODE OF DIVERSION.—In no case can one riparian proprietor be deprived of his just and equal proportion of the waters of a stream for the purpose of irrigation, merely because his land, by reason of its level or altitude above the stream, cannot be irrigated by the same method employed on some other land along the stream. (*Charnock v. Higuerra*, 195.)

8. WATERS AND WATERCOURSES—IRRIGATION—DETERMINATION OF RIGHTS—PARTIES.—A final and satisfactory adjustment between riparian owners of irrigation rights cannot be had without the presence of every person having any right in the stream, and all the facts which can possibly bear on the question should be laid before the court. (*Charnock v. Higuerra*, 195.)

9. WATERS AND WATERCOURSES—TITLE TO PERCOLATING WATER—RIGHT TO DIVERT FROM ADJACENT LAND.—The right of the owner of land to percolating water therein and to appropriate and divert it, is not affected by the fact that an impervious strata of clay beneath and on which the porous strata containing the water rests, diverts the course of percolation in a definite direction towards and over adjacent lands and into a natural stream. (*Gould v. Eaton*, 201.)

10. WATERS AND WATERCOURSES—PERCOLATING WATERS—DIVERSION.—Although the course of percolating water is in some definite direction, the owner of the land in which it is found has the exclusive dominion over it, and does not violate the rights of another by appropriating it to his own use, though the effect is to divert its course from adjacent lands, or to destroy the advantages

therefrom previously enjoyed by the adjacent proprietor. (*Gould v. Eaton*, 201.)

11. WATERS AND WATERCOURSES—TITLE TO PERCOLATING WATERS—DIVERSION.—Principles of law which govern the right to waters flowing upon the surface of the earth are inapplicable to waters which are beneath its surface and percolate through the soil; and the water which is held by the soil, whether sand or sandstone, in a state of percolation is a portion of the soil itself and belongs absolutely to the owner of the land. He may appropriate and divert such water at his pleasure. (*Gould v. Eaton*, 201.)

See *Boundaries*.

WILLS.

1. WILLS—EXECUTION.—A will dictated by a single woman of requisite age and sound mind, signed by her in the presence of two witnesses who subscribe their names in her presence, is legally and properly executed. (*Berberet v. Berberet*, 634.)

2. WILLS—THE OMISSION OF ANY OF THE STATUTORY REQUIREMENTS for the execution of a will is fatal to its operation as such because the right to dispose of property by will is conferred by legislative action, and must be exercised upon the terms prescribed thereby. (*In re Walker*, 104.)

3. WILLS—WITNESSES—ATTESTATION.—Under a statute requiring a will to be attested by two or more competent witnesses, subscribing their names thereto in the presence of the testator, the signature of the witnesses in the proper and usual place, but without any attestation clause, is sufficient. (*Berberet v. Berberet*, 634.)

4. WILLS—UNJUST DISCRIMINATION.—A testator, having sufficient mental capacity, may make an unreasonable, unjust, and injudicious will; and a jury has no right to alter the disposition thus made of his property merely because justice is not done to his family connections. (*Berberet v. Berberet*, 634.)

5. WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—The presumption in favor of the validity of a will is not overcome by the fact of unjust discrimination in favor of a son who is both a devisee and executor under the will and is shown to have had great influence over the testator in her business affairs, nor do these facts cast the burden of proof upon him to establish the validity of the will. (*Berberet v. Berberet*, 634.)

6. WILLS—MISTAKE OF WITNESS IN SIGNING HIS NAME. If a witness undertaking to attest the execution of a will, and intending to sign his own name as a witness thereto, inadvertently writes, instead of his own name, his own initials, followed by the surname of the testator, the will is not properly witnessed, and must be denied probate, if the statute requires that every will must be attested by two witnesses, each of whom must sign his name as a witness at the end of the will. (*In re Walker*, 104.)

See *Contracts*, 6; *Estates*, 1-4.

WITNESSES.

1. WITNESSES—ATTORNEYS AS—ARGUMENT TO JURY. Under a rule of court providing that if an attorney offers himself as a witness in behalf of his client, and gives evidence on the merits, he shall not argue the case, unless by permission of the court, the refusal of the court to allow such attorney to argue is not error, if, before he testifies, he does not explain his position and ask permission to argue the case. (*State v. Gleim*, 656.)

2. CORPORATIONS — EVIDENCE — REFRESHING MEMORY FROM PASS-BOOK.—Under a statute providing that "a witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred," a witness may refresh his memory from a bank-book in which entries of his deposits and drafts were made or verified in his presence. (*McGowan v. McDonald*, 149.)

3. WITNESSES — CROSS-EXAMINATION.—It is error to permit cross-examination of defendant in a criminal case by questions calculated to degrade him before the jury, and which are not cross-examination of his evidence given in chief, and do not legitimately tend to impair his credibility as a witness. (*State v. Gleim*, 655.)

4. WITNESSES — CROSS-EXAMINATION.—A witness cannot be asked on cross-examination, for the purpose of affecting her credibility, whether or not she is addicted to the morphine habit, unless it is proposed to show that the witness was under the influence of the drug at the time the events happened about which she testifies, or unless she is under its influence at the time she is testifying, or unless it is made to appear that her powers of recollection are impaired by the habitual or excessive use of the drug. (*State v. Gleim*, 655.)

See *Wills*, 2, 2.



3 6105 063 241 918

